NEW YORK STATE BAR ASSOCIATION

ADR Insights:

From the Q&A Section of the NYSBA Resolution Roundtable Blog

2017 Year In Review

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In August 2015, Resolution Roundtable, the blog site for the Dispute Resolution Section of NYSBA, began posting weekly questions to seek feedback and insights on various alternative dispute resolution (ADR) topics. Traffic to the blog site thereafter greatly increased by ADR users, providers and panelists, with varied responses depending on the topic. Topics included arbitrator selection, disclosures, depositions, ethics, ADR legislation and third-party funding. Due to the popularity of the site and to promote academic discourse, the Dispute Resolution Section decided to prepare this compilation of all questions and responses from 2017, with attribution,

Jeffrey T. Zaino, Chair, Resolution Roundtable Committee

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ETHIC

Unethical Conduct by Counsel - What are your thoughts?

If an arbitrator thinks that counsel has engaged in unethical conduct, does the arbitrator (or full panel) have a duty to investigate to see if that was the case?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on January 3, 2017 10:14 AM | Permalink

I would report this to the AAA, but I don't think the panel has the authority to sanction unethical conduct. It is unlikely that if the arbitrator senses it so does opposing counsel. I would leave it to her or him to determine how to proceed in any of the obvious ways. As counsel I learned that my adversary had confronted one of my witnesses. I confronted him (he claimed to be the ethics advisor in his rather large firm) and we resolved the matter. I would have found it an intrusion if the panel had stepped in and potentially caused a disqualification and a resultant long delay in the proceedings.

Posted by Sid Bluming | January 3, 2017 10:49 AM

What would be the basis for an arbitrator doing such a thing? Where would such a duty come from? The rules of the AAA don't authorize such an investigation. I've never seen an arbitration clause that grants such authority and I seriously doubt such a clause has ever existed. And wouldn't such an investigation be a compromising of neutrality? Wouldn't the arbitrator have to disclose the investigation to the parties? And would anyone want to let that arbitrator continue to serve? Wouldn't this be disruptive to the process?

An arbitrator isn't a policeman. An arbitrator isn't a judge. An arbitrator's obligation is to do that which the parties have asked for, i.e. decide the issues in the case and no more. A judge, on the other hand, has a duty to the law, first and foremost. Judges can and should refer perceived misbehavior by a lawyer to a grievance committee and can do so without being accused of compromising neutrality.

If an attorney acts badly, the party being prejudiced has the power to file a grievance and doesn't need the permission of anyone, including the arbitrator, to do so.

Paul Marrow

Posted by Paul Marrow | January 3, 2017 11:02 AM

Just as arbitrators aren't supposed to independently investigate matters that come up in a case, it seems to me that investigating one of the client attorney's actions would fall in that same category.

If I thought that one of them had done something inappropriate, I would bring it up in the hearing - perhaps the opposing counsel might want to pursue the matter.

Of course one recourse that we all have is to take anything that comes up in the hearing into account when it comes to constructing the award.

Posted by Raoul Drapeau | January 3, 2017 11:09 AM

An arbitrator, who is a licensed attorney in the jurisdiction in which the suspected unethical conduct transpired, may have a duty under RPC to take action under the Rules. This is a complicated decision requiring research, and thought before acting.

In any instance, the immediate question is whether the conduct has interfered with due process, or the gathering of evidence in the matter before the arbitrator.

I'll be interested in the responses of some of our retired judges who have joined the arbitration community.

Posted by Pat Westerkamp | January 3, 2017 11:14 AM

I believe arbitrators, if they are attorneys, have a professional obligation to report the unethical conduct of attorneys committed in their presence to the Grievance Committee. Such action should be taken only if the violation is patent and, as a practical matter, should be deferred until the arbitration has been concluded.

Judge Gerald Harris

Posted by Judge Gerald Harris | January 3, 2017 11:53 AM

I agree that arbitrators should not independently investigate matters and since the question here asks whether "the arbitrator or full panel have a duty to investigate"--my answer is: There is no duty. However, a lawyer's ethical misconduct presents a challenge for lawyers serving as arbitrators. Lawyers have reporting obligations imposed upon them by the Rules of Professional Conduct when they have actual knowledge of the misconduct. The majority of states' statutes do not contemplate the conflict between the lawyer disclosure requirements and arbitration confidentiality, and they don't provide mechanism to deal with this conflict.

Posted by stephen conover | January 3, 2017 12:10 PM

While an arbitrator does not have a duty to investigate possible unethical conduct, the issue is more difficult where an arbitrator is a lawyer and has actual knowledge that corrupt or dishonest behavior has taken place. The ABA Canons of Professional Ethics provides in Cannon 29 that "lawyers should expose without fear or favor before proper tribunal corrupt or dishonest conduct in the profession". Canon 41 may also apply "when a lawyer discovers that some fraud or deception has been practiced." However, I think that any duties imposed by these canons would be satisfied if the arbitrator reports what he knows to the AAA.

Posted by Michael Blechman | January 3, 2017 12:14 PM

In New York, an arbitration is considered a "tribunal" under the Rules of Professional Conduct. Also, the AAA has Standards of Conduct for Parties and Party Representatives. To the extent that unethical conduct violates those standards, applicable arbitration rules or orders of the arbitrator, I do think it is appropriate for an arbitrator to raise the issue of possible ethical violations and potential remedies for the same as necessary to preserve the integrity of the proceeding.

Posted by Lisa Renee Pomerantz | January 3, 2017 2:30 PM

The key word in the question is "thinks" implying no certainty. In my view the arbitrator has no duty nor authority to go further with this issue, especially when said arbitrator, like myself, is not an attorney. But I would refer the issue to the AAA case manager.

Posted by Robert E. Barras | January 3, 2017 2:30 PM

I have not faced the problem of unethical conduct in arbitration or researched it so my response is provisional.
My inclination is to go with the comments that there is no obligation to report the conduct to the applicable ethics committee. But the comment to check the applicable RPC rule would be advisable. I certainly would report it to the arbitral institution if there is one. Arbitration is fundamentally a private process that is supported by limited judicial supervision and enforcement. It is not always easy to identify whether rules applicable to a lawyer in the practice of law are applicable to arbitration.

This topic is certainly worth a seminar.

Posted by Hon. William G. Bassler | January 3, 2017 3:36 PM

In the case of a three members panel I believe that in the least the arbitrator has the obligation to share the suspected unethical conduct by an attorney with the panel. I agree that the panel's authority may not extend to sanctioning the attorney for the unethical behavior but exposing the situation is in some cases enough to have the attorney cease and desist! When confronted with a situation such as this one I believe it is the duty of the arbitrator to share the details with his or her co-panelists. In one case I was exposed to such a behavior during a break at a hearing. I shared the details of the incident with my co-panelists. The President of the tribunal chose not to mention the collective knowledge with counsel but during the hearing reiterated to counsel that ex-parte communications of any kind was not allowed and that was sufficient for the attorney to realize that his unethical behavior was exposed and that resulted in the matter proceeding without further incidents.

Posted by Nasri H Barakat | January 3, 2017 4:27 PM

I conclude that the arbitrator does not have a duty to investigate a suspicion of unethical conduct and should not do so. If the arbitrator did investigate, it creates an adversarial position with that counsel, so the arbitrator loses the position of neutrality. It raises the administrative question of whether counsel is entitled to some type of due process, such as notice of an investigation, procedural rights, etc. And the party represented by counsel may suffer prejudice in the case from counsel's actions, even if the facts of the case do not warrant it. Of course, opposing counsel can complain to the appropriate disciplinary body, which may then perform its own investigation.

Posted by Federico C. Alvarez | January 3, 2017 6:25 PM

Prior Relationships - What are your thoughts?

How far does an arbitrator need to go to find prior relationships that, if known, should be disclosed? Is there an obligation to disclose relationships the arbitrator does not himself/herself think are disqualifying?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on January 17, 2017 10:41 AM | Permalink

Disclose everything and let the AAA case administrator and the parties determine if the prior relationship is disqualifying.

Posted by J. SCOTT Greer | January 17, 2017 11:09 AM

I think that you should disclose it in order to protect the arbitration even if you think it is not disqualifying. I recently disclosed that I had been an associate 40 years ago of one of the firms that appeared before me. It wasn't a problem, as I expected.

Norman Rosen

Posted by Norman Rosen | January 17, 2017 11:13 AM

I think it's a good rule of thumb for the arbitrator to give the parties the opportunity to decide for themselves whether a prior relationship is of concern or disqualifying.

Posted by Dani Schwartz | January 17, 2017 11:19 AM

The Arbitrator/Neutral has an ultimate duty to protect the award, the process and the Association. If there is any current or past relationship (remote or not) after appropriate and diligent investigation, then disclosure is appropriate and providing advice on the neutral's observation of "no conflict" is acceptable; however, disclosure is required and the neutral should not discount this step unilaterally.

Posted by John B Wood | January 17, 2017 11:20 AM

The answer to the first question is as far as reasonably possible and as to potential conflicts, the issue may be one of appearance. A non-disclosed potential conflict becomes significant beyond the actual potential of there being a conflict. The arbitrator should no more determine whether the potential conflict might be an actual conflict than the surgeon should perform surgery on himself.

Posted by Stanley Eleff | January 17, 2017 11:21 AM

Yes, all relationships, however, tenuous, should be disclosed. Harriet Derman

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Posted by Harriet Derman | January 17, 2017 11:22 AM

My rule of thumb: When in doubt, disclose.
If a court is inclined to vacate, failure of adequate disclosure provides the path.

Posted by Hon. William G. Bassler | January 17, 2017 11:43 AM

All relationships should be disclosed, even if arbitrator doesn't think they are disqualifying. As to how far back to go, arbitrator should be maintaining a conflicts check sheet with regard to prior arbitrations. They should do a complete review of their "rolodex", including their social media first degree connections. If something should surface once the arbitration starts because the arbitrator's memory has been jogged, the arbitrator should immediately make the disclosure to the parties.

Posted by Kyle-Beth Hilfer | January 17, 2017 11:55 AM

Arbitrators are supposed to dig deep and disclose anything that might pose even the smallest doubt about neutrality. Maybe not as far back as primary school, but any relationships from adulthood on seem appropriate to me. Yes, it can be a bother but it would be even more so if an aggrieved party digs up something that any reasonable person would think compromising.

Posted by Raoul Drapeau | January 17, 2017 12:27 PM

I think it is up to the parties, not the arbitrator (candidate) to determine whether a prior relationship is tenuous or should be disqualifying. Sufficient disclosure should be made in each matter to give the parties the opportunity to make that judgment. On the other hand, I do not believe an arbitrator needs to do a lobotomy on all prior case files and relationships over an extended period of time, to see if a potential conflict exists. Each arbitrator has a "conflict list" and that should be routinely examined and updated.

Posted by Mark Bunim | January 17, 2017 12:35 PM

Forgetting our legal obligation to search for possible conflicts, and to disclose, in my experience counsel and parties gain increased respect for Arbitrators who are candid.

Pat Westerkamp

Posted by Pat Westerkamp | January 17, 2017 1:10 PM

The question will always answer itself. If you even have to think about it, you should disclose it.

Posted by andrew gerber | January 17, 2017 1:52 PM

For me, the test is not would "I" think they are disqualifying, but would a reasonable person in a similar situation think that they might be disqualifying. As is the gist of the above responses, disclose more not less...all, not almost all.

Posted by Michael Orfield | January 17, 2017 3:09 PM

The definition of "relationships" may be fixed but the challenge is the extent to which we search for them. Previous work associations and affiliations are easily relationships to disclose. While I prefer to disclose everything (including "connections" on Linked-In) how about if I presented at an educational program at which Claimant's counsel also presented or if I was a director of the Bar organization where counsel was also a director? Even more tenuous, what if counsel & I subscribed to the same Bar or practice-related list serve? The universe of historical information we must search continues to expand.

Posted by stephen conover | January 17, 2017 3:28 PM

Disclose, disclose, disclose. The best practice is to disclose every possible conflict. This returns the decision to the parties and protects the integrity of the arbitration. I recently disclosed a relationship that did not, in my opinion, create a conflict, but I was concerned about "buyer's remorse." I included a special disclosure. It read as follows: "So, while I do not have a personal relationship with Mr. XX (although I believe I have met him) and have not interacted with him in my capacity as an attorney, arbitrator or mediator, his relationship with the [name of organization I run] and my position [running the organization] may create an appearance of bias such that even if the parties initially accepted the appointment after full and complete disclosure, the parties might subsequently be inclined to view an adverse decision as biased.

IF, AFTER READING THIS DISCLOSURE, THE PARTIES AGREE TO PROCEED WITH ME AS THE ARBITRATOR, I WILL AGREE TO SERVE."

Posted by Nancy Greenwald | January 17, 2017 7:26 PM

Disclose everything. At one point, I disclosed a blind date I'd had with a party over 50 years prior. No one would have known, since it was under my maiden name, but I disclosed it. No one cared. Afterwards, one of my co-arbitrators said, incredulously, "You remembered?" Yes, I remembered, so I disclosed.

Micalyn S. Harris

Posted by Anonymous | January 18, 2017 5:24 PM

Arbitrators Writing Long Opinions - What are your thoughts?

Do some arbitrators write opinions that are unnecessarily long and, if so, is that unethical?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on January 25, 2017 10:49 AM | Permalink

I believe that the length of each opinion is "case dependent". If a case is for $25,000, one would not expect a ten page opinion; if it is a complicated fact and legal intensive $200 million case, then a lengthy opinion may very well be justified. Dispositive motion rulings, where the parties have submitted detailed briefing based on legal issues, should, in my opinion, have a discussion of the relevant statutes and case law; and not just a bare-bone ruling finding for one side.

Posted by Mark Bunim | January 25, 2017 11:24 AM

It's hard to spot an ethics issue. Is the suggestion that the arbitrator is writing a longer award to bill more hours? That may be a false assumption. See quote attributed to Blaise Pascal: "I would have written a shorter letter, but I did not have the time" (Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte.).

Posted by Steven Skulnik | January 25, 2017 11:24 AM

It is not unethical to write long opinions but it is unnecessary. I just read an article that Judge Posner wrote. In it Judge Posner states that lawyers should learn to write simpler sentences and briefer briefs. I find that long opinions give the lawyers lots of reasons to try and overturn the award, especially if there is an incorrect statement in the opinion. Be short and to the point. As we say down here in Texas, "Rule and run!"

Posted by Joe Cox | January 25, 2017 11:27 AM

To state the obvious, opinions should be only as long as necessary to resolve the issues clearly and grant appropriate relief. However, I don't see a connection between long-windedness and unethical behavior unless the arbitrator bills for time unnecessarily expended.

Posted by Judge Gerald Harris | January 25, 2017 11:27 AM

Yes, some arbitrators do write opinions that are unnecessarily long. I doubt that this is somehow unethical, but it is both dangerous and potentially destructive to the concept of timely and cost-effective arbitration. With the growth of arbitration, so has grown the boutique practice area that I call "Larbigation." Traditional litigation in the arbitration context. I also note that it is popular now for litigators to feed off "failure to disclose" situations, "exceeded authority" situations and any other method they can find to vacate an Award now that manifest disregard is a doubtful basis. So, the less said, the better the Award. I do not think I have ever seen an Award vacated because it was to succinct.

Posted by William H, Lemons | January 25, 2017 11:39 AM

Actually, it depends upon the nature of the case. In an employment or contract interpretation matter where there are complicated and disputed facts the parties may need resolution of multiple issues. In other matters it may not be necessary. I don't really understand the ethical issue so I will not speculate.

Posted by Roger B Jacobs | January 25, 2017 11:44 AM

Except, perhaps, in the case where an arbitrator simply burns time by writing an unnecessarily long opinion for the purpose of making money, this is not an ethical issue.

Every word in an award is a possible basis for further litigation. Only the words necessary to arrive at the result should be in the award.

Posted by Paul Peter Nicolai | January 25, 2017 11:51 AM

Maybe I am overstating the obvious but an opinion should resolve the dispute and reveal how the arbitrator fulfilled the assigned duties. Style and substance are important ingredients of a good "ethical opinion" and in my view, the length of an opinion does not determine whether its ethical. Sloppy writing shows that the arbitrator put insufficient time into writing the opinion; perhaps sloppy writing creates an opinion that's "unnecessarily long" but not unethical. An opinion with a slanted version of the facts or gives short shrift to a seemingly meritorious argument suggests that the arbitrator did not explore both sides of an issue, is a poor opinion but that may not be unethical. Lambasting or lampooning lawyers or litigants might indicate bias and that may be unethical. In every opinion, I try to precisely, simply, and concisely state the rule on which the decision turns and articulate the award.

Posted by stephen conover | January 25, 2017 11:58 AM

I agree with the comments to date. It is harder to write shorter opinions, so in the long run a longer opinion might end up costing the parties' less money. I have heard of one case where it was alleged the arbitrator deliberately wrote long opinions to pad the bill. That, however, has not been something I have seen.

Posted by William G. Bassler | January 25, 2017 12:54 PM

I agree with the view that, as with any opinion, the length of the opinion must be case specific. Length depends on the issues raised and whether they involve fact finding as well as a pure legal analysis. I do not feel comfortable with unreasoned opinions because, in my view, a statement of reasons focuses the decision and avoids the ability to be arbitrary (or perception of that possibility). When giving reasons, you must be able to state what is necessary to satisfy the author that he or she has explained why the decision is warranted and appropriate. I suppose that may, in some cases, be deemed excessive, but the author should consider length as part of the endeavor to make the opinion clear and understandable.

Posted by Edwin H. Stern | January 25, 2017 1:04 PM

Well, if it is unnecessarily long, it is inefficient, but it is not unethical unless it's done with intent to pad the arbitrator's invoice. But reasonable people can and do differ on what is unnecessarily long.

Posted by Robert L. Arrington | January 25, 2017 3:00 PM

In addition to the great points made by others ... I think it's important to memorialize the facts and findings contemporaneously with the award. Even if it's not billable time.

Posted by Denise Presley | January 25, 2017 3:40 PM

The only ethical aspect I see in award writing is where the arbitrator bulks it up to enhance the fee charged. And the more you write, the more there is to challenge later on by the 'losing' party. It's human nature for us to expound on our reasoning to make sure the parties know we were listening and took into account all the evidence they thought was important. But the Association cautions against unasked-for reasoned awards.

Posted by Raoul Drapeau | January 25, 2017 8:03 PM

When I first came on the AAA panel, back in the early 1990s, reasoned opinions were the exception. Now they are the norm. In part, this trend changed because parties wanted to understand the result. In part, the change occurred because the caseload, over the years, became more complex and a simple one line financial award was no longer appropriate. I always ask parties if they want a reasoned opinion in preliminary hearing. If they do not request one, but I feel that some explanation is needed, I try to keep it succinct. Even if parties do request a reasoned award, that does not mean that the panelists or solo arbitrator should not endeavor to keep the opinion limited by necessity. At times, panelists may disagree internally on the need

for explanation. Sometimes, chairs will also have different parts of the reasoned opinion drafted by different panelists. In all cases, it is the chair's job to review the opinion and ensure its length and content are appropriate and even-handed throughout the opinion.

Posted by Kyle-Beth Hilfer | January 26, 2017 11:07 AM

Opinions can be too long, and the more you write, the more potential pitfalls in terms of appeal. When opinions have a tone or unnecessarily seem to praise or criticize a party, they become more vulnerable to claims of prejudice.

Posted by Mary K Austin | January 31, 2017 10:06 AM

Cultural Differences – What are your thoughts?
What are cultural differences that impact on ethics in international arbitrations?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on January 31, 2017 9:30 AM | Permalink

What an interesting question. Certainly there are cultural differences that may impact testifying. One I have seen is the reluctance of women from many countries to speak out against a male. To carry the point further, in a theocratic country, it seems to me that an arbitrator might tend to (or even be expected to) discount testimony from a witness having a different religion. If that were to happen, I would call it unethical.

Posted by Raoul Drapeau | January 31, 2017 10:11 AM

Understanding cultural differences may be very helpful to understanding and judging the ethical behavior of the parties. However, as arbitrators we are bound by the agreement of the parties and our task is to interpret the relevant agreement (s) in accordance with our understanding of the custom, practice and the applicable law. While we may be able to give some consideration for the cultural differences and their impact on the parties' behavior I doubt that we should carry our understanding so far as to excuse the culprit. The ethical standards are almost universal and their applications should be uniform regardless.

Posted by Nasri H Barakat | January 31, 2017 10:25 AM

In some cultures the making of payments to "grease" transactions is considered appropriate and usual. Americans doing business in such locales must resist such practices lest they run afoul of the Foreign Corrupt Practices Act. How these different perspectives may be dealt with in international arbitration is a sensitive and complicated matter.

Posted by Judge Gerald Harris | January 31, 2017 2:01 PM

Retired Judges and Disclosures – What are your thoughts?

What is the duty of retired judges serving as neutrals to disclose past cases (e.g. names of past parties and counsel) from the bench? In the case of arbitration, when would failure to disclose create a risk of award vacatur for lack of impartiality?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on February 6, 2017 10:42 AM | Permalink

I see it as no different from other arbitrators. If the parties or counsel have appeared before you, you disclose it; just as, if you'd sat on a case with the same or similar issues. Both the fact and appearance of impartiality are critically important.

Posted by Jim Purcell | February 6, 2017 11:10 AM

I think a retired judge should disclose the cases in which the parties have appeared before him/ her on the bench if known.

As an arbitrator I have no way of doing a conflicts search that captures 20 years of adjudication.

So in my disclosure I advise counsel that I have not conducted a search of former cases and have not disclosed them unless I specifically remember.
Better safe than sorry.

Posted by William G Bassler | February 6, 2017 11:12 AM

Recognizing that complete disclosure is the goal, the information available to the former judge (i.e., names of past parties in cases) must be disclosed. By contrast, if the former judge had administrative responsibility over a case or party should not prevent the former judge from acting as a neutral in a matter when the judge previously exercised remote or incidental administrative responsibility that did not affect the merits.

Posted by stephen conover | February 6, 2017 11:15 AM

Both the IBA Guidelines on Conflicts of Interest in International Arbitration and the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes require that any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure. Therefore these connections should be disclosed. Whether the failure to disclose creates a risk of award vacatur for lack of impartiality depends on a variety of factors.

In Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), the US Supreme Court set aside an award where an arbitrator failed to disclose that he had a business relationship with one of the parties. Justice Black's opinion stated that arbitrators should disclose to the parties any information that "might create an impression of possible bias." Justice White concurred but reasoned that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial" (Commonwealth Coating, 393 U.S. at 150).

Courts disagree about whether Justice Black's opinion in Commonwealth Coatings was a plurality or a majority opinion (compare Schmitz v. Zilveti, 20 F.3d 1043, 1045 (9th Cir. 1994) with Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82 (2d Cir. 1984)).

Some courts have held that an arbitrator's failure to disclose any information that may create an impression of possible bias may, but does not automatically, constitute a ground to vacate an award. Other courts have fashioned a "reasonable person" standard for determining whether an arbitrator is evidently biased (see App. Indus. Mat. Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 139 (2d Cir. 2007) (applying reasonable person standard, holding that an arbitrator's knowledge of a potential conflict and failure to disclose or investigate it indicates evident partiality)).

In U.S. Electronics Inc. v. Sirius Satellite Radio Inc., the New York Court of Appeals adopted the Second Circuit's "reasonable person" standard to determine whether there was evident partiality (934 N.Y.S.2d 763 (2011)).

Posted by Steven Skulnik | February 6, 2017 11:15 AM

He has the same duty as any other arbitrator to disclose. It can be relevant if the parties' attorney actively practiced in the county where the judge was located.

Posted by Anonymous | February 6, 2017 11:19 AM

I was on the bench from 1977-2005 and have been practicing ADR since then. There is no way I would be able to make complete disclosures regarding all of the cases I presided over in that time frame and no way to access the data in the two counties I served as many were not electronically recorded in archives and I doubt I'd get access even to those that are. I also sat for two MI Court of Appeals Panels under a program to assist that Bench with a backlog of cases, I think one Panel in the 1980s and one in the 1990s. I have no access to those records.

Cases I sat for that I do remember I can disclose. Those that I do not remember the Parties and Counsel for I simply cannot disclose for a lack of memory.

I can certainly ask counsel if they recall being before me during my bench years, or their present or former firm, but they may not know if their current clients have been before me, perhaps with different counsel.

I submit that former judges disclose their bench years and courts served on, asking counsel and the parties if they recall being in a case before the present judge/arbitrator. If an arbitrator/judge does remember a case it should be disclosed.

I suggest that any rule or interpretation recognize the difficulties of former judges recalling over thousands of cases (in my situation I believe the total number was in the range of 50,000 cases) because the memory of one's entire docket over decades and with no access to searchable databases. The duty in such circumstances should be "as practicable".

Alternatively, it may just more in tune with reality to limit a judge/arbitrator to disclose regarding his ADR practice, recognizing that our resumes list out bench tenures.

Posted by Lawrence C. Root | February 6, 2017 11:43 AM

As a commercial arbitrator, I have not been asked to disclose all prior matters, parties and lawyers. Of course, the proceedings generally are considered private and thus would not be disclosed. I also do not have a complete list of those prior matters. I would disclose any relationship with the parties or counsel as should a retired judge, but I doubt that a retired judge would have available such information, although in this day almost all of that information should be available through database searches for most courts. I believe labor arbitrators, on the other hand, do publish and therefore disclose prior cases, but confidentiality is not expected.

Posted by Bernard Bonn | February 6, 2017 12:02 PM

While it appears that disclosure of parties involved in prior cases should be made, is there need for a jurist to disclose if he has written a decision that appears to be directly on point on a central issue raised in the dispute. This might be of more concern to the parties than a case involving a party in an unrelated dispute. The parties could pick up published decisions in their due diligence, the same as picking up cases involving the other party but what is the duty of the judge?

Posted by Eric Wiechmann | February 6, 2017 12:11 PM

Always disclose. Transparency is the key, but it would seem that only knowledge of the participants in dispute at hand is required, albeit disclosure of people and accounts that arise during the hearing require further disclosure.

Posted by Robert E. Barras | February 6, 2017 12:22 PM

As a retired judge I would disclose the prior appearance before me of a party or counsel should I recall such appearance. I do not believe that an award would be susceptible of vacatur, on grounds of partiality, unless the non-disclosure involved circumstances which rendered unreasonable any claim of failed memory (e.g., the earlier appearance resulted in the rendition of a noteworthy opinion which has been widely cited).

Posted by Judge Gerald Harris | February 6, 2017 1:01 PM

All arbitrators, without exception, should have a duty to disclose if either party has previously appeared before the arbitrator. Attorney-arbitrators typically conduct a formal conflict check before they confirm appointment to a case because we, and our insurance carriers, think it's risky to rely solely on our memories. Nowadays, courts are digitizing their old archived files to ensure that case information, including the name of the judge, is readily available. [Thankfully, researching via microfiche is being phased out.] The former jurist might have to contract with a tech services vendor to sort the data into an easy to reference list of parties, but isn't that de minimis effort worthwhile to protect the integrity of the arbitration process?

Posted by Denise Presley | February 6, 2017 2:21 PM

My sense is that it is more realistic to limit the strict standard of disclosure to the ADR cases, where the neutrals keep records of parties, counsel and witnesses. However, judges are not required to disclose in court cases whether they have handled cases involving the same counsel, parties, or witnesses. It is no conflict for a judge to handle cases involving the same actors. Most

judges may have handled hundreds or even thousands of cases involving one district attorney's office, or one public defender's office or one firm handling collections or evictions. Judges do not segregate records of all cases over which they have presided and do not control the records after leaving.

So, a practical approach could be for a judge to make a general statement of the judge's tenure and note that most local counsel may have appeared before the judge at some point, with specific reference only to cases that the judge recalls that have higher relevance. A judge could couple this with an instruction to counsel to disclose any history that their side has had with the judge for the opposing party's consideration.

Posted by Federico C. Alvarez | February 6, 2017 7:08 PM

Like most others have stated, any arbitrator has an absolute obligation to disclose any past interactions with the parties and counsel to the arbitration. Failure to do so could be grounds for vacatur. A retired judge might have an issue remembering all of the cases he/she worked on, particularly if he/she was on the bench for a long period of time.

Posted by Marvin Schuldiner | February 7, 2017 1:51 PM

I was a judge for 18 years and then sat as a senior judge in various courts for almost a year. Litigants filed about 5000 cases a year in my court, which adds up to about 90,000. They encompassed almost all kinds of criminal and civil cases. There is no earthly way that I can remember most of those cases, except for the most memorable. Certainly I would disclose any acquaintance or familiarity with counsel and parties but would also instruct counsel to advise me of any dealings that they, their clients or witnesses might have had with me or my court.

Posted by Judge Stephanie Klein | February 9, 2017 2:24 PM

As a state district judge, I tried over 400 cases to a jury verdict. I also tried over 100 non jury cases. Further, I held a Motion Docket every Monday morning. There isn't a way to remember or research every lawyer who appeared in my Court. There are obviously some attorneys who I distinctly remember, and information about these individuals is disclosed. Otherwise, I add a statement that the attorneys may have appeared in my court and moreover may have attended one of my fundraisers and contributed money to my campaign.

Posted by scott link | February 13, 2017 10:53 AM

Third-party Funding and Ethics – What are your thoughts?

Does third-party funding in connection with arbitrations present ethical problems?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on February 12, 2017 3:30 PM | Permalink

The only exposure I have had as an arbitrator with third-party funding was a dispute between the funder and the recipient. There was an arbitration clause in their agreement and the proceeding was pretty straightforward. It is not clear to me what ethical issues the question contemplates unless the concern is about whether the party to the agreement which is the subject of the arbitration continues to be the real party in interest if the recovery ultimately will be paid to the person advancing the funds. At first blush I don't see that as an ethical issue.

Posted by Judge Gerald Harris | February 12, 2017 4:19 PM

Third-party funding raises "evident partiality" questions and, therefore, creates greater risk of vacatur. The disclosures required of arbitrators in the Code of Ethics for Arbitrators in Commercial Arbitration, in my interpretation of the Code, require the arbitration party with third-party funding to disclose the identity of the third-party funding source, including principals of the source. The disclosure of a third-party funding source, however, could create a strategic opportunity for the non-funding party that raises a fairness question for the arbitration party being third-party funded. One possible solution is for all parties to the arbitration to agree that no information about arbitration party funding in any form will be provided to the arbitrator and that the arbitrator is under no obligation to make disclosures related to third party funding. Another possible solution, although

draconian, is to require that arbitrators have no personal, business, social, or financial interest in any entity that provides third-party funding to arbitration parties. Under any scenario, the disclosure obligation appears to be the major issue created by third-party funding of arbitration parties.

Posted by John Allen Chalk | February 12, 2017 4:41 PM

I agree with both comments. The regular disclosures required of arbitrators should be enough to weed out possible conflicts of interest.

Jeremy Sussman

Posted by Jeremy Sussman | February 12, 2017 8:05 PM

I will be moderating a program on "Third Party Funding: What You Need to Know" at the ABA Dispute Resolution Section annual conference in San Francisco, April 20, 2018. Panelists, representing funders, users, corporate interests and arbitrators, will discuss how the dynamics of this increasingly widespread billion-dollar industry is impacting arbitration. We will include in the discussion the possible ethical and disclosure obligations it might impose. Hope you can come and participate in the discussion.

Posted by Ruth V Glick | February 12, 2017 11:24 PM

It may be of interest that the Singaporean Arbitration Association has just enacted a specific rule respecting third party funding. I have yet to study the rule or its implications. In general, I think there will be a swinging of the pendulum back and forth between an inherent distaste for funded disputes emanating out of common-law concepts of champerty and maintenance and more progressive recognition that often persons or entities simply cannot afford to achieve justice from within their own resources. In any case it seems that in most funded case there would need to at least be disclosure of the identity of the funder to avoid late-arising conflicts and potential disruption of proceedings.

Posted by Sayward Mazur | February 24, 2017 2:10 PM

Advocate engaged in unethical conduct – What are your thoughts?

If an arbitrator sees that an advocate has engaged in unethical conduct, can/should the arbitrator discipline counsel?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on March 19, 2017 7:51 PM | Permalink

In those states where acting as an advocate in arbitration is the practice of law, advocates are required to adhere to the ethical obligations imposed by the rules of ethical conduct enacted in that state. Out-of-state counsel may or may not be governed by the ethical rules of the forum state. For example, in New York and California, out-of-state counsel are expressly bound by the ethical obligations of counsel in the forum state. There are states, however, where acting in arbitration is not considered the practice of law and, therefore, out-of-state counsel and, possibly, in state counsel are not bound by ethical obligations. This leads to the question of who, arbitrator or attorney disciplinary authority, has the power to discipline counsel. This is largely unsettled law, though in New York, at least, there is authority for the proposition that arbitrator's lack jurisdiction to disqualify counsel. In the end, it is probably the case that for arbitrators to have jurisdiction to discipline counsel, that authority must fall within the scope of the arbitration agreement. If the arbitrator is to impose ethical obligations on counsel, it should be clear which ethical obligations apply, including whether there are ethical obligations incorporated into the arbitration rule set (e.g., LCIA Rules).

Posted by Jeff Dasteel | March 19, 2017 8:22 PM

The arbitrator has something more important to think about: Getting to the right decision. His/her time and energy (and the related costs to the parties) should be directed to that end, not distracted by the collateral issue of the offending counsel's ethical lapses. That might well be an appropriate object of attention for a judge in a court proceeding. But for an arbitrator, it would be a luxury indulged at the expense of the parties who did not come to the forum for that purpose.

Posted by andrew gerber | March 19, 2017 8:43 PM

I would carry Jeff Dasteel's conclusion a bit further. If the arbitrator(s) learns that counsel are not bound by ethical obligations in the forum state, then I think they must be defined and included in the arbitration agreement, even if by amendment. It seems to me that proceeding with an arbitration when counsels are not bound by any ethical rules is just setting the stage for a bad outcome.

Posted by Raoul Drapeau | March 19, 2017 8:44 PM

I've never seen an arbitration clause that allows for this situation. And I know of no rule of the AAA, JAMS, the ICC or CPR that allows an arbitrator to proceed in this manner. So I have to conclude that an arbitrator who disciplines counsel for unethical behavior would be exceeding his/her authority. If the arbitrator is an attorney and feels ethically compelled, the arbitrator could file a complaint with the appropriate grievance committee. If the arbitrator isn't an attorney, he/she could also file such a complaint. This raises the question; if the arbitrator reports counsel for unethical conduct, does the arbitrator have to resign? Resignation isn't looked upon favorably, but this is a very unusual situation and my sense is that resignation would be appropriate. If the arbitrator were to remain having made such a report, it's hard to see how the party whose lawyer has been reported wouldn't demand a resignation based on prejudice or bias. Rather than allow for such a charge and the possibility of vacatur based on the charge, the arbitrator, by resigning, would probably be doing what is best in the long run for the arbitration process and for the parties. Keep in mind, an arbitrator isn't a judge. An arbitrator's powers are limited by the wishes of the parties.

Posted by Paul Marrow | March 19, 2017 9:34 PM

Note that an advocate in arbitration may not be a licensed attorney. In NY for example, FINRA permits a non-attorney to act as an advocate for a claimant and presumably also a respondent.

If the unethical behavior creates problems in the course of the arbitration, does that mean the arbitrator must take action in order to assure fairness? "Discipline" for unethical behavior, for example by a state bar, usually requires a hearing and won't solve the immediate problem of assuring fairness. Does one stop the hearings? Expose the behavior? Anyone have experience with unethical behavior during hearings? If so, what action taken and how did it work out?

Posted by Micalyn S. Harris | March 19, 2017 10:32 PM

I agree that the Arbitrator has no inherent disciplinary authority. But he or she certainly has the responsibility to make sure the unethical conduct does not taint the process by making the hearing unfair to the opposing party, and certainly the responsibility to make sure the conduct does not taint the Award.

Posted by Robert L. Arrington | March 20, 2017 8:37 AM

Another possible approach to consider; if the unethical conduct impedes the arbitration or adds unnecessary costs or delay, the imposition of sanctions may be appropriate.

Posted by Judge Gerald Harris | March 20, 2017 10:18 AM

The primary duty of the arbitrator is to conduct a fair hearing and reach a sound decision. That is what the parties have hired the arbitrator to do.

On witnessing apparently unethical conduct by counsel for a party, the arbitrator needs to determine whether a fair hearing is still achievable. If so, going forward seems proper, with the issue of possible reporting reserved until later.

If the behavior seems so extreme that it will preclude a fair hearing, a more difficult decision exists. How to deal with that situation depends on a number of factors, including whether the opponent appears aware of the adversary's ethical violation. The easiest case is when opposing counsel sees the problem, because then he or she can take appropriate action.

The other situation - where the arbitrator sees an ethical violation but opposing counsel does not - is fortunately probably a rare occurrence.

Posted by William Pastor | March 20, 2017 12:21 PM

I suggest that the initial inquiry regarding ethical issues relating to Counsel start with the question: Is the arbitrator a licensed attorney or not? If an attorney then I respectfully submit that the arbitrator is bound by the ethical rules governing attorneys. Once an attorney always an attorney and thus subject to the ethical rules governing attorneys and thus may well be obligated to report unethical conduct of Counsel. I had a case with a similar situation and referred the matter to the case manager who then met with Counsel resolved the issue and we moved on. Non attorney arbitrators may well not have that duty but I follow the old adage, once an attorney always an attorney until I surrender my license.

Posted by Stanley Sklar | March 22, 2017 11:48 AM

In most states, attorneys are obligated to report violations of RPCs once he/she becomes aware of such a violation. This could put an attorney-arbitrator in a quandary and on a slippery slope. However, if the adversary is represented by an attorney, that requirement also falls on him/her. A non-attorney arbitrator has no such obligation and most wouldn't be aware of the RPCs in any great detail. Beyond all this, it is not the responsibility of the arbitrator to discipline advocates. However, the arbitrator must ensure a fair process.

Posted by Marvin Schuldiner | March 22, 2017 4:09 PM

I agree with Stanley Sklar. If and to the extent that the attorney-arbitrator observes or becomes aware of conduct by an attorney before her that she knows or has reason to know amounts to unethical conduct, I believe she has an ethical obligation to report that conduct to the relevant state's disciplinary board. However, the act of reporting the conduct would itself create circumstances which, in the eye of the attorney in question and/or his client, call the arbitrator's ability to fairly and impartially decide the dispute before her into question. Sadly, the attorney-arbitrator would also have to notify counsel for all the parties and the AAA in some appropriate way that she notified the disciplinary board and either disqualify herself or await the inevitable objection from the affected party and/or the other parties. That said, the potential impact on and disruption if the proceedings cannot dissuade her from complying with her ethical duty.

Posted by Mark F. Brancato | March 22, 2017 6:16 PM

Social Media and Arbitrators/Mediators – What are your thoughts?

Should arbitrators/mediators be active on social media?

If yes, consider also:

- Which social media platforms?

- Will social media involvement create potential conflicts?

- What should be disclosed when handling a case (i.e., friends, contacts, postings, etc.)? Suggest also any standard language for broad social media disclosure.

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on July 30, 2017 10:11 AM | Permalink

The following is social media disclosure language I received from the AAA/ICDR:

"I use a number of online professional networks such as LinkedIn and group email systems. I generally accept requests from other professionals to be added to my LinkedIn website but do not maintain a database of all these professional contacts and connections. LinkedIn now features endorsements, which I do not seek and have no control over who may endorse me for different skills. The existence of such links or endorsements does not indicate any depth or relationship other than an online professional connection, similar to connections in professional organizations."

Posted by Anonymous | July 30, 2017 10:44 AM

The AAA/ICDR sample disclosure covers the basic issues. When serving as an arbitrator I receive names of counsel, parties, and witnesses to run a conflict check, I search those names on social media for any connections and then disclose them.

Posted by Steven Skulnik | July 30, 2017 10:53 AM

The question is like asking "should an arbitrator walk into a bar?" Walking into the bar is innocuous -- legally and ethically neutral -- but what you say or do there might matter and should be treated in the same way that you'd treat similar activity done anywhere else. The same analysis applies to things done on social media.

Posted by andrew gerber | July 30, 2017 11:33 AM

I have used the same standard disclosure. I do not typically use Facebook for business connections. I use it to keep up with family and college and high school friends. I have professional connections on LinkedIn, but per the disclosure, it takes more than a simple connection to create, in my judgment, a conflict of interest.

Posted by Robert L. Arrington | July 30, 2017 11:42 AM

I avoid patronizing social media such as Facebook, because I find it to be a serious waste of time. LinkedIn can be a help in making connections, but also demands time in keeping your own postings up to date and following the activities of others. Then there is the possibility of creating a problem for yourself in creating unwanted conflicts of interest. Leave it to the kids and millennials.

Posted by Raoul Drapeau | July 30, 2017 1:53 PM

As a former federal judge, I never joined Facebook or the like and I consider that to be a wise decision that I will carry forward as an AAA arbitrator. I find LinkedIn to be a massive waste of time, with its bombardment of attenuated contacts and job openings (I am not seeking employment as an attorney).

Anonymous

Posted by Anonymous | July 30, 2017 5:40 PM

I use the social media disclosure language recommended by AAA.

Posted by Patrick Westerkamp | July 31, 2017 10:15 AM

My private practice as an advertising lawyer requires me to be knowledgeable about and active on social media. I am active on Twitter and LinkedIn. Facebook is primarily personal. That being said, my social media usage has little to nothing to do with my arbitration matters. Over time, that may change as more thought leadership about arbitration may switch to specialized LinkedIn groups, etc. In fact, I venture to say as younger members of the bar become arbitrators, it is likely this will happen. Of course, if you are an arbitrator following ADR groups for thought leadership, you should exercise extreme care about what you say in public. As to how I handle my social media presence in arbitrations, I use a version of the AAA social media disclosure language when I accept appointments. In addition, I run names through the search features to see if/how I am connected. If the connection is through a group but I have no personal connection or knowledge of the person, I explain this in my disclosure. Ultimately, it is up to the parties whether to accept my appointment as an arbitrator. I make full, detailed disclosures about any connections of which I am aware on social media. I also encourage the parties to remember their obligations to make disclosures should they be aware of some connection of which I am not, particularly due to the attenuated nature of relationships on social media.

Posted by Kyle-Beth Hilfer | July 31, 2017 10:23 AM

I find LinkedIn to be a very valuable tool in my ADR practice. It has many informative articles and items that I would not otherwise be aware of and provides me with the opportunity to share my own postings and comments with friends and colleagues. I expect that many other ADR professionals used LinkedIn and thus do not feel compelled to go beyond stating that I am a "LinkedIn user" in making disclosures. I have over 700 LinkedIn "followers" of whom I know, personally, less than 10%, so I do not view my LinkedIn network as creating any potential conflicts.

Posted by Mark J Bunim | July 31, 2017 10:49 AM

In this day and time I think being on a social network like LinkedIn is important. Times are changing and the internet is a primary source that young professionals use to and convenient way to learn about someone. Young professionals get older and the ones that follow will be more attuned to going to the internet for information. I have not taken the time to learn how to effectively use it, but have plans to do so.

I make the disclosure that I am on LinkedIn but do not consider linking to persons to be a mater that should be disclosed, in and of itself and request that if anyone wants me to disclose I will make a supplemental disclosure. So far, no one has ever requested.

Posted by Michael S Wilk | July 31, 2017 11:51 AM

I'm glad to see this topic raised on the Roundtable for discussion. I am troubled by LinkedIn "endorsements" when it comes to the subject of arbitrator disclosures. I do not solicit endorsements but will receive them from time to time. If a lawyer in a prospective arbitration has endorsed me for "arbitration" or a specific practice area, I question whether this requires a disclosure. Are other members of the Roundtable leaving LinkedIn because of this issue? Is there a way to track endorsements? I would like to see more development of this sub-topic.

Posted by Michael McConnell | July 31, 2017 3:03 PM

You do have the ability to block LinkedIn endorsements. I have done that for the reason raised by Michael McConnell.

Posted by Anonymous | July 31, 2017 3:16 PM

Dispositive Motions – What are your thoughts?

If the outcome of a dispositive motion involves thousands of dollars possibly lost to the arbitrator if the motion is granted, should the parties let the presiding arbitrator decide the motion? Should they select another arbitrator to decide that specific motion?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on December 9, 2017 3:41 PM | Permalink

If an arbitrator is more worried about his fee than in providing a fair hearing, then he or she has no business being an arbitrator. If the parties are worried about that being the reason to get another arbitrator to decide the motion, they need to get another arbitrator, period.

Posted by Robert L. Arrington | December 10, 2017 9:58 AM

If there is evidence upon which that concern is based, the arbitrator should be removed. If you are asking whether as a matter of course this should happen because all arbitrators face the loss of income by granting dispositive motions, then you have said that arbitration is a fatally flawed dispute resolution mechanism.

Posted by Paul Nicolai | December 10, 2017 10:17 AM

Granting a dispositive motion always means the dispute is "disposed of" before hearing. You are suggesting that the arbitrator has a conflict of interest between denying the motion, and continuing to hear the case, or granting it and thereby cutting off her income stream. If consciously denied, you are dealing with a very cynical arbitrator. If unconsciously denied, the conflict of interest and poor decision making on the arbitrator's part is still there. An ethical arbitrator calls it as she sees it. My panel granted a partial SJ motion in a case. The rest of the case then settled and we forewent $30,000 of income. We were aware of the possibility that our ruling could result in settlement of the entire case. We were also aware that our ethics required us to do exactly what a sitting judge might do. We believe our reputations are only enhanced by doing the right thing. It costs more to bring a new neutral up-to-speed, however, the advocates in an arbitration, in considering an arbitrator's potential conflict of interest, may find it money well spent. In a perfect world, this would never be a consideration.

Judith Meyer

Posted by Judith P Meyer | December 10, 2017 12:13 PM

I have never seen or heard of parties demanding a different arbitrator to decide a dispositive motion. The arbitrators I know at AAA would simply never take their own "future fees" into consideration to not grant a meritorious motion for summary judgment. We are all obligated to decide matters strictly on the merits and the arbitrators I know, do that.

Posted by Mark J. Bunim | December 10, 2017 1:06 PM

An Arbitrator, like a Judge in state court, has to call it as he/she see it. Therefore they should rule on their own Motions.

Posted by Anonymous | December 10, 2017 1:46 PM

Arbitrators are regularly called upon to make decisions that will prolong or shorten the hearing(s). If arbitrators valued compensation over ensuring a fair and efficient process, they would regularly permit cumulative and unnecessary witnesses to testify and ask for briefing on all manner of non-essential interlocutory issues and objections. After all, the longer the hearing and the more work for the arbitrator, the greater the compensation. If arbitrators can be entrusted with these decisions, it seems to me that they can be entrusted with deciding dispositive motions, where the same compensation dynamic is in play.

Posted by Dani Schwartz | December 10, 2017 1:55 PM

I agree with all of the comments already made on this issue. Any arbitrator who would even consider not ruling favorably on a deserving summary judgment motion because of concern about losing income should be removed from the panel.

Posted by Roslyn Harrison | December 10, 2017 2:00 PM

If the party is worried that the arbitrator may be conflicted re a motion, seems to me there is insufficient trust in that arbitrator to make a fair final award. Time to ask for a new arbitrator.

Posted by Robert Bartkus | December 10, 2017 2:59 PM

In the question posed the arbitrator presumably was selected by the parties, sworn as an arbitrator, conducted a preliminary hearing scheduling document disclosures and exchange, and then received a motion under Rule 33 from one or both parties to allow a dispositive motion in lieu of the evidentiary hearing. (At this point the AAA case manager has collected some or all of the deposits estimated by the arbitrator for the cost of the hearing.) The arbitrator granted the motion because under Rule 33 the parties showed or claimed that deciding the dispute on the basis of the motion would provide a fair hearing of the evidence in the case without requiring the parties to incur the expense of the hearing, and the arbitrator decided it was likely to be successful. The question seems to assume that the parties now think the arbitrator will deny the motion because he wants to earn more by hearing the case instead of granting the motion he decided to hear. If so, why did he allow the motion? Having successfully asked him to hear the motion, why do the parties now think he/she intends to deny the motion? On what grounds could the parties select a new arbitrator? Rule 18 specifies grounds for disqualification of an appointed arbitrator. I do not think that the scenario here provides grounds for disqualifying the arbitrator. How would the parties select another arbitrator to decide the motion if the existing arbitrator was not first disqualified on good grounds from handling the case? These questions suggest something is going on that the description does not explain. Is the use or availability of dispositive motions a source of some uncertainty among parties?

Posted by Stephen Armstrong | December 10, 2017 3:12 PM

An important consideration is the appearance of impropriety. If a party makes a motion which could result in a determination, either way, which would have a "significant" impact on the mediator's compensation, there is an appearance of impropriety. I know that "significant" is entirely subjective, but that is really not the point. The appearance of impropriety is sufficient basis for an arbitrator to recuse from deciding that motion. There is no appearance of impropriety in granting or denying adjournment requests, requiring written or oral closing statements, etc., which may be discretionary but are not dispositive.

Posted by Eli Uncyk | December 10, 2017 10:10 PM

As an architect, design services fees are predetermined for the production of a future product or service. If that service is halted so are the fees. I can never collect for something not produced. As an arbitrator on construction related disputes the same applies.

Posted by Robert E. Barras | December 11, 2017 11:29 AM

I think that it is imperative that an arbitrator grant a dispositive motion on the same basis as it would be granted in a court proceeding. Even when the dispositive is not granted, the analysis in the decision is invaluable to the parties in preparing a more streamlined case at the hearing as well as evaluating their respective cases for settlement purposes.

Posted by Hazel Willacy | December 11, 2017 1:34 PM

1. SELECTION, ROLE AND AUTHORITY OF ARBITRATORS

Number of Arbitrators – What are your thoughts?

Increasingly, the rules of international arbitral institutions (e.g. ICC, ICDR, JAMS, etc.) require the appointment of a sole arbitrator where the parties have not agreed on the number of neutrals. The domestic rules of such institutions do not always mirror a sole arbitrator default (e.g. AAA Commercial Rules default to three arbitrators if the claim is over $1,000,000). Does one arena (international or domestic) have the better approach?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on April 24, 2017 7:02 AM | Permalink

It varies from case to case. Frequently, the amount in controversy does not justify the appointment of three arbitrators. Even when it does, the parties should still ponder whether a single arbitrator will serve equally well. This is something that should be addressed in the drafting of the agreement to arbitrate.

Posted by Robert L. Arrington | April 24, 2017 8:35 AM

One arbitrator should be able to adjudicate all but the most complex of disputes.

Posted by Denise L Presley | April 24, 2017 10:11 AM

If it can be justified by the size of the case, I believe three arbitrators are usually better than one for at least two reasons: it leads to a better result (one arbitrator is more likely to miss something or simply get it wrong); and (b) it allows for division of labor in allocating research and writing tasks, thus promoting efficiency.

Posted by George Graff | April 24, 2017 11:01 AM

There is strength in numbers. When I was a younger arbitrator, I wanted to serve solo - "the extra hands just slowed me down." Now that I'm older, I see the value of enhanced deliberation & consideration of different perspectives on the same case. More is better - doing it on the cheap is not the highest value in life, law or arbitration.

Posted by David Blair | April 24, 2017 11:35 AM

Considering the cost and scheduling difficulties in three arbitrator arbitrations, I would vote for a default single arbitrator appointment unless the parties are willing to spend the money and time and agree otherwise.

Posted by Jose W Cartagena | April 24, 2017 12:15 PM

Let's face it, 3 arbitrators cost a lot Parties who are sophisticated enough to agree to arbitration should be presumed to know what is best for them and even in a case that involves a lot of money, in fact especially in such a case, if parties want a three arbitrator panel, they would know enough to specify accordingly in the arbitration clause. Defaulting to 1 arbitrator makes sense because it implies that the institution, AAA, JAMS, CPR etc. isn't going to saddle the parties with a costly scheme unless the parties agree otherwise. In other words, a default for 1 arbitrator signals cost awareness. That's another way of saying that the institution respects the desire of parties to keep cost under control.

Posted by Paul Marrow | April 24, 2017 12:47 PM

When parties draft contracts with arbitration agreements, they often cannot predict whether any future dispute will be simple or complex or will be large or small. Therefore where the parties (understandably) do not specify a number of arbitrators pre-dispute, there should be flexibility once the dispute arises. The AAA approach provides that kind of flexibility.

Posted by Steven Skulnik | April 24, 2017 7:53 PM

Adrian Bastianelli, a construction lawyer and arbitrator from Washington DC, has suggested the alternative to either a single arbitrator or a panel of three is a panel of two, with one of the panel members having a tie breaking vote. In Adrian's experience, which mirrors mine, it is rare for there to be a dissenting award. Since consensus awards are the norm it is unlikely the tie breaker will be used often. Of course, two is cheaper than three, with the added benefit of not putting all your eggs in one basket. I like to call this the "Bastianelli Solution"

Posted by Robbie MacPherson | April 25, 2017 7:45 AM

It seems logical and appropriate to select 3 arbitrators to serve on complicated and sophisticated cases when the stakes are very high and the money demands are too. Having to pay for 3 arbitrators rather than one sitting on the arbitration panel is more expensive, but in my opinion there is certainly less chance of an error or oversight with 3 experienced arbitrators examining the evidence presented at the arbitration hearing, along with the facts and the law controlling the case than one arbitrator handling everything by him/her self. In our legal system we have 3 appellant judges sitting on appeals in each of the 12 circuits reviewing opinions made by the trial judge and jury in the federal District Courts and even more,9 Supreme Court Justices, reviewing the decisions made by the lower Circuit courts. Of course, as previously stated, the amount in controversy makes a big difference.

Posted by Robert Echols | April 25, 2017 10:01 AM

Generally, having three arbitrators instead of one increases costs by more than a factor of 3, a fact that is important to keep in mind. That said, increased costs on that scale may be a drop in the bucket for a very large dispute. I think flexibility is the watchword on this issue, and I agree that AAA's approach embodies that.

Posted by Dani Schwartz | April 27, 2017 9:38 AM

In Texas we have a saying; One riot, one Ranger. One arbitrator is sufficient unless it is a highly complex case with potential damages in excess of $5,000,000. Then a three member may be necessary with one arbitrator handling all the discovery issues with the ability to consult with fellow panel members if needed. In short, it is case specific.

Posted by scott link | May 1, 2017 3:56 PM

I agree with the comments that three is better than one but three is not justified where the amount in controversy doesn't justify the expense.

I have decided not to accept solo appointments. In fact I have in the past suggested that because of the amount, the parties should agree on waiving 3 in favor of 1.

Posted by Judge William G Bassler | July 31, 2017 10:10 AM

Preferred Process for Chair Selection – What are your thoughts?

In an institutional arbitration with three presiding arbitrators, should there be a preferred process for Chair selection (e.g. institution decides; arbitrators decide; default to highest ranked arbitrator; default to judge, if present)?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on April 30, 2017 3:27 PM | Permalink

I would either let the institution or the 3 arbitrators decide. That has worked the best in the cases in which I have been involved.

Posted by Thomas Decker | April 30, 2017 3:58 PM

I agree with Mr. Decker.

Posted by Robert L. Arrington | April 30, 2017 5:59 PM

The panel of 3 arbitrators should decide who should serve as the chair. If the panel is unable to decide, then the AAA should name the chair.

Posted by Thomas J Mitchell | April 30, 2017 6:04 PM

I suggest that the 3 arbitrators should decide. In my experience, the best leader is the one who wants the responsibility of leading. If the institution chooses, it fails to account for the desire to lead. If left to the panel, the leader will emerge.

Posted by Perry Dean Freedman | April 30, 2017 6:39 PM

If the co-arbitrators are appointed first, it makes sense for the two of them to choose the chair. If all three arbitrators are to selected at the same time, then that method would fail and either the parties could agree on the tribunal or the institution can appoint.

Posted by Steven Skulnik | April 30, 2017 7:27 PM

I agree with Mr. Freedman. Usually there is a person who wants to be lead dog. It's (usually) better (for everyone) to satisfy this desire, not frustrate it.

Posted by David Blair | April 30, 2017 10:20 PM

In the majority of cases I have seen the agreement calls for each side to appoint their arbitrator and then the two select the Chair. This works well as the person appointed Chair is someone who the two sides have presumably agreed can work effectively with them. In cases where the institution is appointing all the arbitrators it would be a good idea to appoint two, in the first instance and then give the two lists, and a time period to select the Chair. That way the Chair will have the support of the two wings and it will result in a more amicable process

Posted by Mark Bunim | May 1, 2017 9:37 AM

I would let the parties decide, then default to AAA. I believe the arbitrator should have attended the AAA panel chair course.

Posted by Anonymous | May 1, 2017 10:55 AM

ADR is about empowering the parties to resolve disputes on their own terms. Unless their agreement stipulates otherwise, the parties should choose the chair. If they are unable to do so, then the choice should default to AAA or whatever forum is sponsoring the arbitrators.

Posted by Marvin Schuldiner | May 2, 2017 9:35 AM

I follow the round table discussions regularly and agree with one or more responses. On the subject presented here I see many good ideas. In my case, an architect and construction neutral, I yield to the legal minds for chair selection.

Posted by Robert E. Barras | May 2, 2017 2:07 PM

I agree with Marvin Schuldiner's solution, which I believe is the same as what Steve Skulnik proposed. However, if the parties can't agree and the selection defaults to the AAA, the AAA should be guided by the highest ranked arbitrator.

Posted by Stephen A. Hochman | May 7, 2017 5:18 PM

Wing Arbitrators – What are your thoughts?

What do you think is the proper role for a neutral wing arbitrator on a tribunal? Does your answer differ if the wing arbitrator is party appointed?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on July 10, 2017 8:02 PM | Permalink

Party appointed wing arbitrators are a bad idea especially when they start advocating for the party appointing them. For that reason, they should not be called "neutrals", as a majority of them, are anything but that.

Posted by Anonymous | July 10, 2017 9:19 PM

The panel chair runs the case - discovery, procedure, most motions, evidentiary standards - and the wings come alive at deliberations with full participation & equal voice & vote. Non-neutral wings are a waste of time & money.

Posted by David Blair | July 10, 2017 10:24 PM

Lack of neutrality of any arbitrator, even if party appointed, is grounds to vacate an award. On appointment, the appointing authority (or the other arbitrators) should warn the panel of this fact and arbitrators should also be aware of the fact that, in the event an award is overturned for their lack of neutrality, they would be personally liable for their misconduct.

If, in fact, party appointed arbitrators do turn into advocates for the party that appointed them, then the decision is made by the chairman. This being so, why then spend all the money on two arbitrators if they do not really decide the dispute?

Posted by Jose W Cartagena | July 10, 2017 10:30 PM

Neutral wing party appointed arbitrators serve a very useful purpose. In my experience they insure that the position of the party appointing them is fully understood and evaluated. As Chairman I have not found them to be advocates. In addition, they serve to support party autonomy and participation in the arbitration process. The consensus of the Panel in the procedure leading to the hearing often leads to a better result. My problem is cost. Where the stakes are high, a panel of three is critical. Where the stakes are not high, a panel adds unnecessarily to the expense.

Posted by William G. Bassler | July 11, 2017 8:50 AM

The whole idea of a party-appointed arbitrator seems to me to violate the whole premise of arbitration - the use of neutrals who have no connection with either party. Think of all the forms we have to fill out prior to appointment detailing even the smallest connection we have to either party, attorneys, witnesses, experts, etc. To me, that alone would disqualify most party-appointed arbitrators.

Posted by Raoul Drapeau | July 11, 2017 9:31 AM

In Rhode Island almost the only time three arbitrators are used is when there is one neutral and two party-appointed arbitrators. In many instances there is a lack of clarity as to the role of the party-appointed arbitrators and whether they may communicate with "their" side once the arbitration has begun. Not infrequently, one party-appointed arbitrator sees their obligation as giving "their side" the benefit of the doubt while the other may try to be completely neutral. The result is an unfair forum. The problem is not so much who gets to appoint the arbitrators, (often the parties choose them through a striking process), as is the absence of clear direction to all that all three arbitrators are obliged to be completely neutral.

Posted by Nicholas Trott Long | July 11, 2017 10:50 AM

There is never a need for party appointed arbitrators in domestic arbitrations. One good arbitrator who will agree to decide based on applicable law and give a reasoned award is ideal, but in a big case (e.g., over $1 million), a panel of 3 neutrals, selected by the strike and rank method, is an acceptable alternative.

Posted by Stephen A. Hochman | July 11, 2017 5:36 PM

Role of wing arbitrator:

Remain a neutral arbitrator throughout proceedings.

Assist the chair in managing the arbitration by expressing my views on procedural issues and rulings on motions, and drafting proposed panel communications when requested by the chair.

Read and understand all documents filed in the case in order to fully understand the parties positions, requests, motions, and oppositions thereto.

Deliberate with the panel members so that the panel can resolve, decide, and rule on motions, etc. and timely issue orders.

During the hearing give the chair (at breaks) my views about procedural issues that may be more efficiently or effectively handled.

Direct your attention to testimony, questions and answers, gage the veracity of each witness, and take notes that shall assist in your decision and deliberation with panel members.

Post-hearing study all transcripts, exhibits and briefs and deliberate with panel members to reach a consensus on findings and conclusions and final awards and actions.

Remain neutral arbitrator to final award issue.

Posted by Edd Dreyfus | July 11, 2017 8:24 PM

I think the Chair needs to set the table and let the wings know from the start of the arbitration that their thoughts and opinions are just as important as that of the Chair. While the Chair usually handles discovery issues, and procedural issues during the Hearing, the Chair should actively solicit the wing arbitrators' views and try to create consensus.

I agree with the comments re cost, but many arbitration agreements call for three arbitrators and it is important that the parties contractual intentions not be cast aside.

When there are two party selected arbitrators involved it is important that they spend the time and diligence to select a Chair that who will work to bring about consensus; who will be truly open and neutral and will be considerate of the wings' opinions.

I agree with the comments above of Edd Dreyfus.

Posted by Mark J Bunim | July 12, 2017 12:43 PM

The previous 8 comments raise more questions than answer. Edd Dreyfus' list for wing arbitrators is good for all neutrals t0 keep in mind. That list if followed seems to result in a panel of 4 rather than 3.

Posted by Robert E. Barras | July 12, 2017 4:09 PM

Sorry to be "late" with my comments. My personal philosophy is to ask all members of the prospective Panel if they are Article X Arbitrators. Under Canons of Ethics, if a panelist declares he or she is non neutral as required by the Canons, I will decline the assignment. I just feel that I have to be free to discuss issues with my fellow Panelists without fear that conversations or comments will somehow be shared with the party who appointed them.

Posted by Stanley Sklar | July 14, 2017 3:17 PM

Three person panels are helpful in more complex litigation matters. I have served on numerous panels where the parties each pick one arbitrator and the chairman is picked either by the parties, the selected arbitrators or the AAA. In most instances all the arbitrators have remained completely neutral. In a few instances, it seemed as if one of the selected arbitrators felt that it was his duty to make sure that the other 2 of us understood the arguments of the party who selected him or her.

For that reason I would prefer to see all of the arbitrators to be selected by both counsels or the Association.

Posted by Thomas Decker | July 16, 2017 12:20 PM

Three person panels are helpful in more complex litigation matters. I have served on numerous panels where the parties each pick one arbitrator and the chairman is picked either by the parties, the selected arbitrators or the AAA. In most instances all the arbitrators have remained completely neutral. In a few instances, it seemed as if one of the selected arbitrators felt that it was his duty to make sure that the other 2 of us understood the arguments of the party who selected him or her.

For that reason I would prefer to see all of the arbitrators to be selected by both counsels or the Association.

Posted by Thomas Decker | July 17, 2017 3:47 PM

Naming the Neutral in Your Contract Clause – What are your thoughts?

If the parties want to memorialize a dispute resolution mechanism, how advisable is it to name a specific neutral to serve as the mediator or arbitrator in the dispute resolution clause? Would it make a difference if the document (like a Stipulated Protective Order) will eventually be filed in a public court proceeding?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on September 17, 2017 8:07 AM | Permalink

I'd say naming a specific tribunal and its applicable rules is sufficient. Years can pass before the parties have a dispute that requires neutral intervention. What if the named arbitrator or mediator relocates, becomes disabled, or dies? What if one party assigns its interest in the contract to a third party who has a different point of view about the named arbitrator or mediator? Enforcement of arbitration clauses is already under attack. Such a clause would only serve to provide another basis for challenge.

Posted by Denise Presley | September 17, 2017 9:12 AM

The process Jeff describes is the dispute board or dispute review board process. It is quite common in the construction industry, especially in major projects like Boston's Big Digm. It is very effective in keeping long term, mission critical projects from derailing due to a dispute. This process has many advantages over post-dispute selection and I have been a speaker on the topic advocating its use in IT outsourcing engagement contacts, which have many parallels to construction projects. Concerns such as lack of availability of the nominated arbitrator can be addressed in drafting.

Posted by Steven Certilman | September 17, 2017 10:23 AM

If the clause provides for reaffirmation of the choice at the time a dispute arises and an alternative method for proceeding in the absence of agreement or the unavailability of the neutral, I see no downside.

Posted by Judge Gerald Harris | September 17, 2017 10:30 AM

Naming a specific person works only if there is a short window of time in which to invoke the provision.

Posted by Robert L. Arrington | September 17, 2017 11:00 AM

For projects of short duration, if the parties agree on a neutral, identifying that neutral in the contract gives the parties an enhanced level of confidence in the dispute-resolution process. For projects which span many years, simply identifying specific ADR tribunal or the applicable ADR rules should be sufficient to instill confidence and minimize the parties' risks.

Posted by steve conover | September 17, 2017 11:19 AM

Unbeknownst to me, I was once identified as a mediator for any disputes regarding an asset between two parties. At the mediation, we had agreed that one party would own a building and the other party would own a small business, of among various other assets. The party with the business would rent the building to house the business. They included me as their mediator in their rental agreement. Of course, a dispute arose. In that case, the parties saved substantial time and money because they activated me and we spent little time getting acquainted to mediate the new dispute. I think that this would be more complicated in an arbitration, especially if the arbitrator comes into contact with the parties on occasion, and needs to observe the appearances of impartiality at all times.

Posted by Federico C. Alvarez | September 17, 2017 9:51 PM

Expanding on the dispute review board process, in order to facilitate speedy resolution of disputes, reports can be made to the named arbitrator(s) on a regular basis so when disputes arise, the tribunal knows what has been done and has the background needed to resolve the dispute quickly. The mechanism entails some ongoing expense, but when time is of the essence, as in construction contracts or other circumstances, the investment in making reports and having them read on an ongoing basis can save time and money when there are problems, and also encourage communications that result in early focus on incipient problems with a chance for early resolution. Simply identifying a neutral has the problems pointed out above; identifying an individual or board that is kept advised of a project's progress and can therefore see and respond to problems promptly, possibly while they are still small, may have advantages.

Posted by Micalyn S. Harris | September 17, 2017 11:26 PM

No good reasons for naming a specific neutral in an arbitration agreement. The variables at dispute resolution time are unpredictable. Selecting the arbitration administrator and expressly selecting the arbitration rules in the version existent at the time of the dispute provide all the flexibility needed to get a suitable, well-qualified neutral. Even the use of neutral qualifications creates a potential new barrier to getting the dispute arbitrated.

Posted by John Allen Chalk | September 18, 2017 7:31 AM

Naming the neutral in the agreement is a great idea. In several cases in which I served as the mediator, both parties requested that I serve as the sole arbitrator in the event any disputes under the settlement agreement. That has the dual advantage of getting an arbitrator who is familiar with the dispute and avoiding the additional costs of having a panel of three arbitrators. It also minimizes the risk that you will end up with an unknown arbitrator or panel that, with the benefit of hindsight, you were not happy with.

Posted by Stephen A. Hochman | September 18, 2017 11:47 AM

While contract enforcement often gives rise to disputes, parties might not initially expect to find themselves in court. Planning an effective and efficient path to resolution at the contracting stage can help clients anticipate disputes and manage them constructively. Of course, every situation is different, but the parties' agreement on dispute resolution techniques, including naming a mediator, is a good first step to collaborative problem solving.

On Tuesday, September 26, my associate, Tim Nolen, and I will be teaching a CLE course on satisfying clients' interests and understanding their perspective. More information is available here:

https://www.nycla.org/NYCLA/Events/Event_Display.aspx?EventKey=CLE092617.

Posted by Lewis Tesser | September 18, 2017 2:42 PM

It is fine to list a specific neutral if that's what the parties agree upon, however, I would recommend that a backup plan also be included in the dispute resolution clause, such as other neutrals or a roster. Neutrals do die, retire, move away or could otherwise be unavailable. Having a backup plan will not leave the parties hanging.

Posted by Marvin Schuldiner | September 19, 2017 12:33 PM

Issuance of "individual practices" by the Arbitrator – What are your thoughts?

How helpful would it be for arbitrators to put together and issue to counsel upon appointment a set of "individual practices" - much like some judges do - that detail their preferences and typical practices?

Please post your thoughts/comments below.

Posted by Jeffrey Zaino on October 7, 2017 4:03 PM | Permalink

Arbitration is a creature of agreement between the parties. The parties determine the procedure for the most part. "Individual practices" of the arbitrator are not binding unless agreed to by the parties. While such practices can be discussed at the pre-arbitration conference, I would not recommend issuing the practices in any formal way.

Posted by Mary Libassi | October 7, 2017 4:50 PM

I believe that practice is useful only in circumstances where much motion practice and many court appearances are to be expected, to wit, in litigation. I don't think it should be imported into arbitration where, generally, the process is less paper-weighted and appearance oriented.

Posted by Judge Gerald Harris | October 8, 2017 9:09 AM

I have found that an individual practice document can be useful in a big case, where there are experienced attorneys on both sides, and so it's important to have your cards on the table before arguments about procedure arise.

What I use on smaller cases is the equivalent of a "Quick Start Guide" in computer parlance - just the essentials.

Posted by Raoul Drapeau | October 8, 2017 10:02 AM

They can be helpful if they are concise don't require lots of additional work by the parties and their counsel.

Posted by Mary K Austin | October 8, 2017 11:09 AM

Any arbitrator considering adopting a set of individual practices must take care that the practices don't infringe upon procedures and time-frames set forth in the arbitration provider's rules. And presumably the individual practices should be circulated along with arbitrator resumes when the parties are selecting their arbitrator(s) to ensure that the parties are making informed decisions about their selection(s).

Posted by Dani Schwartz | October 8, 2017 12:43 PM

Arbitration is supposed to be simple and informal when compared to litigation. And arbitrators shouldn't try to take on the persona of a judge. So I would not encourage this practice. If the arbitrator has some special procedure, he or she can advise the parties when the hearing begins. And the parties can also tell the arbitrator to dispense with whatever practice is being pushed on them by the arbitrator. The arbitrator is there to serve the parties, not the other way around.

Posted by Paul Marrow | October 8, 2017 2:57 PM

Individual practices developed by experienced arbitrators and designed to streamline the process are salutary and, if presented as suggestions rather than demands, should not be objectionable to counsel. One such item might be exhibits produced to arbitrators and opposing counsel in advance and indexed in three ring binders. Particularly in a large case, this eliminates the delays for everyone to search through their boxes. Saving time saves money.

Posted by Deanne Wilson | October 8, 2017 3:58 PM

Mr. Marrow is on target. My practice is to emphasize the informality of model; the kind of super codification envisioned by the question would be exactly the opposite.

Posted by andrew gerber | October 8, 2017 5:18 PM

What is the agenda here?

Make arbitration more than ever a miror image of litigation?

What is next? referring to arbitrators as "your honor"?

We need to go back to the origin of the process: a private, confidential, economical and expeditious conflict resolution process managed by folks the parties trust (for their knowledge (of the process) and expertise (ability to sort through facts and to actively listen to the parties and how they articulate their respective cases).

Nothing less, nothing more.

Posted by Anonymous | October 8, 2017 8:35 PM

One of the benefits of arbitration is that the parties can choose their arbitrator. Because arbitration is a creature of contract, the parties can specify the "individual practices" that their arbitrator should follow, either before or after he or she is selected. However, it would be helpful to the parties if the individual practices of potential arbitrators were distributed to the parties together with their resumes. Of course, as Dani Schwartz points out,the arbitrator is bound to follow the practices and procedures provided in the arbitration agreement, including the rules of the arbitration provider that may be incorporated in that agreement. However, a party's counsel may be faced with a boilerplate, bare bones arbitration clause that merely provides that the dispute shall be resolved "in accordance the the AAA's Commercial Arbitration Rules." Before deciding how to rank potential arbitrators, it would be helpful for counsel to know the practices of each candidate on many subjects, such as whether he or she would permit depositions in addition to testimony at a hearing, exclude irrelevant evidence, or grant remedies that exceeded those a judge could award under applicable law.

Posted by Stephen A. Hochman | October 8, 2017 11:11 PM

It would be more helpful if it was done prior to the arbitrator's appointment as noted by The comment by DanI Schwartz.

Posted by Anonymous | October 9, 2017 8:15 AM

I agree with Mr. Marrow. I am not in favor of an arbitrator dictating procedures to parties, and I agree with others who have said we should try to make the process less like court litigation, not more like court litigation.

Posted by David Shaiken | October 9, 2017 1:43 PM

Paul Marrow makes the best sense regarding individual practices. I am more in concerned with individual practices of witnesses. As a practicing architect and AAA neutral as well as a witness in numerous construction disputes, conflicting witness testimony clouds judgment. Without skilled counsel on both sides, arbitrators have difficulty getting to the truth.

Posted by Robert Barras | October 15, 2017 12:59 PM

Party-appointed Arbitrators Selecting the Chair – What are your thoughts?

When two party-appointed Canon IX (neutral) arbitrators are given the opportunity to select the Chair, to what extent should those arbitrators seek guidance from their respective appointing parties as to the applicable criteria for selecting the Chair before they must act impartially and serve as true neutrals?

Should the diversity of the Chair (race, gender, background, experience, etc.) relative to the party-appointed arbitrators be considered a criterion and, if so, to what extent?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on November 4, 2017 4:18 PM | Permalink

If both sides agree to have ex parte communications with their respective party-appointed arbitrators about chair selection, they should set the parameters. Under the IBA Guidelines on Party Representation in International Arbitration, for example, the communication should be limited to the names of possible candidates for a chair.

As for diversity, many arbitrators and arbitration practitioners have taken the Equal Representation in Arbitration Pledge (http://www.arbitrationpledge.com/take-the-pledge), for example. Those who have pledged to, for example, appoint a fair representation of female arbitrators should be expected to honor their pledge.

Posted by Steven Skulnik | November 5, 2017 9:36 AM

In my experience, the parties who appointed the wings do expect that they (counsel for the parties) will be consulted about the neutral appointment and expect that they will have a veto role. It is an "advise and consent" situation.

All factors should be considered in the neutral appointment and there should be no biases that exclude a qualified neutral arbitrator. Affirmative efforts to ensure diversity should certainly be part of the equation. Subject matter knowledge and experience will also usually be an overriding factor.

Posted by Mark J. Bunim | November 5, 2017 1:55 PM

A neutral arbitrator in my opinion doesn't need to confer with the appointing party about anything. He or she does need to study any criteria in the arbitration agreement or passed on to both arbitrators from the parties jointly. Diversity is always a factor to consider.

Posted by Robert L. Arrington | November 5, 2017 5:10 PM

Counsel for appointing parties normally expect the party-appointed arbitrators (even though neutral) to confer with them on the criteria for a chairperson and to be able to comment on candidates and to suggest candidates. But this should be explicitly agreed as a mutually acceptable procedure. Experience and expertise tend to be more influential factors than diversity, although some parties actively encourage diversity in specific cases.

Posted by Philip Allen Lacovara | November 6, 2017 12:42 PM

Tentative Rulings – What are your thoughts?

The notion of judges issuing tentative rulings is quite common in California practice, but not so much on the East coast. How helpful is it for an arbitrator to issue tentative rulings in advance of making a final definitive ruling? Under what circumstances would a tentative ruling make for a best practice?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on November 12, 2017 2:32 PM | Permalink

I believe a tentative ruling may be useful when the calculation of damages involves application of complex factors which may lead to mistaken awards. It is preferable to invite comment and make any appropriate revisions that may be required before finalizing the award than having to revise the award after issuance.

Posted by Judge Gerald Harris | November 12, 2017 3:12 PM

If the arbitrator is not ready to decide the case (or issue), he should solicit further briefing from the parties. If he his ready to rule, he should do so. Issuing a tentative ruling only delays proceedings and undermines the authority of the arbitrator. Parties don't want Hamlet when they select arbitrators.

Posted by Steven Skulnik | November 12, 2017 3:20 PM

I have never done it. I have told the parties what issues most concerned me and should be addressed in post hearing briefs.

Posted by Robert L. Arrington | November 12, 2017 3:22 PM

I have sent the parties a draft of my final ruling where I was not 100% sure that my tentative ruling on the legal issue was correct. The purpose was to give the party I was intending to rule against a chance to change my mind by citing to me some authority that I may have overlooked. I believe arbitrators have a duty to do their best to decide disputes correctly based on the applicable law, and giving the potential losing party the right to try to change your mind is consistent with that duty.

Posted by Stephen A. Hochman | November 12, 2017 3:40 PM

Tentative rulings should not be allowed. These rulings are unfair to at least one party. Either make a ruling or reserve ruling until you have all the briefing and arguments to make a ruling. The parties deserve a well-reasoned ruling and should not be subjected to tentative rulings that create uncertainty.

Posted by Anonymous | November 12, 2017 4:34 PM

Tentative rulings are common in family practice in NJ. It focuses any remaining legal argument by the parties and helps assure a correct final result. I don't believe it diminishes the arbitrator's authority.

Posted by Gabrielle Strich | November 12, 2017 4:49 PM

It seems to me that a tentative ruling could benefit the parties in that after they had presented all their evidence but before you issued your award, that they had a last chance to mediate the case. If they didn't do so within a set, short time, then the award issues.

Posted by Raoul Drapeau | November 12, 2017 5:19 PM

I believe this option is a waste of time. Any issues with regard to complications for measuring damages, etc., can be handled either at the hearing or by post hearing brief.

Posted by Paul Nicolai | November 12, 2017 6:03 PM

I concur with Bob. I like to keep an open mind until I have enough information to make a decision.

Posted by Lisa Pomerantz | November 12, 2017 7:00 PM

Tentative rulings are quite common in NJ state trial courts. In my 17 years on the bench, I never issued one, however. The time guidelines were so tight that I couldn't devote the time truly needed for a well-reasoned tentative ruling. I was then concerned that I might be "up and locked" into a tentative ruling that did not arise from as careful consideration as I would have given to a final ruling. In addition, if the tentative ruling is designed to give the losing party a "second bite at the apple," do you then give the other party the opportunity to respond to the "second bite'? Where does it end?

Posted by Deanne Wilson | November 13, 2017 5:16 AM

Tentative rulings have unintended consequences, the major one being ambiguity about appeal of what might be construed by a court to be a "final ruling." Courts in recent years have construed what were meant by the arbitrators to be non-final tentative rulings as final awards creating more expense and less efficiency in the arbitration process. The best practice would be to request additional, focused briefing while holding the final hearing open. Another unintended consequence of tentative rulings is additional time, expense, and confusion before getting to a "final" award.

Posted by John Allen Chalk | November 13, 2017 9:13 AM

I prefer to give the parties more extensive guidance about what issues I would like for them to address in their briefs. When I was representing a party, I wanted my judge to keep an open mind before until she considered all of the arguments. So giving the parties a signal about the issues important to me, I think, more properly reflects that I have not made up my mind on an issue but see one or more issues as very important if not determinative.

Posted by David Andrew Byrne | November 13, 2017 9:28 AM

The comment about computation of damages is well taken. However, rather than a tentative ruling, I suggest you ask the parties for additional briefs on the issues you are not sure of.

Posted by Anonymous | November 13, 2017 9:37 AM

Interesting comments all, but I would like to hear about tentative rulings related to construction disputes and how they might apply.

Posted by Robert E. Barras | November 13, 2017 12:48 PM

A tentative ruling, by design, invites feedback and further argument. If the Arbitrator truly wishes to provide another bite at the apple, then you issue a tentative ruling and set oral argument. Once oral argument is complete, you issue your Final ruling. While this was my MO on the bench, it is not my practice to do it in Arbitration. I can always ask for briefs if I see a complicated issue that needs post hearing analysis for my benefit. But I believe I can deliver true and accurate justice by asking for post hearing briefs if I need further help. Tentative rulings too often result in a total re-arguing of the case, lacking focus.

Posted by Michael Orfield | November 13, 2017 3:25 PM

Punitive Damages – What are your thoughts?

Can an arbitrator direct that [statutory] punitive damages be paid to a charity, instead of Claimant, since it is Respondent's "bad conduct" that is being punished, not any act of Claimant that merits monetary reward?

Please provide your comments/thoughts below.

Posted by Jeffrey Zaino on September 3, 2017 10:39 AM | Permalink

Side question: Would the Respondent then be able to take a tax deduction for the compulsory donation?

I would not direct or authorize such an action. If I contemplated such action, I wouldn't know who to allow to choose the charity.

Jim Bailey

Posted by James H. Bailey | September 3, 2017 11:19 AM

Punitive damages fall in the category of extreme remedies. In order for an arbitrator to award punitive damages the arbitrator has to rely on the wishes of the parties. This means that the power to award punitive damages has to have been agreed by the parties in the disputed contract. During the time I have been practicing arbitration one panel I was a member of awarded punitive damages. on several occasions panels I participated in have considered punitive damages but did not award them. In the one case where we did, the arbitration clause contemplated such relief and specified its requirement. The evidence presented at the hearing was clear that the behavior of one party warranted the award. The amount of the award was in that case dictated by the state law. We know that some of the jurisdictions do not permit a panel issuing punitive damages awards and the panel has to make sure that it is acting within the law when considering or awarding such a relief.

Posted by Nasri H Barakat | September 3, 2017 11:29 AM

I know of no case where punitive damages apply to construction contracts. I would like to hear of any from our round table respondents.

As a 50 year practicing architect and AAA neutral clarification is useful on this type issue.

Posted by Robert E. Barras | September 3, 2017 11:58 AM

If the Panel has the authority to award punitive damages under the law applicable to the dispute, and I think that is a big, IF, I know of no authority that would authorize the Panel to direct that the damages be paid to a Charity.

Posted by Hon. William G. Bassler | September 3, 2017 12:00 PM

Punitive damages fall in the category of extreme remedies. In order for an arbitrator to award punitive damages the arbitrator has to rely on the wishes of the parties. This means that the power to award punitive damages has to have been agreed by the parties in the disputed contract. During the time I have been practicing arbitration one panel I was a member of awarded punitive damages. on several occasions panels I participated in have considered punitive damages but did not award them. In the one case where we did, the arbitration clause contemplated such relief and specified its requirement. The evidence presented at the hearing was clear that the behavior of one party warranted the award. The amount of the award was in that case dictated by the state law. We know that some of the jurisdictions do not permit a panel issuing punitive damages awards and the panel has to make sure that it is acting within the law when considering or awarding such a relief.

Posted by Nasri H Barakat | September 3, 2017 12:03 PM

Only if the claimant asked for that relief. If the arbitrator came up with that relief on her own, she would have to explore the source of her authority to do so.

It would seem the claimant could get the deduction if both:

- The claimant books the punitive damages award as income.

- The claimant can prove donative intent (such as by specifically requesting that the arbitrator direct the respondent to pay to a specified charity).

The respondent would have a harder time establishing donative intent.

Posted by Steven Skulnik | September 3, 2017 12:07 PM

Since punitive damages awards stem from the parties' arbitration agreement I do not think that the award can be diverted to charity unless the arbitration clause allows it. I also do not believe that an award for punitive damages can be diverted to charity unless the arbitration clause permits it. If anyone comes across such a clause then I sure would like to see/read it!

Posted by Nasri H Barakat | September 3, 2017 12:10 PM

This is an intriguing question on many levels. While I don't have an answer, I have learned that there are certain jurisdictions with "split-recovery" statutes dividing judgments for punitive damages. Might the statutes be applicable to an award confirmed by the Court? In any case, here's a fascinating Pepperdine Law review article that highlights many of the issues this question raises: http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2135&context=plr

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Posted by Eric Holtzman | September 3, 2017 2:39 PM

The question appears to assume that the imposition of punitive damages is provided for statutorily. Assuming that is so, I know of no authority allowing the arbitrator to order that such damages be paid to a non-party, even in actions at law. If there is such authority I would be interested in learning about it. I would not presume to opine as to the tax consequences of any such payment.

Posted by Judge Gerald Harris | September 3, 2017 5:04 PM

An arbitrator's authority is determined by the parties' contract and by the applicable statutes and rules. I do not see that directing the disposition of an award of punitive damages to a charity is consistent with that authority unless explicitly provided for in the contract. An award of punitive damages does not become justified by such a condition. It's either allowed and appropriate or not.

Posted by Nancy Wiegers Greenwald | September 3, 2017 5:36 PM

[I may have cut myself off. This is a continuation of my comment that a charitable gift to a third party never considered by the scriveners of the arbitration agreement is indefensible.] Add to the benefit awarded to a third party with no concern for the dispute the possibility of receiving a tax deduction is ludicrous. Neither party had a corresponding deduction, nor should they have had. Passing the money through the accounts of the parties truly involves parties not entitled to a kind of relief they have not sought and for which no one was awarded a benefit. The claimant and respondent are more intimately involved than they could have imagined. If the relief was not dictated or permitted by the agreement, the arbitrators have no business making such an award.

Posted by Stephen D. Kramer | September 4, 2017 8:20 PM

[The beginning of the comment had gotten lost in the computer.] I once sat solo on a case in which I was certain that both parties' counsel (not necessarily counsel litigating the arbitration) handled the dispute poorly, and I awarded counsel fees to the claimant because the respondent, whose attorney was the more incompetent of the two, would have to pay something. It was the closest I've ever gotten to an award of punitive damages. As others who have responded to this question have remarked, there is some justification to make such an award when the agreement permits it.

Awarding a gift to charity, on the other hand, involves a third party foreign to the proceeding for whom the writers of the arbitration agreement clearly had no intention of giving a windfall. The issue of the selection of the charitable beneficiary alone is fraught with interests different than those anticipated by the scriveners of the agreement.

Posted by Stephen D Kramer | September 4, 2017 8:23 PM

No. Not unless it is authorized by the law. And I know of no law that would authorize that.

Posted by Anonymous | September 5, 2017 10:15 AM

Arbitration Chair exclusively handling discovery disputes – What are your thoughts?

Where an arbitration clause requires three arbitrators, should the Chair exclusively handle discovery disputes? Consider also whether the Chair makes this determination sua sponte or the parties request the same. What are the positives and/or negatives of such an arrangement?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on April 2, 2017 6:33 PM | Permalink

Where an arbitration clause requires three arbitrators, should the Chair exclusively handle discovery disputes? Yes, provided that the Parties, counsel and the two wing arbitrators agree to this procedure at the Preliminary Hearing Conference. The Parties should also agree that upon the request of any Party or at least one arbitrator, the decision may be reviewed by the entire Panel. The Positives are the process is more efficient, only one arbitrator need be involved so less time is involved. The process is also much more cost effective. The Cons are that you only get input (initially) from only one of the three arbitrators. Another Con is that if there is a lot of disputes, the Chair is disproportionately providing service and the parties do not get a feel for the other two arbitrators who will be involved in the decision. Another approach, is to have all discover disputes handled by the Chair unless a Party requests that the entire Panel hears the dispute before any decision is made by the Chair.

Posted by L. Tyrone Holt | April 2, 2017 7:18 PM

As a default, I believe the chair should make all discovery rulings without involving the other two arbitrators, regardless of whether they are true neutrals or biased party-appointed. It's quicker and less expensive. However, if the parties agree it should be all three, I'd be inclined to accede to that. Typically, the chair at the preliminary conference should raise this issue for discussion, making the point that unless there is agreement to the contrary, the chair alone will rule.

Posted by Jim Purcell | April 2, 2017 7:20 PM

The FINRA arbitration rules provide for this. It is eminently sensible and efficient. Perhaps AAA should consider adopting a similar rule. If not, the commenters above are right in saying it would require agreement, at least by the parties.

Separately: Mr. Purcell says, above, "if the parties agree it should be all three, I'd be inclined to accede to that." I don't understand his use of "inclined". If the parties agree, could he tenably decline?

Posted by andrew gerber | April 2, 2017 7:59 PM

In smaller cases and where the arbitrators are paid by the hour, I can understand the parties' desire to control costs and have the chair decide; their wishes should be respected. Generally, however, the entire tribunal should make decisions regarding evidence.

Posted by Steven Skulnik | April 2, 2017 8:32 PM

The Chair almost always exclusively handles discovery disputes. That is the most cost-effective way to proceed. In large complex commercial arbitrations, the Chair usually consults with the wings and gets their input before making rulings on discovery motions, but it is the Chair, at the end of the day, who makes the decision. This arrangement works, and I have never seen parties objecting to it. The Preliminary Hearing is the time to spell out how discovery disputes will be handled and see if there are any issues. The Case Management Order should also address this subject.

Posted by Mark Bunim | April 2, 2017 9:16 PM

I follow the practice at the outset of asking the parties whether they agree that the Chair should handle all discovery disputes, but always making clear this is a revocable grant of power to the Chair and one party or both parties can always revoke the grant and return the power to the full panel.

Posted by David M. Brodsky | April 2, 2017 9:19 PM

Generally works well in my experience particularly where Chair keeps the other arbitrators in the loop and is not hesitant about consulting the other arbitrators when necessary for their views...I assume there is a discovery order in place laying out the parameters for the pre-hearing discovery process and that the parties have a right to go to the entire Panel if they feel a need to do so.

Posted by Anonymous | April 2, 2017 9:41 PM

In matters where I have chaired the Panel it has been my practice to first have a telephone conference with the other panel members and seek their endorsement of proposing such a procedure to counsel. If they are in accord I then raise the proposal during the preliminary telephone conference call. In every instance I have secured the consent of my co- arbitrators and of counsel. Everyone has recognized that is the most efficient and cost effective way to proceed.

Posted by Judge Gerald Harris | April 2, 2017 11:47 PM

Use of three arbitrators is always time-consuming and expensive. If the parties agree to that, the arbitrators have no right to refuse it. The resolution of discovery disputes may ultimately decide the whole matter. On the other hand, I can understand the parties deciding, when faced with the actual cost of paying three arbitrators for every hour, that the extra protection is not worth trebling the cost.

Posted by William H. Ewing | April 3, 2017 12:03 AM

In my experience the subject is raised at the preliminary conference by the Chair. I have had situations in large cases where counsel wanted the full Panel to resolve discovery disputes. Usually, and I think the better approach, is to obtain consent for the Chair to handle discovery disputes with the option of counsel or Chair to ask for full Panel decision or a review the Chair's decision. In my experience counsel do not ask for full Panel input or review but often the Chair before rendering a decision will ask for input from the Panel in more complicated disputes where the decision is critical. It works.

Posted by Hon William G. Bassler | April 3, 2017 7:59 AM

I agree with those who believe the Chair should consult with the other panel members, especially if there is a substantial amount in controversy.

Posted by Robert L. Arrington | April 3, 2017 8:44 AM

The practice is very good and works well under many International Arbitration Regimes. The option is always available for the Chairman to consult with his/her co-panelists if he/she deems it necessary. In addition, the Chairman can and in some instances should keep his/her co-panelists in the loop on important communications regarding the discovery issues before issuing the ruling. On several occasions when I chaired a panel I dealt with discovery motions and had positive reactions from my co-panelists. The practice is economical and helps a panel deal with discovery issues in a more expedited fashion.

Posted by Nasri H Barakat | April 3, 2017 8:58 AM

I mentioned earlier that FINRA's rules delegate discovery issues to the Chair, and that the system works well. In view of the subsequent comments above, it's worth adding that the FINRA rules also require action by the full panel for sanctions or dispositive motions based on the Chair's rulings. I believe this is a well-thought out approach.

Posted by andrew gerber | April 3, 2017 12:20 PM

An excess of discovery disputes is one of my biggest concerns in taking on a case. Over the years, I have determined that there is nothing to be gained by participating in the review of a medley of arguments over issues that were often settled at the preliminary conference precisely to avoid wasting time parsing discovery matters.

Let us not forget that not so long ago, the rules (often ignored by arbitrators with a background in litigation) provided for virtually no discovery except for a few interrogatories and an exchange of documentary exhibits just prior to the hearing. The pioneers of arbitration recognized that discovery was the biggest cause of a lack of efficiency in a proceeding with the smallest effect on the results of the hearing. Arbitration and discovery were not dance partners in the early days.

Unfortunately, a party's lawyer often believes that he or she is making a showing of strength by papering a less aggressive attorney with one objection after another and all the discussion and loss of time that goes with it. I have found that bunching discovery issues together so that they can all be resolved in a day by the Chairman for resolution avoids interruptions in the proceeding and turns aggressive lawyers into kittens when they see that they have lost their audience. There is also more consistency in the way issues are settled, and two arbitrators are spared from the risk of learning to hate the attorneys. Those issues that the Chairman does not feel comfortable deciding alone are heard by the whole panel on a second discovery day

after first requiring the parties to spend a week together trying to eliminate matters that the panel would rather not have to deal with. The whole process goes more rapidly and smoothly.

Efficiency is also improved by the setting of limits by the panel as to what can be discovered AND STICKING TO THE LIMITATIONS as they should have been set after due discussion at the Preliminary Hearing. The less the panel has to deal with discovery matters, the better, and if that means burdening the Chairman, then so be it.

Posted by Stephen D. Kramer | April 3, 2017 2:59 PM

Generally, the Chair should make decisions on discovery disputes. This is the most cost and time-efficient way to resolve such disputes and keep the arbitration on track for the commencement of hearings by the scheduled date. However, there may be circumstances under which it would be prudent for the Chair to involve the other arbitrators in resolving the issue or soliciting their input. For example:

• The requested discovery seeks the disclosure of matters which the requesting party shows are likely to be or have a probability of being critical to the proof of its claim or defense. The opposing party has asserted credible arguments that disclosure will violate the attorney-client privilege, work product doctrine or some other recognized privilege or rule of law that would prohibit disclosure. This may require a hearing on the merits of the defense or oral argument before the panel, or- at the very least- the Chair's consultation with the other arbitrators.

• The party requesting the discovery asserts that it is seeking the information to develop facts to support an amended claim or counterclaim. The opposing party makes a credible argument that the amended claim is outside the scope of the arbitration agreement. If the issue of arbitrability cannot be readily resolved and both parties have compelling reasons supporting their respective positions on the issue, the Chair should not proceed without the involvement of the other arbitrators.

Posted by Mark F. Brancato | April 3, 2017 5:59 PM

I agree completely. I have found that assigning the discovery responsibility to one panel member is most efficient and consistent. I do when I chair a panel and always defer to the Chair when I am not.

Posted by Anonymous | April 3, 2017 6:08 PM

The Chairman should raise this issue and make the suggestion to the other two panel members that in order to save time and money he will make all the discovery rulings unless the issue is so complex and/or uncertain that he wishes to confer with the other two members about the ruling. After approval of this procedure by the panel members, he should announce the panel's agreement on this issue at the Preliminary Hearing with the attorneys for the parties.

Posted by Robert Echols | April 4, 2017 5:38 PM

Ideally, the chair could resolve discovery disputes if he/she keeps the panel members in the loop. However, in complex cases with complicated discovery issues, every member brings experiences to the table. For example, I was a litigant in a large complex case and the Chair was in over his head which resulted in his tirades and poor decisions. The other members of the panel were older and more experienced lawyers and should have been allowed to participate in the decisions. Let the Chair conduct the discovery hearing , but make sure his/her panel members have some input. This will save the litigants some money and result in good rulings.

Posted by scott link | April 4, 2017 7:24 PM

From my perspective, there are two main issues here. One is getting proper discovery motion decisions. A competent chair should be able to render such decisions. The other issue is cost. Involving the other arbitrators presumably has a cost. One reason to arbitrate rather than litigate is to contain costs.

Posted by Marvin Schuldiner | April 5, 2017 11:02 AM

2. DISCOVERY

Review of Confidential and Privileged Information – What are your thoughts?

Arbitrators sometimes need to review highly confidential and privileged information that could potentially bias the Tribunal and/or taint the process. Should an eDiscovery Special Master be appointed independent of the Tribunal to review such discovery?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on May 20, 2017 1:51 PM | Permalink

I don't think there's any need regarding confidential materials, but it's a very interesting question regarding materials that might be legally privileged. As finder of fact, an arbitrator is in a difficult position making privilege rulings on documents that one party is claiming he should not see at all. Having someone designated solely to make privilege rulings is an interesting suggestion but I've never seen it in practice.

Posted by Steven Skulnik | May 20, 2017 3:39 PM

In court cases lay jurors may be deemed to have been irreversibly prejudiced by exposure to inadmissible material. However, judges are presumed to be capable of disregarding such evidence. I suppose the same presumption should be applied to arbitrators.

Posted by Judge Gerald Harris | May 21, 2017 11:25 AM

Arbitrators are can receive lots of evidence (e.g., hearsay) that would be inadmissible in court proceedings for much the same reasons, and decide for themselves what weight it should be given. Is there a reason why potentially privileged information should be treated differently?

Posted by andrew gerber | May 21, 2017 12:18 PM

I suggested an independent reviewer to the parties. They rejected my proposal. Fortunately, it was a tripartite tribunal and I was selected chair by 2 party appointed neutral wings. We advised the parties that I alone would review any privileged evidence to determine if it was admissible. Also fortunately, the issue never arose.

Lou

Posted by Louis Coffey | May 21, 2017 12:24 PM

In my opinion this adds another layer of expense that in most cases is unnecessary.
I have seen examples where the Chair alone sees the material and decides.
In a critical case an outside person can be employed.
I am not sure it is a real problem. Judges in bench trials by necessity do it all the time.

Posted by Hon William G Bassler | May 21, 2017 12:59 PM

No, I do not feel an Arbitrator needs to have others review his/her case materials. An Arbitrator should be able to review the materials believed to be legally privileged and decide its legal use in your case.

As an Arbitrator we are taught to let all evidence in and then if it is not legally sufficient evidence disregard it when making your decision.

One of the few ways an Arbitration Award can be reversed is to not let in evidence which should have been allowed in evidence.

Posted by Robert L. Cowles | May 21, 2017 2:20 PM

An arbitrator has an obligation to remain impartial. If the "highly confidential and privileged information" is relevant to the issues before the arbitrator, it should be considered. If it is not relevant, it should be disregarded and not considered. If the arbitrators do not believe they can do so, they should recuse themselves from hearing such a case. Judges and arbitrators are faced with these issues on a regular basis. I see no need to increase the costs to the parties by use of a special master to review the confidential information during discovery.

Posted by Melvyn Wiesman | May 21, 2017 2:30 PM

Retaining an additional arbitrator to address a dispute related to asserted privileged or confidential documents is likely to both increase costs and create additional time delays, since an existing arbitrator and/or one or more panel members will usually have the advantage of assessing documents in the context of a dispute that they have already taken time to understand better than a newly appointed special master. Though challenging, the existing arbitrator(s) should be able to avoid consideration of excluded documents, and potential bias, after documents are determined to be legally privileged and/or confidential after an In Camera review is complete. If this type of evidence dispute is presented to a panel, the risk of extra costs, or potential bias by the panel, could be reduced if all or part of the admissibility assessment is delegated to one panel member only.

Posted by Jonathan T.K. Cohen | May 21, 2017 8:42 PM

I don't think this measure passes the cost-benefit test. If an arbitrator doesn't think his or her impartiality will survive examination of such documents, that arbitrator should withdraw.

Posted by Robert L. Arrington | May 22, 2017 8:41 AM

Deposition Subpoena - What are your thoughts?

Should an arbitrator agree to sign a deposition subpoena for a non-party out of state deposition, knowing it is not legally enforceable?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on January 10, 2017 12:01 PM | Permalink

It is enforceable if processed correctly. Otherwise, why do anything that is invalid?

Posted by David Evans | January 10, 2017 12:26 PM

The proposition presented may not be accurate depending on what statutory and case law applies. A lengthy discussion of this issue is found in a number of articles to include "A Model Federal Arbitration Summons To Testify And Present Documentary Evidence At Arbitration Hearing" By the International Commercial Disputes Committee and Arbitration Committee of the New York City Bar Association (May 2015).

Posted by Donald G. Gavin | January 10, 2017 12:32 PM

I would sign the subpoena. Our role as arbitrators is to organize, manage, facilitate and ultimately adjudicate the merits of the case. It is not for us to protect a third party witness from the use of an unenforceable subpoena. It is for the witness to contest, or not contest, the subpoena's enforceability. Sometimes a witness wants a subpoena in hand before providing assistance, and may elect not to challenge enforcement. We should not make this decision for them at the expense of the party seeking the discovery.

Posted by Steven Certilman | January 10, 2017 12:46 PM

Colorado has a statute that authorizes district courts to validate out of state subpoenas. A case has to be filed. The witness has to be served to appear in court. The judge serves the witness with the subpoena and orders the witness to honor it, and tenders the required travel funds or airline tickets. If the witness ignores the subpoena, the judge can impose contempt penalties. So an arbitrator's subpoena from out of state is enforceable through this vehicle. Speaking out of ignorance, I believe that most states have a similar, expedited mechanism. So arbitrators can issue subpoenas, knowing that the enforcement occurs elsewhere.

Posted by Federico C. Alvarez | January 10, 2017 12:55 PM

The answer is NO if you know it is not legally enforceable. There are an awful lot of reasons why, including credibility and not assisting in persuading an out of state non party that he had to do something he doesn't have to do. Seems pretty fundamental to me.

Posted by Jim Purcell | January 10, 2017 12:58 PM

In my opinion an arbitrator has the obligation to follow the applicable law. If the Subpoena is not authorized under the Law of the Circuit interpreting Sec 7 of the FAA or the applicable state law the arbitrator should not sign the subpoena. That is the position of the NYC Bar report.

To do otherwise subverts the rule of law.

Posted by William G Bsssler | January 10, 2017 1:41 PM

I would sign the subpoena because often witnesses (especially companies) want a subpoena for documentation of the request and are not concerned with whether it is enforceable.

Posted by Richard DeWitt | January 10, 2017 2:18 PM

NEVER sign a document which you know to be illegal. Sure, a witness appreciates a subpoena in order to facilitate getting out of work and being able to testify. But what could that possibly have to do with an Arbitrator performing an illegal act? To scare a witness into an honoring an illegal subpoena? To force an unsuspecting citizen to appear without legal basis? Putting the obligation onto a witness to discern the illegality of the subpoena seems antithetical to our mission of fairness, professionalism and civility!

Posted by Michael Orfield | January 10, 2017 3:48 PM

I think some of the respondents misunderstood the question: It does not assume that all such subpoenas are unenforceable. It is meant to ask "Should an arbitrator . . . IF HE KNOWS it is not (etc.)."
Beyond that, I agree with Mr. Purcell and would not sign a subpoena I know is unenforceable. If I don't know I would probably might ask the requesting party to submit authority on the applicable law and, of course, give the opponent a chance to rebut. If still in doubt, I would probably sign, following Mr. Certilman's reasoning. I don't think it would be my place to undertake research beyond the AAA rules.

Posted by andrew gerber | January 10, 2017 3:49 PM

I agree with Steven Certilman's line of reasoning. I am currently involved in an arbitration where this issue came up. We asked the party seeking the subpoena why the request was being made because the witness was in California. The explanation was that the witness was willing to appear but would not do so without a subpoena in hand. So the key is to first determine why the subpoena is being asked for and if there is a reasonable explanation, then what harm is there in complying? So far as I can see, none.

Posted by Paul Marrow | January 10, 2017 6:50 PM

Starting with the given, as posed in the question, that the arbitrator knows the requested subpoena to be unenforceable it should not be issued. To do otherwise would involve the arbitrator in a deception that smacks of the illicit tactics of some collection agencies who issue phony subpoenas and might even be viewed as borderline illegal. Of course, if counsel represents that the witness is a willing participant who simply wants the comfort (or cover) of a subpoena a different decision might be made.

Posted by Judge Gerald Harris | January 10, 2017 11:19 PM

Although most US attorneys think of depositions as primarily a discovery device, they often serve a different, salutary function: obtaining the testimony of witnesses who cannot be compelled to attend the trial or hearing. If an arbitrator believes the testimony of a third party witness is material to the determination of the merits, then he or she should cooperate with the party seeking to secure such testimony. If the witness is located in a jurisdiction that will not enforce the arbitrator's subpoena and the witness will not comply voluntarily, then arbitrator should consider other procedures, such as seeking letters rogatory from the local court, or convening a special hearing in the jurisdiction where the witness is located.

Posted by George Graff | January 11, 2017 11:28 AM

Deposition Transcript Only – What are your thoughts?

What is your position regarding the presentation of evidence at a Hearing by deposition transcript only (the witness does not appear either in person or by video)?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on February 18, 2017 4:52 PM | Permalink

As in any kind of evidence, one of the freedoms that we arbitrators have is the recognition that we aren't required to give each piece of evidence the same weight. If there is only a deposition with no one to defend or explain it, then surely it would carry less weight than something that can be examined.

Posted by Raoul Drapeau | February 20, 2017 7:29 PM

I always prefer live testimony if available. Transcripts are two dimensional; live testimony is three dimensional. They don't capture the nuance and can be misleading. I'm reminded of the line in My Cousin Vinnie: "I shot the sheriff, right." It was said with sarcasm, but the transcript was used against the fellow at trial.

Posted by Mark C. Zauderer | February 20, 2017 7:51 PM

I agree the deposition transcript is not as good as live testimony. But the opportunity to cross examine was there. I would give it the weight I thought it deserved. The Arbitrator should bear in mind that not all witnesses can be subpoenaed to the hearing. And the Arbitrator should understand that even those who can be subpoenaed may have health or other issues that preclude live appearance.

Posted by Robert L. Arrington | February 20, 2017 9:04 PM

This is an easy one. Anyone who has ever read the transcript of a deposition or testify can tell you that it is, at best, a poor representation of what was presented.

Posted by Tc Barr | February 20, 2017 9:17 PM

Deposition testimony is to be given the same weight as 'live' testimony. Both sides are present and can examine the witness who is under oath. Approximately 25% of all testimony in trial is through the reading of depositions. Try getting a doctor to appear live at trial or arbitration. It ain't happening.

Posted by scott link | February 20, 2017 9:57 PM

While hesitancy in accepting a deposition transcript with nothing more is clearly appropriate, I can also envision circumstances in which it is appropriate to take such submitted testimony into evidence. The over-arching value, I believe, is to be flexible in considering such atypical requests and avoid allowing rigid adherence to "best evidence" to deprive a party of necessary evidence.

Posted by Steven Certilman | February 20, 2017 10:20 PM

I'd want some background. Was the deposition indicated in the exchange of information prior to hearing as possibly being offered into evidence? Did counsels discuss and agree to its admission? If both parties agree a deposition should be admitted, admission would be acceptable and the question would be weight. If one party objects, there would have to be a showing of necessity with no other way to obtain the information, that the information was key, that the unavailability of the witness was beyond the requesting party's control (e.g. death, physical or mental incapacity) and the arbitrators' need for the information would also be a factor. Other specific factors would include whether there was adequate opportunity for cross-examination, whether it was the same or a different attorney examining and cross-examining and what kind of information was involved - factual, background, technical, etc. It feels uncomfortable at best, and under most circumstances, an objection would be difficult to overrule.

Posted by Micalyn S. Harris | February 20, 2017 10:34 PM

If the person deposed was cross-examined and assuming the parties are in agreement as to admissibility, I see no reason not to accept the transcript. If admissibility is disputed I would want to hear the reasons for the unavailability of the witness and any other basis for the objection. Ultimately, the test will remain whether the party with the burden of proof has met its obligation based on the evidence presented, including deposition transcripts.

Posted by Judge Gerald Harris | February 20, 2017 11:58 PM

If the witness is employed by or under the control of either party or otherwise is critical to the claimant or respondent, then he/she should testify in person unless there is a truly compelling reason why that is not possible. I want to see and hear the witness live, ask her questions or ask her to explain her testimony and be in the best position possible to see her demeanor, hear the inflection, hesitation or emotions in her voice, and get a true sense of the person so that I can more accurately assess her credibility and the merits of her testimony. If either party anticipates that a party or critical witness may be unavailable to testify at the hearing (for example, the witness resides in Australia and the arbitration hearing is in Boston), then videoconferencing should be explored. Presenting testimony by written deposition will give me only part of what I need, and, in my view, is a method that should be used only as a last resort.

Posted by Mark F. Brancato | February 21, 2017 8:58 AM

It would be preferable if it as a video deposition in which the adversary could cross exam. If not the weight of the evidence may be weakened if the matters are in controversy.

Posted by Anonymous | February 21, 2017 9:43 AM

I'm a trial lawyer. If a deposition was taken for use at trial it is admissible.

Posted by Charles Shaffer | February 21, 2017 9:45 AM

I agree with Judge Harris's comments and also with the comments of Mr. Shaffer. My bottom line would be to accept deposition testimony if it was prepared and offered for trial purposes, in the absence of disqualifying factors.

Posted by Sid Eagles | February 21, 2017 10:54 AM

I concur with Arbitrator Steven Certilman, who listed the array of factors to be considered.

Pat Westerkamp

Posted by Pat Westerkamp | February 21, 2017 11:09 AM

As a couple of people have mentioned, use of deposition testimony in lieu of live testimony is commonplace at trial, subject to a couple of conditions such as opportunity to cross examine. While live testimony is sometimes preferable, use of depositions may have advantages in terms of expedition (for example, by requiring the parties to designate the pertinent sections in advance, or by agreeing that the arbitrator can read the testimony outside the hearing room). Seems unwise to make use of depositions more limited or difficult in the arbitration context, and if anything, an arbitrator should have somewhat more flexibility than a trial judge in relaxing the restrictions on use.

Posted by Tim Russell | February 21, 2017 12:41 PM

If the deposition testimony were admissible under the applicable rules, I would allow it. If not, I would not admit it in the absence of agreement by the parties.

If it were admissible, I think that I would caution counsel who wanted to admit the testimony that reading such testimony into the record or leaving it to the arbitrator to read it on his/her own is, as a general matter, a very ineffective way to present testimony. Indeed, one federal district court judge described reading such testimony into the record as "an act of contributory somnolence."

One exception: If counsel has a crisp clear admission from a witness on the other side, reading just that admission into the record can be very effective.

Posted by Dennis R. Suplee | February 21, 2017 2:53 PM

Admissible, yes, assuming the opportunity to cross-examine at the time of deposition, or in the absence of an objection by the opponent.

However, it is not the preferred mode of presenting testimony for many reasons, especially the inability of the arbitrator to view the demeanor of the witness (unless the deposition was videotaped).

Posted by E. William Pastor | February 21, 2017 4:00 PM

In prudence and foresight, the arbitrator can include in his/her Scheduling and Case Management Order that if depositions are taken during discovery, the opposing counsel may cross-examine the witness at that time so there is full testimony by the witness from both sides at the final hearing. Or course, it is better to have the testimony from a live witness at trial because other proof will be presented and other questions may be relevant and helpful. However, if the opposing attorney does not have a chance to cross-examine the testifying witness when the deposition is taken, he/she is disadvantaged in challenging the testimony of the unavailable witness at the hearing. The arbitrator should clarify this matter before trial if possible so the attorneys are not arguing about the admission of the signed sworn one-sided deposition because the other attorney failed to challenge the testimony when it was taken in discovery.

Posted by Robert Echols | February 21, 2017 4:55 PM

If the deposition was taken for the arbitration, then presumptively there was the opportunity and the motivation for adverse parties to conduct a full cross-examination, and clarify any ambiguities in the testimony. Accordingly, such a deposition should not only be admissible, but it should carry significant weight, notwithstanding that in-person testimony is usually preferable. However, sometimes a party will offer a deposition that was taken in discovery in another case, where the adverse party in the arbitration may not have been there, or may not have had sufficient motivation or opportunity to fully cross-examine on the issues germane to the arbitration. I would be hesitant to allow it into evidence under those circumstances, or simply not give it great weight if admitted.

Posted by Sayward Mazur | February 24, 2017 1:51 PM

4. ARBITRATION PROCESS

Class Action Waivers – What are your thoughts?

Should arbitral institutions handle arbitrations with class action waivers?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on February 26, 2017 6:17 PM | Permalink

Great question.

If existing institutions resisted, the Supreme Court's class waiver policy would theoretically be eviscerated. However, other institutions would be launched to provide the service. Therefore, the courts (with Congress AWOL), not the institutions, set public policy.

Posted by Steven Skulnik | February 26, 2017 7:17 PM

Since the inclusion of class action waivers have been upheld by the courts, an arbitral institution would have no legal basis to decline administering arbitrations arising from agreements containing such a provision. Indeed, the prevalence of such agreements would make it economically unfeasible for such institutions to turn away such arbitrations. That does not mean that arbitral institutions should not weigh in on the desirability of allowing individuals to seek relief in an arbitral forum on behalf of others similarly situated.

Posted by Judge Gerald Harris | February 26, 2017 7:27 PM

Judge Harris: Why would an arbitral institution need a legal basis for declining? What law would require an institution to administer a case that it prefers to decline on a policy basis?

Mr. Skulnik: Granted that arbitral institutions don't set policy, aren't they free to set their own policies? Declining cases on this ground might be uncompetitive, but it would certainly seem to be within an institution's discretionary power.

Beyond that, neither comment above seems to answer the question whether arbitral institutions SHOULD handle cases with class action waivers. I'd argue that the answer is a value judgment for each institution to make on its own.

Posted by andrew gerber | February 26, 2017 10:11 PM

I see no reason not to do so. Class actions are not holy writ.

Posted by Robert L. Arrington | February 27, 2017 8:21 AM

Mr. Ferber: I am not saying that an institution requires a legal basis to decline administering any particular type of dispute; just making the observation that the institution is not compelled, by force of law, to make such declination. As to the issue of a policy choice, that was addressed by the final sentence of my initial post which, I believe, is consistent with the conclusion expressed in your comment.

Posted by Judge Gerald Harris | February 27, 2017 11:52 AM

Arbitrability and arbitration procedure are very largely creatures of contract. If parties contract, in a legally enforceable way (and without foreknowledge that the administrative organization they select has a policy of not enforcing such provisions), for non-class arbitration, why should the organization override their contractual choice? Organizations may be under no legal compulsion to honor class action waivers, but refusing to do so strikes me as a little haughty, and inconsistent with principles favoring private consent to ADR mechanisms.

Posted by Tim Russell | February 27, 2017 1:11 PM

Thanks Judge. That clarifies.

Posted by andrew gerber | February 27, 2017 1:14 PM

The states are handling the issue differently, and SCOTUS seems committed to upholding class action provisions whereas a state like New Jersey has been very restrictive by requiring clear and complete waivers of the right to sue in court. Class action waivers are not the same as waivers of the right to bring an action in court and the right to jury trial, but they are analogous in terms of being the only way some people can afford to seek a remedy. It seems to me that, at least in new Jersey, the issue of arbitrability is an issue for the court to decide, so if the arbitration is ordered, I would proceed. If an issue arises during the arbitration, I would consider the position of the parties and decide it (including the forum to consider the issue, including waiver by filing pleadings).

Posted by Edwin H. Stern | February 27, 2017 1:18 PM

Circulation of Draft Award – What are your thoughts?

Should an arbitrator circulate to the parties a draft award (with explanation that it represents tentative conclusions) and provide an opportunity to respond in efforts to: (i) create compromise or conclusion on an issue or (ii) highlight issues as to law or fact, even towards misunderstands of the applicable law or faulty reasoning?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on March 27, 2017 2:53 PM | Permalink

I would generally prefer post hearing briefs.

Posted by Robert L. Arrington | March 27, 2017 3:44 PM

No.

Posted by Jose W Cartagena | March 27, 2017 3:52 PM

How is that different from having a rule that says the parties can file a motion for reconsideration? I do not think that is appropriate in arbitration proceedings.

Posted by Charles A. Shaffer | March 27, 2017 3:52 PM

I was originally opposed to the idea when it was first utilized by trial judges in New Jersey, but learned that (a) it may well result in a response which points out an error in the draft opinion, (b) avoids the need to send letters or raising questions--usually on factual questions--while working on an opinion, and (c) avoids the need for motions for reconsideration. I can see the benefits in an arbitration IF (1) the parties consent to the practice (which I would make a prerequisite to avoid other issues), and it is clearly stated both in advance of releasing the draft and at the top or bottom of each page that it is only a "draft." I would also set a procedure, not inconsistent with rules, for formal responses and release of a final opinion. And I would make utilization of the procedure a matter of discretion for the arbitrator when he or she thinks that there is a reason justifying it, to avoid extra time when it is not.

Posted by Edwin H. Stern | March 27, 2017 3:53 PM

I would not do this unless it is specifically required by the parties' arbitration agreement. By contrast, if the parties' arbitration agreement or subsequent agreement calls for award of attorneys' fees and costs to the prevailing party, I would, only if jointly requested, issue an interim award with all issues except such fees and costs addressed. The prevailing party or parties would then file any fee claims for the arbitrator's review and issuance of a final award. However, I prefer that, in cases where there are post-hearing briefs, that these include any attorneys' fees claims and that there be a reply brief opportunity to address all issues, including such fee claims.

Posted by Gerard F.Doyle | March 27, 2017 4:07 PM

It seems to me that circulating a draft award is a mistake at best. This is especially true if the final award substantially differs from the draft being circulated. This will only increase the likelihood of challenges to the award by a disgruntled party.

On the other hand, it may be a good idea to ask the parties to submit their respective positions with respect to specific legal or factual issues in the case that will help the arbitrator render a final award on such issues, especially if the questions to be addressed are unique or constitute areas that the arbitrator feels have not been adequately addressed at the oral hearings or in pre-hearing memoranda.

Posted by William B. Flynn | March 27, 2017 4:08 PM

I would not. This opens the door to all kinds of motions and arguments about the award which effectively means either that the hearing has been reopened or that the hearing never closed. It also creates a paper trail of "evidence" that either side will argue the arbitrator failed to consider opening whatever the ultimate award is to possible vacatur.

Posted by Paul Peter Nicolai | March 27, 2017 4:10 PM

I am opposed to the idea. When I first became a federal judge, this procedure was suggested at the "baby judges' school" for summary judgment decisions. I tried it and after oral argument I reversed course, changing my mind based on what I heard at the argument. The original draft then became the basis of an appeal by the losing side to the Circuit Court of Appeals. which, I am happy say was unavailing. I never tried it again.

In arbitration I think it runs the same risk as the interim award. That is, it gives a dissatisfied party an opportunity to file a challenge to the arbitrator on some cooked up complaint. This happened to a friend of mine.

I think that the risks outweigh any perceived benefit.

Posted by Hon. William G. Bassler | March 27, 2017 4:22 PM

No. Inclusivity has its place, but not here. Our job is to render a decision and render it right. Sending out drafts would lengthen the process terribly with all sorts of supplemental you name its.

Arbitration is supposed to be speedy and definitive. Let's not water it down.

Posted by Jim Purcell | March 27, 2017 4:23 PM

I do not see such a procedure doing much more than increasing the time and expense of getting to a final award, and I would not, as an arbitrator, initiate a discussion of any such procedure unless there were some extenuating circumstances. Assuming competent counsel on both sides, the matter will usually be adequately briefed, and the arbitrator is responsible to draft a clear and understandable award, particularly if the parties have requested a reasoned award. The release of a draft award, in my opinion, is more likely to elicit mere repetitive argumentation and briefing in the form of "proposed corrections" than anything else. However, if the parties themselves have created or initiated such a process, then the arbitrator should or must comply. In any case, an award, whether in draft or final, should be as complete and accurate as possible whenever issued.

Posted by Sayward Mazur | March 27, 2017 4:50 PM

The arbitrators' award is not supposed to be a consensus of the parties and the trier of fact. That kind of approach is more appropriate for mediation, which tests the ability to compromise. I agree that the opportunity to submit a post-hearing brief allows a party to revise its position in light of the arguments of the opponent and even the attitude of the panel during the hearing. But it is one thing to refine one's position and quite another to suggest to the panel that they are wrong or mistaken. The arbitrators are charged with the duty to draw conclusions from the evidence presented. Let us do our job. Besides, circulating a proposed award creates doubt as to the certainty of the award of the arbitrators. It surely doesn't build confidence in an arbitrator's opinion that the parties have had the opportunity to edit - if not more.

Posted by Stephen D. Kramer | March 27, 2017 4:53 PM

Unless such a provision is contained in the arbitration agreement, I would not. Doing so would, in effect, reopen the case for additional/ new arguments after the record is closed. As others have said, it also extends the time it takes to resolve the matter.

Posted by Denise Presley | March 27, 2017 5:00 PM

There is a tactic that I haven't used myself, but heard about and has a lot of appeal to me. And that is to conduct the hearing, hear the evidence, and then prepare an award, as usual. But the award is sealed and the parties have a time certain to negotiate a solution of their own. If they can't then the award is unsealed. To me, this approach has the advantage that after hearing the evidence that the other side presented, it might prompt them to settle instead of taking the risk of losing it all.

Posted by Anonymous | March 27, 2017 5:03 PM

I agree with the "no" votes. Better to render a decision and rely on a motion for reconsideration if there's a problem that needs to be corrected or clarified.

Posted by Micalyn S. Harris | March 27, 2017 5:07 PM

As a trial judge, I used this method frequently when deciding minor motions. I would post a list of tentative rulings, and if the attorneys could live with them, they avoided having to come in for oral arguments. As to dispositive motions, however, I refrained from the practice as I thought counsel wanted the give and take of oral argument, and the points argued often changed my mind. In my many years as an appellate judge, I do not think I ever issued a tentative opinion, which would be hard to do with a multi-judge panel.

For a final arbitration award, the sole use I have made of this practice is in areas where computations were difficult, and the help of counsel was appreciated beyond the briefs and schedules that had been filed. Often my own rulings adopted some of one side's and parts of the other's, or followed other logic. I would point out that the reasoning was set, but the calculations might need some critical review. I have found the attorneys cooperative with this approach, and my final awards have been less likely to be subject to motions for corrections.

Posted by William A. Dreier | March 27, 2017 5:23 PM

I agree that certainly in general it is not good practice to submit a draft award/opinion and ask for comments. I did it once as a judge and it backfired. Long story I won't bore you with. Post-hearing briefs are appropriate in some cases but unnecessary in others - that's up to the arbitrator(s). A party can ask for reconsideration and I assume the award/opinion can be withdrawn.

Posted by Richard B Klein | March 27, 2017 5:39 PM

If you're inclined to do it, that probably shows that you haven't done enough work analyzing the record of the case.

Posted by andrew gerber | March 27, 2017 5:51 PM

This seems to be a good example of comparing the worst that can happen to the best when considering a course of action. The examples cited above seem to make the decision fairly simple.

Posted by Michael Walsh | March 27, 2017 6:50 PM

That is a very bad idea. I see no benefit and a whole lot of danger.

Posted by Ira M. Schulman | March 27, 2017 8:12 PM

I think the answer depends on (1) whether the arbitrator previously disclosed his or her views on the relevant issues and tentative decisions on those issues (e.g., in oral argument) and (2) the complexity of those issues.

If the arbitrator has been proactive and transparent as to his or her leanings on the relevant issues during the course of the proceeding (which I believe should always be the case), and the issues in the case are simple, then circulating a draft of the arbitrator's tentative conclusions is not necessary. However, if there is a complicated issue of law or fact, such as which is the correct applicable law, or the method of computing damages is complicated, circulating a draft of the award will increase the likelihood that the arbitrator will decide those issues correctly. It also saves the parties time and expense by focusing them on the issues that the arbitrator considers relevant and, as others noted, it avoids the need for motions for reconsideration.

Posted by Stephen A. Hochman | March 29, 2017 11:48 AM

Delay Tactics – What are your thoughts?

All parties to arbitration can be guilty of instigating delay tactics at various stages of the arbitral proceedings. Such can add cost and veer the proceedings off track. What tactics have you seen? How can the Tribunal/Opposing Counsel minimize or circumvent such tactics?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on April 18, 2017 9:49 AM | Permalink

Failing to call in for scheduled status conferences or telephonic hearings, untimely responses to permitted discovery requests, missing deadlines for mandatory disclosures, and last minute motions for continuance are all in my personal history. The Tribunal should use its powers under the forum rules to ensure an efficient process, while being mindful that generally a postponement for good cause must be granted. Opposing counsel must bring difficulties to the Tribunal's attention sooner than later.

Posted by Robert L. Arrington | April 18, 2017 10:18 AM

The very first arbitration I did over a decade ago, the lead arbitrator set out a schedule for everything. Discovery, motions, and even hearing. I still think that is the best way. In the ones I have done where it is taken step by step, yes, there are always postponements. I'm open to either approach, but frankly the latter sure does result in a lot of last minute cancellations.

Posted by Richard A Lavely | April 18, 2017 10:55 AM

I have to say that in the ten years of arbitrating since I left the federal bench I have not experienced delay tactics. As Chair I have a very detailed proposed agenda which I give counsel several weeks to work on and most everything is agreed upon before the Preliminary Conference. Where there are differences, the Panel resolves the dates, and we move on as scheduled.

Posted by Judge William G. Bassler | April 18, 2017 11:32 AM

If the parties know that the evidentiary hearing will not be postponed other than by mutual agreement or extraordinary circumstances, the ability to delay is significantly curtailed.

Posted by Steven Skulnik | April 18, 2017 1:57 PM

Richard Lavely has it right. If you can get the parties to agree on a schedule before the first event even happens, that sets the tone, and makes it easier for the arbitrator(s) to jawbone parties if they want to postpone an event.

The worst case I've seen is where the party calling for the arbitration didn't even show up at the hearing, or let the others know that he wasn't going to be there ("I had something come up"). My reaction was to state, "If this wasn't important to you, then why are we here?"

Posted by Raoul Drapeau | April 18, 2017 2:20 PM

The most common device to delay an arbitration, in my experience, is protracted discovery demands and untimely responses to appropriate discovery requests. The most effective remedy is for the arbitrator to establish clear guidelines early on , make prompt and decisive rulings on discovery disputes and generally provide vigilant oversight.

Posted by Judge Gerald Harris | April 18, 2017 11:46 PM

During the Preliminary Hearing the Panel should make it crystal clear to the parties that the Hearing date is set in stone, absent some very unusual circumstance or illness. Discovery motions are a big cause of delay. It is helpful if discovery motions are limited to a very short letter or email (three pages maximum) and ruled upon by the Panel in a matter of a day or two.

Posted by Mark Bunim | April 19, 2017 10:19 AM

When a party fails to pay the fees or charges of the arbitrator or the administrator, the delay is often caused by the arbitrator or administrator declining to proceed until payment is made. Under appropriate circumstances, I have recommended that my client "advance" the other side's share. The problem in advancing money is that the ultimate award may not be collectible.

Posted by Eli Uncyk | April 19, 2017 10:53 AM

Trial Time vs. Arbitration Time: What are your thoughts?

Please see the following link to a study on Trial Time v. Arbitration Time:

Study

What are your thoughts/comments on this study? Why are some still reluctant to arbitrate?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on July 22, 2017 10:17 AM | Permalink

I believe it is because of the usual limited discovery in arbitration.

Posted by Robert L. Cowles | July 22, 2017 10:57 AM

The fact that on average arbitrations conclude more quickly than litigations has no particular relevance to a single case. Arbitrators and counsel must work to ensure that their particular case is not protracted.

Certain circumstances may delay the resolution of an arbitration, including:

* The parties selecting a tribunal of busy and popular arbitrators.

* Because an arbitrator's power of coercion is more limited than a judge's, there is greater opportunity for deliberate delays and breaches of procedural deadlines.

* While the parties may initially agree to arbitrate, one party may resist arbitration once a dispute arises. This typically results in litigation where a judge must decide whether to compel arbitration or issue an anti-suit injunction, which in turn, delays resolution of the dispute.

Moreover, deliberate delaying tactics may be more difficult to combat in arbitration than in litigation because arbitral tribunals' coercive powers are much more limited than that of a court.

Finally, while arbitrators can determine claims and defenses summarily, in practice they are often less willing than a court to do so.

Posted by Steven Skulnik | July 22, 2017 11:00 AM

I think it is generally true that cases are resolved more quickly in arbitration. There are notable exceptions, but these are almost always party as opposed to arbitrator driven. Parties are sometimes wary of arbitration for a number of reasons. Some fear they won't get adequate discovery. Others worry they will not have broad appeal rights. Some fret that arbitration costs may exceed court costs because of forum and arbitrator fees. All of these concerns can be effectively addressed in a well-managed arbitration process. The best thing a party can do is to hire counsel with the arbitration "litigation" experience to know how to manage the process, with the help of the arbitrator(s).

Posted by Robert L. Arrington | July 22, 2017 11:32 AM

Arbitration is less formal and usually faster.

Posted by Paul McDonough | July 22, 2017 11:59 AM

It seems pretty simple to me. If I'm the attorney for one party in a dispute, and if there is the slightest possibility that I might lose, then why would I want to have my case adjudicated in a forum where the outcome is final, with no opportunity to appeal? If on the other hand, I want to dispose of the matter as soon as possible, and I'm willing to go with the decision of professionals, rather than a random selection of jury members, then I'd be all for arbitration. Since I expect that each case has both of these competing elements at work, it behooves the arbitration industry to do a better job of marketing the concept.

Posted by Raoul Drapeau | July 22, 2017 12:15 PM

Many clients rely on outside counsel's advice whether to agree to arbitration. Many such counsel are reluctant to give up the comfort of the FRCP and FRE, the right of appeal, and the likelihood of rulings on dispositive motions before trial or hearing. Some defendants want delay and hope to wear out plaintiffs. Arbitration awards are not easy to research. Many clients still do not believe that arbitration is cheaper, especially when there will be a panel of three arbitrators. Finally, the perception persists that arbitrators will issue compromise awards.

Posted by Gerard F. Doyle | July 22, 2017 1:41 PM

The answer to this question has to come from experienced trial attorneys. I know when I was on the bench I would hear comments that utterly surprised me: I would never let a client sign an arbitration agreement. The comments to date suggest answers: arbitration is not always the best route to take.

Posted by Judge William G. Bassler | July 22, 2017 2:42 PM

Per my experience, parties seem to be motivated by two goals when they avoid or delay arbitration and also court litigation. The first is that a party wants to avoid or delay an expected result. So this party will likely go to court to try to avoid the arbitration clause and then delay the arbitration wherever it can. This tactic may produce concessions from the other party in a negotiated resolution. If not, it at least defers the day of reckoning.

The second goal, related to the first, is that a party wants to avoid taking responsibility for or admitting to wrongdoing. This party will also resist the arbitration wherever it can, try to turn over every stone in discovery, and then want to appeal the decisions wherever available. Since arbitrators can control delays a little better than courts, which are cautious of being reversed, parties with these motives will look askance at arbitrating, in my opinion.

Posted by Federico C. Alvarez | July 22, 2017 3:05 PM

If the issue is solely a matter of time from answer to hearing it is simply a matter of caseload. In Texas, cases are "required" to be tried in 18 months from the answer. This has evolved into 'cases are required to be set for trial in 18 months from the filing of the answer". There is a new expedited trial schedule of cases in which the damages are less than 100k. Very few lawyers agree to this schedule. Bottom line, the expedited schedule of arbitration may decrease the number of cases an attorney or firm may accept because of the required focus needed for arbitration's abbreviated discovery deadlines. State and Federal courts are fairly liberal in granting continuances of 3 to 6 months. The longest continuance of which I am aware of from an arbitrator was 2 months. Mathematically, I could easily handle a case load of 50 good plaintiff cases in State Court, but only 20 or so in arbitration. This is one of several reasons the biggest opponents of arbitrations is the plaintiff's bar. The answers above discussed the issue of delay. thanks

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Posted by scott link | July 22, 2017 5:00 PM

I believe that a reluctance to arbitrate stems, in part, from the media's treatment of arbitration as an unfair forum imposed by powerful corporate interests upon weaker parties who are deprived of a choice. While that perspective is grossly skewed, it seems to be the prevailing view in the press.

Posted by Judge Gerald Harris | July 22, 2017 5:35 PM

The reluctance to arbitrate is driven by a number of factors, which individually and collectively deter arbitration.

1. The owner has a "self-help" remedy -- hold the contractor's money. The longer, more difficult and costly the dispute process, the better this self-help remedy works.

2. No appeal. A bad arbitration decision is fatal.

3. Arbitrators occasionally ignore the law. A court, in contrast, must follow the law (or subject itself to reversal). Construction contracts today are filled with conditions precedent, such as written notice.

4. Many arbitrators are reluctant to entertain, let alone grant, summary judgment motions – even where clear cut.

5. Arbitrators are viewed as more likely to split the baby than a court.

Posted by David Anderson | July 24, 2017 11:10 AM

Putting aside the reluctance of the trial attorney to give up his discovery and motion options, one factor that may be holding back arbitration is that the motivations of In house counsel or executives to add arbitration to a contract when it is being negotiated (cheaper, faster, somewhat confidential)differ when the actual dispute arises which has a greater down side then was even thought about during formation of the agreement and the General Counsel then regrets the limitations placed on his ability to defend the party's position and in the future will be reluctant to agree to arbitration. Large losses are not good for one's career. This can partly be addressed by customizing the dispute resolution processes in the agreement but these are usually thrown together at the 11th hour by attorneys who will not be responsible for the outcome.

Posted by Eric Wiechmann | July 24, 2017 12:06 PM

I'm glad that this study was done, and it highlights what many lawyers already knew -- arbitration is significantly cheaper, faster and gives a better result than litigation.

Posted by David Andrew Byrne | July 25, 2017 10:40 AM

Microeconomics' research report makes for hard reading. It is clear that U.S. court systems are deteriorating to the detriment of business, our national economy, and the public. Repairing the courts in our multiple jurisdictions is fraught with political and financial obstacles. While arbitration is clearly a better alternative an average of 11.6 months to award is too long. American Arbitration Association is in a unique position to address the situation.

Part of arbitration's difficulties lies in its evolution over the past 25-years to become a clone of litigation. Discovery, dispositive motions, non-consecutive hearing days, and explained decisions create delays and increase costs. These trappings of litigation, in my opinion, do little to increase the quality of the process. Perhaps it is time for a major revision of AAA's rules to bring arbitration back to the bare-bones model that was so successful for many years?

Labor-management grievance arbitration, though decreasing in volume owing to organized labor's decline, continues to reflect AAA's former motto of "Speed, Economy, and Justice." The devastating series of articles in the New York Times, and attacks on arbitration in Congress and state legislatures show now is the time for change.

Posted by Pat Westerkamp

Posted by Patrick Westerkamp | July 25, 2017 3:43 PM

I concur with Mr. Anderson.

"2. No appeal. A bad arbitration decision is fatal."

What makes this more compelling is that SOME arbitrators, in my view, often ignore the law. A court, in contrast, must follow the law (or subject itself to reversal). Construction contracts today are filled with conditions precedent, such as written notice. So are no-fault cases with elaborate regulations that require correct timing as conditions precedent.

For example, I read on the community of one arbitration forum, a post of a no-fault arbitrator. Almost all courts deciding the issue went the same way. Her colleague told her that, and that he awarded in conformity with the law. Yet, she said she would go the other way because "it will be ok to do so" or something like that. Her reason was result-oriented.

No one would advise a client to arbitrate with arbitrators who don't follow the prevailing view in the law. Second, it will be tougher to get the award confirmed if the arbitrator did not follow the prevailing opinion in the law.

Yet, some forums seek to hire inexperienced arbitrators or those who do not attempt to follow the law. It is like a small "clique" of friends that are "in the group" notwithstanding their resistance to follow the law. Of course, mandatory diversity quotas may add to this issue.

"4. Many arbitrators are reluctant to entertain, let alone grant, summary judgment motions – even where clear cut."

I have heard this at a seminar. If your client is spending money for a defense, and there is no viable cause of action, why would you want to force the client to pay for an ENTIRE arbitration, when you could go to court and win summarily by motion? This prevailing view is simply not cost effective for your client.

"5. Arbitrators are viewed as more likely to split the baby than a court. "
Or even worse, be motivated by sympathy. after all, the company can afford to pay "something". I personally knew an arbitrator who told me he would "give the claimant a little something." That's great for the claimant. But the long term effect is that the company" is reluctant to use the forum in the future. To them, these awards encourage future baseless litigation and needless expenses.

I was a small-claims arbitrator for 20 years. I used the same standards I used to decide motions as a court attorney. Why? Because you want to encourage people to use the arbitrators.

Posted by Nelson Timken | July 27, 2017 7:51 AM

In each arbitration, there will be a losing party and no one in corporate America wants to own a loss. When looking for reasons for the loss, it is easy to blame the arbitrator who is not in a position to respond. Accordingly, myths arise such as "the arbitrator was the source of delay, the arbitrator split the baby, the arbitrator went outside the law", etc. It is very difficult to dispel these myths and unsophisticated parties may therefore be deterred to enter into arbitration agreements.

Posted by Mike McConnell | July 28, 2017 12:56 PM

Arbitrators Receiving Evidence Before the First Oral Hearing – What are your thoughts?

Should arbitrators receive evidence, such as expert reports, before the first oral hearing on the merits?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on August 19, 2017 4:53 PM | Permalink

There is no single "right" answer to this question. It should be resolved collaboratively with counsel for the parties who can decide how much efficiency they want to trade for traditional presentation of evidence. Generally, it does no harm for the arbitrator to read the reports in advance, provided the ultimate decision of the credibility of evidence is tested by cross examination, as the parties have a right to expect.

Posted by Robert L. Arrington | August 20, 2017 9:45 AM

I sometimes will receive expert reports prior to the oral hearing on the merits, but I will only review them to get a general sense of their import, waiting until closer to the actual testimony to study more fully.

I ask not to see regular exhibits until they are introduced at the hearing, as reviewing those without context would be a waste of time.

I also ask the parties to submit concise prehearing briefs (at least a week before the scheduled hearing), in which they outline what they intend to prove, without actually submitting evidence at that time.

As to other pre-hearing evidence, it is of course helpful to review the contract between the parties, important not only for the dispute resolution clause but also to get a sense of the parties' relationship and the areas of dispute.

In some instances, after agreement at a preliminary hearing incorporated in a scheduling order, I might receive written witness statements in lieu of direct testimony, with oral confirmation and summary at the hearing and full cross examination of the witness at that time.

Posted by Amy Eckman | August 20, 2017 10:09 AM

I never thought this to be an issue. In all the arbitrations that I have engaged in since leaving he federal bench in 2006, the Panel/Tribunal has received the expert reports in advance of the hearing.

It helps to read the reports in advance in order to better understand the examination and cross of the reports and to ask informed questions of the experts.

A question that I would like to see discussed is whether the expert reports should themselves be admitted into evidence.

Posted by Hon. William G. Bassler | August 20, 2017 10:44 AM

My practice is to review documents provided at the time the invitation to serve is received, including the agreement, to determine whether there is any conflict of interest or need for disclosure. Generally, I do not review exhibits in advance of the hearing to avoid forming any preconceptions. Exhibits should be viewed in context and after determining admissibility. However, an exception is probably in order for the reports of experts since a careful review is likely to be time consuming and may facilitate a better understanding of technical testimony at the time it is offered.

Posted by Judge Gerald Harris | August 20, 2017 11:47 AM

Prior to the first hearing date, my practice is to receive evidence on the merits only with counsel's joint consent.

Pat Westerkamp

Posted by Patrick Westerkamp | August 21, 2017 9:33 AM

I agree with Judge Bassler. I always ask for expert reports of all experts who will testify as well as the exhibit notebook of all documents to be introduced, at least one week before the Hearing.

Posted by Mark Bunim | August 21, 2017 11:00 AM

I too generally agree with Judge Bassler, but in construction disputes there exist experts from many different fields outside of design and construction. Pre-hearing review of reports with the parties' attorneys can shorten hearing time as well as helping to make decisions as to the validity of some reports being introduced as evidence.

Posted by Robert E. Barras | August 21, 2017 5:04 PM

Detailed Pleading – What are your thoughts?

If a Claimant chooses to file a detailed pleading instead of simply submitting a Demand Form, to what extent should the Claimant be held to any deficiencies in that pleading? For example, if the Claimant pleads certain factual averments but, even if taken as true, they do not rise to the level of a claim, is that an appropriate basis for an arbitrator to dismiss the claim upon the Respondent's motion?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on August 26, 2017 3:47 PM | Permalink

Motions addressed to the sufficiency of pleadings have no place in arbitration. If the pleading reveals a possible legal deficiency, the parties and the tribunal can explore bifurcation or other devices to determine threshold issues on the merits.

Posted by Steven Skulnik | August 26, 2017 8:39 PM

The acceptance of a detailed complaint rather than "claim" should be considered in its broadest form and non-technically - not held the standard of pleadings in state or federal courts. In order to make arbitration efficient and equitable/fair, the arbitrator should infer from the complaint and request additional illumination from the parties at the Preliminary Hearing. Otherwise the trap is to fall into litigation standards by omission or rejection

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Posted by Anonymous | August 27, 2017 9:43 AM

Such a situation should be addressed as it is currently. If one party believes that the process can be expedited by the making of a dispositive motion as to all or part of the claim, counsel should exchange letters enabling the arbitrator to determine whether it would be useful and economic to permit the filing of such a motion. In general, the resort to motion practice should be discouraged in keeping with the advantages offered by using an arbitral forum.

Posted by Judge Gerald Harris | August 27, 2017 10:13 AM

I know of no authority that would require dismissing a claim in an arbitration based upon state or federal pleading standards. Any deficiencies in a detailed pleading can be addressed at the preliminary hearing and remedied without the filing of a motion. Motions should be discouraged in arbitration and certainly dispositive motions on the pleadings. Having said that I once permitted a motion for judgement on the pleadings to be filed and to my surprise upon careful examination of the contract found there was no basis for the claim.

Posted by Hon. William G.Bassler. | August 27, 2017 11:41 AM

I have three thoughts. The first is to add my agreement with my colleagues - a "claim" that arrives in the form of a "complaint" "should be considered in its broadest form and non-technically" -Anonymous, and "Motions addressed to the sufficiency of the pleadings have no place in arbitration." Steven Skulnik. Second, where there appear to be arguments that would in court lead to a motion to dismiss a portion of a claim, I encourage the parties to meet, confer, and reach an agreement or to agree that they want a ruling on the matter. As an arbitrator, I control the timing. I find that the broad "kitchen sink" approach to legal pleadings is often narrowed by agreement between reasonable parties in the arbitration setting. Finally, I have a "claims template" I use with parties in construction arbitrations that gives them an opportunity to clarify their claims and also serves as a "reality check" on whether their investment of time on that issue is worth the potential return.

Posted by Nancy W. Greenwald | August 27, 2017 3:50 PM

Most of my arbitrations are conducted in accordance with rules that do not require detailed pleadings.

That said, the arbitrator needs to establish the issues in the case, within the context of the arbitration agreement, the jurisdiction it confers, and the authority granted by the forum rules.

If the Claimant, after having had the opportunity to explain his or her claim, is unable to articulate any reason why, under the arbitration agreement, he or she is entitled to relief, granting a dispositive motion may be appropriate. But that is very seldom appropriate at the initiation of the case.

Posted by Robert L. Arrington | August 27, 2017 4:12 PM

With the circumstances given, it appears that the claimant has no attorney, or a weak one at best, for submitting a detailed pleading. This question must be cleared during the preliminary hearing between the parties by written clarification by both Claimant and Respondent.

Posted by Robert E. Barras | August 28, 2017 6:11 PM

I am going to play devil's advocate and give you the flip side of the coin.

Here was the question:

"For example, if the Claimant pleads certain factual averments but, even if taken as true, they do not rise to the level of a claim, is that an appropriate basis for an arbitrator to dismiss the claim upon the Respondent's motion?"

If this is the case, then the respondent would make a pre-answer motion to dismiss, and likely win in court.

Correct?

But the majority of you, with the exception of Judge Bassler, who did otherwise in practice, are denying the respondent that expedient and dispositive relief in an arbitration.

That means that the respondent has to go through a hearing to attempt to remedy the claimant's deficiency in pleading, and then perhaps an entire substantive arbitration, in order to reach the same conclusion, to wit, that the claimants lacks the salient facts upon which relief can be premised. It seems to me that this defeats the goal of arbitration to be more expedient than litigation in court.

If all of the factual averments made by the claimant, even taken as true, do not rise to the level of a claim then the motion should be permitted, and granted.

Posted by Nelson Timken | August 30, 2017 4:50 PM

Mock Arbitrations – What are your thoughts?

What are your thoughts on mock arbitrations? Are they widely used and helpful? At what stage in the process should they occur? How extensive should a mock arbitration be?

Please provide your thoughts/comments below.

Also, kindly assist with participating in a survey about mock arbitrations, see the following link:

Survey

Posted by Jeffrey Zaino on October 21, 2017 5:08 PM | Permalink

It seems to me that employing a mock arbitration would be especially useful when the stakes are high. But then, it would be important to match the backgrounds of the mock arbitrators to those assigned to the evidentiary hearing as closely as possible.

For example, if it is a technical case, then I believe that having a mock arbitrator who is expert in that particular field is important. Such a person might be better equipped to evaluate the evidence on the basis of equity rather than whether it met legal principles.

Posted by Raoul Drapeau | October 22, 2017 10:04 AM

I have participated in a two-arbitrator mock arbitration panel in a high-stakes case, where the goal was to sharpen the claimant's presentation and articulate possible reactions of the arbitrator. Counsel told us afterwards that they found the exercise extremely valuable, and later that they obtained an award in the upper range of their more optimistic hopes. I do not think mock arbitrations are necessarily valuable to predict the award, because there are too many variables. Sharpening a presentation and alerting counsel to weaknesses in her or his case are probably the most useful roles for mock arbitrations to fill.

Posted by Richard T. Seymour | October 22, 2017 12:59 PM

I have participated in 3 high stakes mock arbitrations in the past. Although the presentations of evidence and argument were abbreviated, the attorneys all said in post interviews there were valuable lessons learned from the exercise.

Posted by Jerry Hoover | October 22, 2017 6:00 PM

I agree with the previous comments. They are not affordable except in high stakes cases. And they are more valuable as hearing preparation exercises than as award predictors. It can be extremely valuable to lawyers to know whether key witnesses impress or don't impress, and to know what arguments are persuasive and what arguments are less persuasive. The expense can be reduced by conducting an abbreviated presentation.

Posted by Robert L. Arrington | October 23, 2017 9:27 AM

I have served as a "Mock Arbitrator" in at least 4 mock arbitrations. They were a very useful tool for counsel in evaluating and modifying their "trial" presentations and evaluating their liability and damages issues.

Larry Crispo

Posted by lawrence w crispo | October 23, 2017 12:49 PM

The cost can be controlled by limiting the presentation to those most critical aspects of a trial. In particular, I have found that opening statements before a mock panel are helpful in complex cases. First, it gives the panel context from which to judge everything else you present. More importantly, it helps the advocate maximize the effectiveness of that important opportunity.

On a significant arbitration, I would not miss the opportunity to make a mock presentation.

Posted by Bob Jenevein | October 24, 2017 1:02 PM

I strongly believe in mock arguments before trial court motions and appellate arguments. I have never conducted or participated in a mock arbitration, but as with mocks before court proceedings, I suppose they can help someone become more relaxed and comfortable and be more prepared to answer a tough and unexpected question that might not have been considered. Moreover, you can learn what a third party may feel to be your strengths and weaknesses, and what should be emphasized.

I am not sure you can handle evidentiary presentations without doing the entire arbitration, and agree with the concern about time and cost, but in any event, it seems to me that a benefit of any mock is hearing what an adversary may spring and becoming prepared to answer. Therefore, the mock should include presentation by a mock adversary, thereby increasing the time and cost.

Posted by Edwin H. Stern | October 26, 2017 7:27 PM

I see valuable potential in a mock arbitration, subject of course to the reality that it can be very expensive unless limits are placed on time for witnesses, and time for oral argument by counsel. If the case is complex, the financial stakes are very high, the party considering a mock arbitration possesses great wealth, and that party is at significant risk of losing a significant amount of its wealth a mock arbitration is likely to help the party's cause.

But, each litigant needs to weigh carefully all the factors, including putting limits on the various elements in the mock arbitration.

Posted by Justice George D. Marlow (Ret.) | October 31, 2017 11:21 AM

Detailed Arbitration Pleadings – What are your thoughts?

If a Claimant chooses to file a detailed pleading instead of simply submitting a Demand Form, to what extent should the Claimant be held to any deficiencies in that pleading? For example, if the Claimant pleads certain factual averments but, even if taken as true, they do not rise to the level of a claim, is that an appropriate basis for an arbitrator to dismiss the claim upon the Respondent's motion?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on October 28, 2017 7:37 PM | Permalink

While it's an advocacy mistake to fail to provide a statement of claim containing a full narrative of the facts giving rise to the dispute, a statement of claim is not a pleading. There are no minimum pleadings requirement under applicable arbitration law or institutional rules, and, therefore, a motion to dismiss would make no sense.

Posted by Steven Skulnik | October 28, 2017 8:29 PM

No. Parties should not be punished for things the rules do not require. If a dispositive motion is going to be considered at all, the party should be allowed to plead and prove whatever facts they wish in the context of the motion.

Posted by Paul Peter Nicolai | October 29, 2017 9:40 AM

Detailed statements of claim are regularly required by arbitrators even if Claimant filed a simple Demand form. It would be appropriate to dismiss a claim if the detailed statement is legally deficient based on the facts alleged, but leave to amend should freely be granted so Claimant can cure the deficiency.

Posted by Al Appel | October 29, 2017 10:13 AM

Seems to me and under Employment Arbitration Rules as in any litigation, any statement made by either side as to which they verify its truth and accuracy may be considered on a motion, whether by claimant upon the defense or respondent seeking to dismiss the proceeding. Whether or not the pleading is sufficient to withstand the motion depends on the facts, circumstances and law but certainly the filer should be held to the averments at that stage.

Posted by Ruth Raisfeld | October 29, 2017 11:02 AM

A real estate broker is required (at least in New York) to both plead a prove licensure to state a cause of action. In a simple breach of contract case, the claimant is technically required to plead her performance of all obligations of the contract on her part to be performed or that she was wrongfully prevented from doing so by respondent. Dismissal on these technical grounds seems to me inconsistent with the goals of arbitration. Indeed, dismissal in these circumstances should fall into the "no good deed [particularization of the claims] goes unpunished" category. Upon respondents' objection to the detailed claim, leave to amend should be very freely given to claimant to supply the omitted technical allegations.

Posted by Eric H Holtzman | October 29, 2017 11:43 AM

Dismissing a claim on the face of a pleading is wholly inimical to the raison d'etre of the arbitral process. While dispositive motions may, at some point, become appropriate (though rarely, in my opinion), failure to state a claim is a feature of cumbersome litigation which should not be imported into arbitration. It would be particularly ironic to allow simple demands for relief to suffice yet punish a more fulsome pleader who, perhaps, inartfully sets forth its claim.

Posted by Judge Gerald Harris | October 29, 2017 12:11 PM

Usually the detailed pleading comes as a result of an arbitration that is originally commenced in court and then transferred to arbitration due to an arbitration provision in the parties' agreement. I have granted motions to dismiss complaints that are insufficient as a matter of law, however, always without prejudice, giving the Claimant an opportunity to replead.

Posted by Mark J. Bunim | October 29, 2017 12:28 PM

I generally agree that "Rule 12" Motions are not appropriate in arbitration proceedings. There can be exceptions after the claimant has been allowed to file a detailed statement of claims. Exceptions should not swallow the rule.

Posted by Robert L. Arrington | October 29, 2017 7:49 PM

"Gotcha" litigation tactics have no place in arbitration. Having said that, in New York there is caw law holding that a motion to dismiss a complaint based upon a pleading deficiency (i.e., failure to state a cause of action) can be defeated by remedying the deficiency in an affidavit submitted in opposition to the motion, where the affidavit amplifies the pleading. Presumably, a claimant put on notice of a pleading deficiency in a motion to dismiss is squarely presented with an opportunity to address and remedy the deficiency in response. If the claimant fails or is unable to do so, one may well wonder about the merit of the claim.

Posted by Dani Schwartz | October 30, 2017 9:20 AM

Dismissing a claim upon the Respondent's Motion without an opportunity for the Claimant to respond and amend is definitely not appropriate. Since having an efficient arbitration depends on the parties focusing on the necessary elements of the claim(s), encouraging a detailed statement in outline form is helpful.

Posted by Roslyn S. Harrison | October 30, 2017 1:50 PM

While motion to dismiss for failure to state a cause of action or defense is not part of the arbitration landscape, there is no reason that arbitrators cannot make an expeditious determination of one or more manifestly unmeritorious claims or defenses. See https://iccwbo.org/media-wall/news-speeches/icc-court-revises-note-to-include-expedited-determination-of-unmeritorious-claims-or-defences/.

Posted by Steven Skulnik | October 31, 2017 9:18 AM

Dissenting Opinions – What are your thoughts?

Are dissenting opinions problematic for the arbitration process? Should parties pay for the time it takes to draft a dissenting opinion?

What are your thoughts/comments? Please provide below.

Posted by Jeffrey Zaino on October 14, 2017 8:09 AM | Permalink

Given that opinions are increasingly being shared with non-parties ... yes.

Posted by Denise Presley | October 14, 2017 9:06 AM

It is hard to see any real value for dissenting opinions in commercial arbitrations to either the process or the parties. Since arbitration awards in commercial arbitrations have no precedential effect beyond the decision between the parties, the process reason for court dissents is not present in an arbitration award. More to the point, the implicit reason for dissents in general is to cast doubt on the legal reasoning in the majority decision (to prompt a reconsideration of the legal analysis in a future case) and this is counter to the fundamental principal in arbitration to encourage and promote the enforceability of awards except for the type of extreme defects listed in the FAA or the New York Convention. Indeed, any dissent which goes to a mistake in the findings of fact or law in the award, as most dissents do, deals with a perceived issue or issues in the award for which there is no right of challenge to the award itself.

As between the parties, the award is the operative legal document and the dissent has no legal force. In fact, it is hard to see an effect at all for dissents except to encourage the loser to try to attack the award in court. Such attacks are almost always to no avail and just cost the parties to expend money needlessly. As such the value of a dissent to the parties is questionable, if it has any value at all. Given that, it is hard to justify charging the parties for anything but the most abbreviated dissent.

Posted by Anonymous | October 14, 2017 9:39 AM

If the parties wanted and two panel members write a reasoned award, then a reasoned dissenting opinion is OK at the parties' expense. If the parties wanted a standard award then the award should be issued upon the decision of a majority of the Panel, one Panel Member dissenting, without reasons. I feel such dissenting opinions enhance the value of the arbitration process.

Posted by Edward Dreyfus | October 14, 2017 9:41 AM

Perhaps one situation in which a dissenting opinion may be considered is when the one arbitrator feels so strongly about his/her view that he/she simply cannot sign on with the majority. That should be a rare instance and when it occurs, the dissenter should consider whether the parties should be billed for the drafting time. In other words, the dissent is probably the child of the dissenter's sense of integrity rather than the dispute resolution process sought by the parties...

Posted by Deanne Wilson | October 14, 2017 10:05 AM

I fully agree with Anonymous' 10-14-17 9:39 AM posting and reasoning. A dissent often represents a failure in the panel's deliberative process, which envisions respectful mutual consideration and debate of each arbitrator's views on each material issue, and sometimes requires compromise in one or another panelist's views based on considerations raised by his co-arbitrators.

Dissents in awards "on the merits" seem to me to be marks of egos offended, or, worse, "marketing" efforts. As Anonymous observes, they generally have no purpose other than to encourage vain litigation.

However, as with any generality, there are exceptions. I can think of three: one, where the dissent is on the core issue of arbitrability of the dispute, and the panelist can articulate a strong argument supporting her view, simply because the articulation of that view may not be merely academic. That is, a court may value it in making an ultimate determination.

The second, where the dissent is grounded upon substantial evidence that there has been material misconduct by another arbitrator which may have affected the award. Indeed, under such circumstances it is arguable that the dissenter is duty-bound to issue a dissenting award. That scenario appears more likely in a private-arbitration setting, where the protections and requirements of rules of an arbitration association, such as the AAA, may not be available to prevent or correct any such misconduct long prior to issuance of an award.

The third, where there is an interim, non-binding project ADR process involved, and/or the interim awards are inherently subject to further review, either by a court, a "chief engineer," or a final arbitration panel. There, too, dissents can be important and useful to the final resolver, or even the parties resolve or avoid further disputes as the project continues.

Posted by Sayward Mazur | October 14, 2017 10:49 AM

A separate dissenting opinion serves no purpose if the arguments of the minority are analyzed in the award. In that case the minority arbitrator can and should note his disagreement by not signing the award. A dissenting opinion is useful only in rare circumstances such as where the majority chooses to ignore a dispositive legal issue.

Posted by Steven Skulnik | October 14, 2017 11:04 AM

I believe that the best approach to a disagreement among members of a Panel would be to work hard to resolve differences, reviewing the evidence and reexamining one' conclusions. A willingness to compromise should be considered so long as the result would not impair a just result. Though every reasonable effort should be made to avoid a dissent, if an arbitrator cannot conscientiously join in an award a short dissent may be in order but it should be a rare occurrence.

Posted by Judge Gerald Harris | October 14, 2017 11:18 AM

The key to an arbitration that is useful is an award that the parties will respect. Nobody likes to lose, that's obvious. But there is actually something worse than losing. I'm referring to a concern that the losing party wasn't heard. So in this context a dissent can be quite useful. It tells the loser that the effort to be heard wasn't in vain. Knowing that someone heard and considered can go a long way to helping a party move on beyond the dispute.

Some fear that a dissent will serve as a road map for a motion to vacate. A well drafted dissent takes that concern into account. As long as the dissent is focused on the merits of the issues in the dispute, there should be no reason for concern. A proper dissent does nothing more than tell the parties that there is more than once way to interpret evidence and law. The FAA doesn't allow for vacating based on a differing view of the merits of a dispute.

The last question, i.e., who should pay? All parties benefit from an award that is respected. If a dissent helps to realize this goal, it stands to reason the cost should be borne by all the parties.

Posted by Paul Marrow | October 14, 2017 11:55 AM

Dissenting opinions in tripartite labor arbitrations--if not bitter--may assist parties to better understand and improve their on-going relationship.

However, in "one off" commercial cases, dissents only encourage the non-prevailing party to pursue what--most often--will be a fruitless appeal.

Pat Westerkamp

Posted by Patrick R. Westerkamp | October 14, 2017 2:34 PM

I agree with the others that a dissent usually does not serve a purpose, however, in situations where the wing arbitrators are party appointed the wing arbitrator who is on the "losing side" may feel it necessary to send a message to the party that appointed that arbitrator. In such a situation the dissent may not serve an "arbitration purpose" but rather a political one, and is justified.

Posted by Mark J. Bunim | October 14, 2017 8:12 PM

An arbitrator, like an appellate judge, should try and reach consensus (except where a dissent serves a useful purpose for further review). But there are cases in which, for any number of reasons, consensus cannot be reached. A dissent really serves little useful purpose in terms of the result of a binding or contractual arbitration (except, if it relates to a statutory basis to vacate the award---which is unlikely), but one who disagrees with the result must not agree merely because he or she is outvoted. An arbitrator who wants to disassociate with an award should be entitled to do so as a matter of conscience

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Posted by Edwin H. Stern | October 16, 2017 4:04 PM

I believe an arbitrator should endeavor to decide disputes correctly based on the applicable law as though he or she were a judge, and to do so as efficiently as possible. Canon 1.A of the Code of Ethics for Arbitrators in Commercial Disputes states that "An arbitrator has a duty not only to the parties but also to the process of arbitration." In furtherance of that duty, I believe an arbitrator should (1) explain the reasons for his or her award (unless the parties have agreed otherwise) and (2), if the other two arbitrators issue an award that deviates from that ethical duty, write a reasoned dissent.

For example, I dissented in a 1996 NASD (now FINRA) case in which the chair and I, both lawyers, agreed that the brokerage firm breached its duty to the customer, although the non-lawyer industry arbitrator disagreed on the liability issue. However, there was no disagreement on the amount of the customer's damages. After the chair was unable to convince me to join in a unanimous award for one-half of the customer's damages, I explained in my dissent (1) that my co-arbitrators' unexplained award was inconsistent with the result that would have been available in court and (2) that, although arbitrators are not required to follow the law, arbitrators should decide disputes in accordance with applicable law rather than on the basis of their own subjective notions of justice and equity. Similarly, I dissented in a 1991 AAA employment case in which my co-arbitrators issued an unexplained award in favor of an employee because they thought it was fair and equitable to do so despite the fact that the award would not have been available in court.

I believe that dissents to legally erroneous awards can enhance respect for the process of arbitration.

Posted by Stephen A. Hochman | October 16, 2017 4:44 PM

I don't favor the publication of dissenting opinions. In a panel of 3 arbitrators, if consensus can't be reached, then it is sufficient for only the 2 arbitrators in the majority to sign the award, and the dissenter can simply not sign. While some of the posts articulate situations where a dissent may be appropriate, on balance they should be avoided in the vast majority of cases.

Posted by David Shaiken | October 16, 2017 5:05 PM

Dispositive Motions and Expedited Arbitrations – What are your thoughts?

Should dispositive motions be permitted in expedited arbitrations (e.g. consumer arbitrations) that generally provide for 1 hearing day? Are such motions necessary/useful in this context, designed to obtain a quick result?

(Consider AAA Consumer Arbitration Rule R-33 providing that the Arbitrator may allow a dispositive motion when "the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.")

What are your thoughts/comments? Please provide below.

Posted by Jeffrey Zaino on June 25, 2017 9:13 AM | Permalink

I think the option should be left open but such a motion should not be granted without a high degree of justification. The party affected, of course, should have a right to respond before any decision. Due process requires that.

Posted by Anonymous | June 25, 2017 10:47 AM

Although the granting and denying leave to file a dispositive motion should be left to the arbitrator, my experience is that most such requests for leave are really requesting leave to file a motion for summary judgment, when in fact genuine issues of material fact exist related to such motion. In the few cases in which the motion may be justified, I have nevertheless denied the request to file such motion because it would not add to the efficiency of the proceeding since the evidence and witness testimony would be required anyway for other more major issues. Regarding the question applied to expedited cases, the AAA does not need a special rule on this point since the AAA arbitrators are well trained on this matter and can judge and rule on requests for such motion without further rule changes.

Posted by Edward Dreyfus | June 25, 2017 11:05 AM

The point is to keep Expedited cases short and sweet. Dispositive motions are costly in that they must follow R-33, get Arbitrator approval, then be filed and adjudicated, along with the opposition. An Arbitrator is being paid about 3 hours worth of time for the entire case, through final decision. I recommend against dispositive motions as separate matters. I also recommend tighter controls on expedited cases. They should not even get to the arbitrator unless they have agreed that they are ready for hearing in 30 days, that documents have been exchanged and all that is needed is a hearing. You can even require of that there are no dispositive motion's to be filed. The plan is to make these cases as economically feasible as possible.

Posted by Michael Orfield | June 25, 2017 11:27 AM

I would assume that in many, if not most, of these cases the consumer appears pro se. Thus, a matter which is decided on papers alone is likely to disadvantage the unrepresented party. When coupled with the need for an expeditious and economic resolution, I believe these factors should make dispositive motion practice in consumer related cases disfavored.

Posted by Judge Gerald Harris | June 25, 2017 12:30 PM

I totally agree with Michael Orfield. Expedited cases, if they are under $25,000, are submitted on documents (Rule E-6) unless a party asks for a hearing. Otherwise the hearing in larger-amounts-in-dispute cases is scheduled within 30 days of the arbitrator's appointment (E-7) and is scheduled for a single day and the arbitrator's compensation is fixed. Dispositive motions require time and attention from the arbitrator that would well exceed a document review or a single day of hearing and would delay the hearing by at least another 30 days. They would destroy everything expeditious about an expedited hearing. The whole point of an expedited hearing is it is quick (expeditious), cost sensitive and succinct. DO NOT amend the rules to allow dispositive motions in arbitrations submitted under the Expedited Procedures rules.

Posted by Judith Meyer | June 25, 2017 12:54 PM

Expedited hearings are designed for speedy, low cost resolution of disputes. The addition of hearing a prehearing dispositive motion in such a case slows the process and increases the attorneys' fee costs to the parties. Most of these cases are one day hearings. Prehearing dispositive motions in expedited hearings should not be allowed.

Posted by Judge Melvyn Wiesman | June 25, 2017 2:04 PM

I agree with the previous commenters. Since one of the goals of expedited arbitrations is speed, spending some of the precious time on dispositive motions that might be frivolous doesn't help meet that goal. Let the parties make their case in the hearing - that's what they're for.

Posted by Raoul Drapeau | June 25, 2017 3:53 PM

I agree with all the views expressed that it is antithetical to a consumer mediation to have dispositive motions because of the time that would be required and the delays that would ensue.

Posted by Mark J Bunim | June 25, 2017 7:40 PM

While the "never say 'never'" rule is a good one for arbitrators to bear in mind, I agree that dispositive motions are generally at odds with expedited proceedings, and wind up adding expense and adding time that could be saved.

Posted by Robert L. Arrington | June 26, 2017 8:54 AM

Probably the most important thing to a consumer is having someone listen to them, and being allowed to tell their story to someone who will listen, and decide their dispute. Sometimes, they just want to unburden themselves, and to vent. If you entertain a dispositive motion, you are short-circuiting that process, possibly denying them the right to be heard, if you grant the motion. You are telling them that they are at a disadvantage not being an attorney, or that the law is paramount over a compelling set of facts. It often takes the same amount of time to just listen to their argument, attentively and thoughtfully, without commenting on the merits, and then decide the matter. You will certainly create a much better impression before a pro se consumer if you do this.

Posted by Nelson Timken | June 26, 2017 11:51 AM

I treat these motions just the same as in non-expedited arbitrations. If the motion has merit and will resolve some or all of the issues, I see no reason to delay resolution.

Posted by David Andrew Byrne | June 26, 2017 11:54 AM

Quite simply, either party can move to dismiss claims or counterclaims, but should only do so after a one day hearing has been held - and do so without paperwork. Such a motion should only be made if the movant believes in good faith it has substantial merit. These lesser cases are for amounts up to only $25K and should be speedy and much less expensive, just as they are intended to be.

That is principally why this expedited arbitration process exists. We should not allow the process to become laden with paperwork and thus make it more expensive. That would prevent low value cases from being brought and would deny justice to at least one side.

Posted by Anonymous | June 29, 2017 7:27 PM

5. MEDIATION PROCESS

Mediating and Arbitrating the Same Dispute – What are your thoughts?

After a failed mediation, should the parties use the same neutral to then arbitrate the matter? Under what circumstances, given mutual party request and consent? Conversely, when should a neutral decline to serve as arbitrator?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on July 16, 2017 11:24 AM | Permalink

My understanding of the reason a mediator should not serve as an arbitrator is that he or she may have been given confidential information that a party or parties would not want the arbitrator to know. However, this objection would seem to be dealt with if both parties wish the mediator to be their arbitrator and consent thereto.

Norm Rosen

Posted by Norman H Rosen | July 16, 2017 12:08 PM

The parties should not use their mediator to later serve as the neutral arbitrator. I think it is equally true that the mediator should not accept appointment as the neutral arbitrator. I recall a 2013 decision from the NJ Appellate Court held that serving as a mediator is inherently incompatible with subsequently serving as a neutral arbitrator. (Minkowitz v. Israeli Mediators "who may become privy to party confidences in guiding disputants to a mediated resolution cannot thereafter retain the appearance of a neutral fact-finder necessary to conduct a binding arbitration proceeding."

Posted by steve conover | July 16, 2017 12:09 PM

I am surprised at the number of arbitrators who refuse to mediate a case which they may be required to decide. Our job is to solve labor relations problems and both processes are designed to do that. I suppose in a rare instance mediation results in confidential, relevant information which, nonetheless, would likely have not been produced in arbitration, but that is the exception, not the rule. Only in those cases would recusal be warranted, my view. Howard Edelman

Posted by Howard Edelman | July 16, 2017 12:11 PM

Absolutely not. Mediation depends on the parties and their counsel sharing in confidence their concerns as well as their strengths. Knowing the mediator will later serve as arbitrator ruins the process.

Posted by Robert L. Arrington | July 16, 2017 12:15 PM

It is very difficult. I have done only one mediation followed by a single judge decision (essentially an arbitration). It was very difficult to be an effective mediator, as I found myself reaching the final judgment or award as we progressed through the mediation. But I felt that I couldn't really advise the parties of the strength of their positions without appearing to prejudge the final outcome if the mediation failed.

Posted by Ronald A. Kienlen | July 16, 2017 12:25 PM

The AAA's Guide for Commercial Arbitrators (Guide) provides guidance for arbitrators who consider assuming the dual role of arbitrator and mediator. Where parties in an arbitration wish to mediate the case, the arbitrator may serve as the mediator if requested. The Guide warns that if the mediation fails then the arbitrator more than likely cannot resume service as the arbitrator (Guide at 3). The Guide also cautions arbitrators not to participate in the parties' settlement discussions because if the case does not settle, one party may challenge the arbitrator's continued service as arbitrator based on a claim of partiality (Guide at 12).

For example:

* Where an arbitrator agrees to preside over a dispute that he previously mediated, his prior service as mediator arguably constitutes an interest or relationship that could create an appearance of partiality (Canon II).

* If the arbitrator accepts the dual engagement of mediator and arbitrator before the mediation takes place, his communications with the parties in mediation caucus arguably creates an appearance of impropriety (Canon III). The fact that an arbitrator previously mediated the case may also constitute entering into a professional relationship with the parties (Canon I.C).

* If the arbitrator, even subconsciously, relies on evidence learned during private mediation caucuses in rendering the arbitral award, the procedure can deny the losing party the due process right to confront evidence against it.

Posted by Steven Skulnik | July 16, 2017 12:51 PM

Just say no.

Posted by David Blair | July 16, 2017 1:02 PM

Mediation and arbitration are Venus and Mars. The mediator who has used every stratagem for voluntary resolution of a dispute will almost always have signaled or implied bias or prejudice that should but may not have put all the parties on full notice of that mediator's predispositions that may arise in the arbitration. Even with full and necessary full written waivers and consent for the mediator to act as an arbitrator, it will not be difficult for the losing party in the arbitration to claim a 9 USC 10(a)vacatur. Even if the vacatur claim doesn't work all arbitration parties will be put to unnecessary post-award time, effort, and expense. It is not worth the risk! Mediate or arbitrator but not both!

Posted by John Allen Chalk | July 16, 2017 1:24 PM

I think this all boils down to informed consent. To begin with, if confidential thoughts are going to be an intimate part of a mediation that either side feels have no place in an arbitration, then they probably should not go this route. However, this is not always the case and both sides may feel that each can benefit from an arbitrator's getting an informal view of the case ahead of time, rather than the first and only shot at an arbitration. I think it can be appropriate as long as all sides understand that the outcome could be influenced one way or another from the mediation and be prepared to take that risk, and, the neutral does her best to decide the case based on the facts and the law and not be influenced externally.

Posted by Michael G. Mehary | July 16, 2017 3:57 PM

If the mediator is a licensed attorney, (S)he might want to check applicable state bar rules on professional conduct to determine if this situation falls within the ambit of a conflict that cannot be waived by the parties.

Posted by Denise Presley | July 16, 2017 5:52 PM

The whole idea of having the same person be both an arbitrator and mediator on the same case doesn't seem fair to the parties to me. If the mediation comes first, then the arbitrator will be exposed to the weaknesses of the arguments that can't help but be used in the arbitration.

A solution I have heard is to hold the arbitration first and hold the award in secret until/if the parties can't successfully mediate.

But whatever sequence they are held in, it seems to me it's a recipe for problems.

Posted by Raoul Drapeau | July 16, 2017 6:04 PM

Not if we really believe in the ex parte rule (and we should). And this is one instance where consent of the parties really doesn't compensate for the potential evils. The practice seems seductively practical, with its prospective efficiencies of time and money. But they're not worth the potential introduction of injustice and unfairness to the parties and corruption of the arbitration system. Sorry if this sounds paternalistic, but the fairness of the proceedings is integral to the arbitration system, and the respectability of the system is more important than the tempting expedience to be gained from compromising that integrity.

Posted by andrew Gerber | July 16, 2017 6:11 PM

A supplemental comment: Another reason why "informed" consent doesn't work is that no party knows what the others have said to the Mediator in caucus, so nobody can be truly "informed".

Posted by andrew Gerber | July 16, 2017 6:24 PM

I don't think it is a good idea. Knowing that the mediator will not be the arbitrator, encourages frank discussions of case weaknesses which may not otherwise occur.

Posted by Paul McDonough | July 16, 2017 6:30 PM

I do not feel it is proper for the mediator to switch hats and become the arbitrator, under any circumstance. The mediator can make a mediator's proposal if there is a true impasse which is almost the equivalent of an arbitrator's decision but it is non-binding and is usually an attempt by the mediator to find a window that the adversaries will accept to resolve the matter. I have seen some instances where parties ask for a binding mediator's proposal. It is rare, but that gets much closer to an arbitrator's ruling. There is nothing wrong with that provided both sides request it (in writing).

Posted by Mark Bunim | July 16, 2017 7:00 PM

If the mediator was provided confidential information to foster settlement, ignoring that information to subsequently arbitrate the dispute impartially seems quite challenging. If the mediator is not being provided with confidential information to preserve his or her ability to impartially arbitrate the dispute, then the mediation might be undermined. Not an easy situation to handle.

Posted by Dani Schwartz | July 17, 2017 9:42 AM

As a litigator, I want a correct decision. I believe the more information a decision maker possesses the more likely the decision will be correct (which is my primary concern). A mediator who later serves as an arbitrator has more information. For this reason, as a litigant, I am usually comfortable with the mediator, later arbitrating the dispute.

My clients demand timeliness. They need to put the litigation behind them. Having a separate mediator and arbitrator frequently lengthens the dispute process. My clients are also deeply concerned about litigation costs. Having a separate mediator and arbitrator almost always increases cost.

As an aside, in my experience, many judges conduct an informal mediation, in chambers, immediately prior to trial.

Switching hats, as a mediator, I would be very reluctant to arbitrate the dispute. Not because I think my decision would differ (or be biased), but because so many of my peers believe it can't be done ethically. As a mediator, I respect my peers' views.

As a litigant, however, I struggle with their position. Arbitration is a dispute process created by party consent. Absent a compelling interest to the contrary, informed parties, represented by experienced counsel, should be able to select the dispute resolution process that "the parties" believe best suits their interests.

Posted by David Anderson | July 17, 2017 10:00 AM

In the past year alone, I have gotten 3 emails from experienced colleagues/arbitrators asking me how they should proceed when being selected as a party- designated neutral. Questions include "am I a partisan or a neutral"? "If I am a neutral, may I nonetheless have ex parte conversations with my designating party about the individual I should select as the umpire"? "If so, may I sit down with the party which designated me and learn about the dispute before I am sworn to neutrality"? "Who collects the fees"? "Who will pay my fees, the party selecting me"? The list goes on.

My own practice is to not accept such assignments. Nothing improper about it. It's just my preference.

However, I think that the much misunderstood role of the party-designated neutral is a subject that's appropriate for your Resolution Roundtable Discussion.

Posted by Anonymous | July 17, 2017 11:19 AM

I would not accept the role of mediating and arbitrating the same case. Even putting aside the issue of confidential information or biased information coming in caucus, it would be difficult to retain full neutrality in arbitration after having participated in mediation with the parties. I do not think it is impossible, but it would be difficult. In theory, the parties could consent. . I do I not think the parties can really provide informed consent unless they are very sophisticated stakeholders who fully understand both processes. Before accepting this kind of appointment, I would want to have a frank conversation with the parties.

Posted by Kyle-Beth Hilfer | July 17, 2017 11:30 AM

The question asks, "After a failed mediation, should the parties use the same neutral to then arbitrate the matter?" Let's change a few words, and ask After a failed judicial settlement conference, should the parties use the same judge to hold a bench trial? In litigation the answer to the second question is invariably "yes." In arbitration the answer to the first question if often "no."

In my capacity as arbitrator, I would only agree to become a decision maker following a failed mediation if: A. The parties signed a submission granting jurisdiction; B. The submission was countersigned by counsel; C. I knew and trusted the attorneys; and D. the parties acknowledged that my Award would be based on facts proven at hearing.

Posted by Patrick Westerkamp | July 17, 2017 1:18 PM

I believe that being involved in mediating the case gives the neutral unforgettable knowledge about the inherent weaknesses and strengths of the parties' respective interests in the contested matter, such that it lays a foundation for a claim of, if not actual, bias in arbitration.

As such I do not recommend arbitrating a failed mediation.

Posted by Clarance J Jones | July 17, 2017 4:12 PM

Mr. Conover states N.J. law and the notes Appellate Division precedent in Minkowitz v. Israeli. I cannot conceive of a case in which I would serve as one and then the other (or, as in Minkowitz, one (arbitrator), mediator, and then arbitrator again). But there are cases in which discrete issues can come up and the parties to a mediation could agree to save time and expense by putting the issue before an individual who generally knows the case through mediation and then can decide the issue based on what is presented in an arbitration, PROVIDED that the parties and their counsel acknowledge what is being requested and that it is being done knowingly and voluntarily. A decision on one claim or another may also (by agreement or otherwise) lead to a resolution of a the balance of the matter, and while it is, in my view, far better to have a separate and independent arbitrator, it also seems to me that saving time and expense could be beneficial to the parties if they ask and want a mediator to arbitrate a discrete claim or issue.

Judges who hear and deny motions to suppress or who exclude evidence at a preliminary hearing can try cases even non-jury. What is wrong with arbitrators and mediators doing the same when asked and all parties agree and execute knowing and voluntary waivers.

Posted by Edwin H. Stern | July 17, 2017 6:20 PM

As a general rule a mediator should not serve as a arbitrator in matters that are the subject of the mediation. An exception to the general rule is in a rare situation where after an impasse has been declared, and the mediation is over and the parties and their counsel request that the mediator serve as the arbitrator in a binding arbitration of the dispute. The mediator may serve as the arbitrator as long as the mediator believes nothing heard or learned during the mediation will bias the mediator or otherwise adversely influence the independence and impartiality of the mediator.

Posted by Michael S Wilk | July 18, 2017 4:42 PM

My first thought was that Norm is right. But what if one party has given the arbitrator information it is happy to have the arbitrator know but the other party would prefer the arbitrator not know? The other party would have no way of knowing what the opposing party or parties have disclosed that might have been objected to and stricken from evidence. That still leaves the problem of once disclosed, it's known, but at least there would be an opportunity to ask the arbitrator to ignore that evidence. P. Westerkamp's comment deals with this problem. I can imagine a situation where it might be appropriate, and the described submission agreement handles a lot of the issues. Maybe some "gut reaction" would guide in a particular case. I'd have to feel comfortable; if in doubt, probably wise to decline.

Posted by Micalyn S. Harris | July 18, 2017 4:50 PM

Mediation Proceedings in Good Faith – What are your thoughts?

By statute, rule, or agreement, many mediation proceedings require that the parties participate in good faith. How close to the line of "bad faith" does a defendant/respondent tread by coming to a mediation session with a "no-pay" position? To what extent does that party have to maintain an "open mind" about a possible resolution relative to its "no-pay" position before it is basically not participating in good faith?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on September 23, 2017 7:08 PM | Permalink

In Florida the good faith has been interpreted by the courts as attending the mediation. There is no requirement to make an offer to be in good faith.

Posted by Robert L. Cowles | September 24, 2017 7:57 AM

Because the essence of mediation is a consensual dispute resolution, the engrafting of a "good faith" requirement is difficult to conceptualize. If a party refuses to compromise due to a strongly held opinion of the worth of its position, is that "bad faith"? If a party compromises merely a token amount, is that "bad faith"?

That having been said, if a party fails to appear or substantially backtracks on a former position after the adversary has responded in its own compromise, then the showing of "bad faith" becomes more evident. The standard varies also, depending on whether the obligation is imposed from the outside (statutory or rule-based) or arises from agreement. Usually the agreement to arbitrate involves some type of a quid pro quo from an adversary so the "good faith" requirement should weigh in at a higher level.

A skillful mediator, however, with creativity, patience and persistence, can usually open the mind of a recalcitrant party, no matter how obstinate the first appearance. Thus, it may be more productive to craft an acceptable resolution to the logjam than to delve deeply into the "good faith/bad faith" analysis.

Posted by Deanne Wilson | September 24, 2017 10:09 AM

Just a couple of thoughts. See what you think. Not from a particularly legal point of view, but, from an interest-based negotiation focus ---

Doesn't everyone come in - generally speaking - on a position? That is why the need for mediation. As we begin a mediation we are first hearing those positions. Finding the interests that are driving the parties to their positions is the job of the mediator, along with allowing the parties to 'hear' those interests. Then, the mediator has the opportunity to guide the process toward the reaching of effective and lasting solutions.

Simplistic, but, I suppose mediators must assume parties are attending in good faith. If there is reason during a mediation to find otherwise then something must be done accordingly.

Posted by Niki Rowe | September 24, 2017 12:58 PM

If a party has expressed a "no pay" position, it is not that different from a "firm" low ball position that is known to be unsatisfactory to the other side. To say that "good faith" requires agreeing in advance to be willing to depart from this position would be even more likely to entrench their position with arguments that would make a departure from the no-pay position even more difficult.

The beauty of a mediation, particularly where the parties stay together for the intro and opening statements, if not longer, is that the clients (who, by agreement have the authority to settle), get to listen directly to the best arguments of the other side. The mediator by open ended questions can both build the psychological atmosphere conducive to understanding, but can uncover interests that the lawyers have never addressed, since they are often only interested in evaluating the legal position, usually supported by confirmatory bias.

"Good faith" should be applied to the procedural aspects, such as whether the attorney and/or party show up, refuse to stop calling on their cellphone, or something egregious like surreptitiously reviewing the other side's papers when left in the room inadvertently, or warning witnesses of the other side with retribution.

Posted by Richard Lutringer | September 24, 2017 1:20 PM

Taking a "no-pay" or token payment position is not, by itself, bad faith in the mediation. It is up to the mediator to understand and address that party's position, and offer to convey the reasons to the other side. Being absolutely positive of your case, can be a motivation to make no offer; but the mediator needs to address that, and exchange enough information to make sure the other party understands the reason for the position. The other side may then try to persuade the no-pay party there merit, or at least that there is a risk, or that settling by paying a part of the costs of proceeding (because there is uncertainty in any outcome), is good business. Insisting on some payment (even "nuisance-value"), after seeing there is a very bad claim, can itself be bad faith. Reaching a mediated settlement does not require that a payment be made by one party to the other. A settlement can be achieved by agreeing to withdraw the claim.

Posted by Eli Uncyk | September 24, 2017 4:30 PM

Taking a "no-pay" or token payment position is not, by itself, bad faith in the mediation. It is up to the mediator to understand and address that party's position, and offer to convey the reasons to the other side. Being absolutely positive of your case, can be a motivation to make no offer; but the mediator needs to address that, and exchange enough information to make sure the other party understands the reason for the position. The other side may then try to persuade the no-pay party there merit, or at least that there is a risk, or that settling by paying a part of the costs of proceeding (because there is uncertainty in any outcome), is good business. Insisting on some payment (even "nuisance-value"), after seeing there is a very bad claim, can itself be bad faith. Reaching a mediated settlement does not require that a payment be made by one party to the other. A settlement can be achieved by agreeing to withdraw the claim.

Posted by Eli Uncyk | September 24, 2017 4:32 PM

The American Bar Association's Standing Committee on Ethics and Professional Responsibility (the "Ethics Committee") has expanded the scope of Rule 4.1(a) of the Model Rules of Professional Responsibility to included "caucused mediation."

The Rule itself simply provides that

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.

As now interpreted in Opinion 06-439, mediators fall among the "third persons" to whom lawyers may not make "false statements of material fact or law."

Now that caucused mediation has been subsumed under Rule 4.1(a), attorneys have a justification for being "less than entirely forthcoming" with mediators about: estimates of value, the strengths/weaknesses of their case, and their client's willingness to settle. In the words of the Opinion,

"Statements regarding a party's negotiation goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing,' are ordinarily not considered false statements of material fact.

Accordingly, in and of themselves, "No pay" positions do not constitute bad faith negotiations.

Posted by Patrick Westerkamp | September 24, 2017 5:39 PM

Tennessee is similar to Florida. There is no duty beyond attendance. I might add that even more troubling is the desire of some judges to have a backdoor to the mediator to find out what is happening in the mediation, and the desire of some lawyers to use the threat of punishing the opposing party by accusing them of bad faith mediation as leverage in negotiation. All of this is antithetical to the concept of consensual negotiation.

Posted by Robert L. Arrington | September 24, 2017 8:51 PM

THANK YOU DEANNE WILSON

Posted by Robert E. Barras | September 25, 2017 9:58 AM

I start off every mediation explaining my goal, namely, that "you are together here, of your own free will, to reach a reasonable compromise, not to accomplish what each, or either, of you might consider your perfect outcome. If either is uncomfortable with that goal it would likely be better that we end this now before this process becomes a waste of all our time and of your money." I then explain how the process works and I emphasize my promise to listen to both sides with an open mind. I also hope and expect the lawyer for each side to guide their clients through the process by encouraging their client to be open to a reasonable (not necessarily perfect) agreement; and to not push the client too hard to overcome their sincerely held position. I also tell them that they need not rush into an agreement, because there is always an opportunity to have a second session if there is a well-founded belief that time will be afford them an opportunity to arrive at the "right" agreement.

Justice George D. Marlow (Ret.)

Posted by Justice George D. Marlow (Ret.) | September 26, 2017 2:16 PM

Mediating and Arbitrating the Same Dispute, but no ex-parte communication – What are your thoughts?

During a mediation, the mediator does not permit caucusing/ex-parte communication. The mediation then fails, should the mediator, on agreement by the parties, serve as the arbitrator?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on December 3, 2017 5:28 PM | Permalink

Since arbitration is a contractual engagement, if the parties want to engage the mediator, I see no objection. If during a mediation, a mediator learns of confidential information material to the outcome of the arbitration, then in my opinion he or she should not accept the invitation.

Posted by Hon. William G. Bassler | December 3, 2017 6:18 PM

If neither party believes that anything harmful to their position has been disclosed and the mediator shares that view, and since there were no ex parte communications so that both sides can feel assured that each is aware of everything that has been disclosed, I see no reason why the mediator cannot doff his arbitrator's hat with the consent of both sides.

Posted by Judge Gerald Harris | December 3, 2017 6:36 PM

I don't understand when or why a good mediator would not conduct a caucus or conversation with one party alone, It would seem to me that the only reason would be to permit him or her to conduct a subsequent arbitration which could not be conducted if there had been ex parte or similar discussions containing information and communications unknown to the adversary. In New Jersey, a mediator can become arbitrator in the case based on a signed written approval of the parties to the arbitration because the parties would have to acknowledge that the arbitrator may have learned things during the mediation which the other party did not know.

I have urged parties in unsuccessful mediations to allow an arbitrator to conclude the matter by deciding some defined or unresolved issues because they could be easily focused, or even allow the mediator to serve as arbitrator to conclude the matter by a decision based on an award between a top and bottom figure or high-low award. As mediator I have encouraged that approach where I believe the arbitration can produce a fair result expeditiously and at minimum cost, and the mediator would often be able to conclude the matter quickly and at little cost when he or she felt knew enough about the matter to do that. But on most cases, if not all to date, my knowledge of the underlying matter was the product of conversations and caucuses which would preclude me from accepting the role of arbitrator.

Posted by Edwin H. Stern | December 3, 2017 8:09 PM

I do not know many mediators who disavow the use of caucusing, which I have always found to be extremely useful in trying to develop common ground for a settlement between the parties. Without that kind of mechanism, it seems to me that the role of the "mediator" is simply that of a "neutral evaluator," which is quite a different role.

In any event, as my colleagues have noted, there is nothing inherently objectionable about changing roles to serve as an arbitrator after an unsuccessful mediation, so long as the parties are fully informed that the mediator may have formed impressions about the merits of the case that may carry over into the arbitral proceeding, which will eventually involve presentation of evidence. That possibility should be clearly explained in order to ensure that the consent to the change in role is fully informed.

With this kind of fully informed consent, I even have had success serving as an arbitrator following unsuccessful mediations that did involve caucusing and ex parte communications. The key is informed consent.

Posted by Philip Allen Lacovara | December 3, 2017 9:16 PM

The danger in such a shifting of roles is that if a possibility is known by the parties before the mediation session begins, which is likely, counsel will be structuring its client's participation in the mediation with the future arbitration in mind. Rather than encouraging the parties to find interest-based practical solutions, counsel will be buttressing the "legal" arguments to get a head start on the potential arbitration, where interests of the parties have no role. Enforcement of hearsay and other evidentiary rules at the mediation session may be the logical next step, effectively modifying the nature, purpose and value of mediation.

Posted by Anonymous | December 3, 2017 10:14 PM

Since all information conveyed by the parties has been conveyed in joint caucus, there is nothing the mediator knows that both parties do not also know. You have a more level playing field than if private caucuses had been held. But even had private caucuses taken place, it is up to the parties to determine if it is more efficient for them to segue a mediator into the role

of arbitrator, since the mediator is already up-to-speed on the facts and law of the dispute. With appropriate conflict waiver by the parties, moving a mediator into the role of arbitrator can be a cost-efficient way of resolving a dispute. One should not assume that a mediator is inherently biased should he/she have heard information conveyed in private caucus. If the mediator who is asked to serve as arbitrator feels he/she has been tainted or biased by confidentially conveyed information, he/she will decline to serve as arbitrator.

Posted by Judith P Meyer | December 3, 2017 11:17 PM

Assuming no confidential mediation statements were submitted to the mediator prior to the first mediation session, there should be no concern on that front. However, if the mediator has formed opinions of the parties or their positions based on negotiations during the mediation - whether opinions of intransigence, a lack of merit, or otherwise - the mediator should not accept an appointment as arbitrator as his/her neutrality has been compromised. Because such influences may not always be readily detectable, perhaps generally it would be prudent for mediators to decline appointment as arbitrators in disputes they've mediated.

Posted by Dani Schwartz | December 4, 2017 8:46 AM

The key to this question is that the mediation has been conducted without caucus or ex parte communication with the mediator, and therefore presumably without disclosure of confidential information. Under these circumstances, the mediator can comfortably function as arbitrator.

Posted by Robert L. Arrington | December 4, 2017 8:50 AM

Yes.

Posted by Paul Nicolai | December 4, 2017 9:11 AM

In simple terms it seems to me that in a mediation that both sides will disclose information and positions that they might not disclose in an arbitration. Therefore I do not think it would be wise to have the same neutral who was the mediator also be the arbitrator.

Posted by Raoul Drapeau | December 4, 2017 10:06 AM

In simple terms it seems to me that in a mediation that both sides will disclose information and positions that they might not disclose in an arbitration. Therefore I do not think it would be wise to have the same neutral who was the mediator also be the arbitrator.

Posted by Raoul Drapeau | December 4, 2017 10:06 AM

While the parties and neutral are certainly able to agree on whatever they collectively feel is best -- that's the purpose of ADR -- it is probably bad practice. A mediator should strive to set an environment as open as possible to be as conducive as possible for a resolution. Even in a non-caucus mediation, the mediator should still encourage the parties to be open. Even in a joint session, a party may say something they would not want to be admissible in an arbitration. The mediator can't "unhear" that statement should s/he become an arbitrator in the same dispute. There is enough confusion out there even in the legal world between mediation and arbitration. They are not interchangeable and also require two different skill sets.

Posted by Marvin Schuldiner | December 4, 2017 11:07 AM

6. UNREPRESENTED PARTY

Unrepresented Party – What are your thoughts?

What special or extra steps are best practices to take as a neutral, in either a mediation or arbitration context, when faced with an unrepresented party on one side?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on December 28, 2017 12:56 PM | Permalink

At the start of any preliminary conference where a party appears without counsel, the arbitrator should confirm the party is in fact proceeding pro se and explain the party has a right to retain a lawyer at any time. The AAA has published "Find an Attorney or Other Legal Representation" (https://www.adr.org/sites/default/files/document_repository/ProSe_Find_an_Attorney.pdf). The arbitrator may direct the party to this document.

The topics of discussion and arbitration jargon experienced practitioners use during hearings may be difficult for a pro se party to understand. The arbitrator must ensure the pro se party understands and makes an informed decision about each topic of discussion.

Posted by Steven Skulnik | December 28, 2017 1:35 PM

Initially, make 100% certain that the unrepresented party has been advised that they can and should retain an attorney and, if in arbitration, that proviso can be stated in the initial scheduling order. Clear advance explanation of each step in the process also goes a long way.

Posted by Dani Schwartz | December 28, 2017 1:39 PM

This issue should be expanded to address the instance, which I've experienced on more than one occasion, when a party dismisses counsel during the hearings. I believe that the appropriate approach by the neutral is to spend a reasonable amount of time cautioning the party about the risks of acting pro se and strongly recommending that counsel be engaged. If that fails, the tension is between allowing the represented party the benefit of an expeditious process, and making certain that the pro se party fully understands all aspects of the proceedings. I have been mindful that a ruse could be in process giving the pro se party, if not successful, a potential argument in court that the proceedings did not provide a full and fair opportunity to be heard. Frail as that argument might be, the party might be pursuing a frivolous claim or defense and such tactic might be part of the ruse. Putting that aside, I believe that as long as all steps are clearly explained to the pro se party, no additional procedures need be employed as the same might delay the process or indeed prejudice the represented party.

Posted by Sid Bluming | December 28, 2017 1:52 PM

Lawyers serving as a neutral must adhere to Rule 2.4 of the Rules of Professional Conduct. Rule 2.4(b) provides that the lawyer-neutral "shall inform unrepresented parties that the lawyer is not representing them." The Rule further provides that "[w]hen the lawyer knows or reasonably believes that a party does not understand the lawyer[-neutral]'s role in the matter, the lawyer [-neutral] shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." Beyond this, the neutral should be vigilant to ensure that the unrepresented party understands every aspect of the proceeding and that counsel for any represented party does not cross boundaries to the extent of taking unfair advantage of the unrepresented party.

Posted by Eric H Holtzman | December 28, 2017 1:57 PM

When you say "unrepresented" I expect you mean "self-represented" parties. The arbitrator should confirm the party has decided to represent itself and explain the party can exercise its right to retain a lawyer at any time. The arbitrator should give special consideration to self-represented parties to ensure the fairness of the proceedings. The self-represented party may not understand the procedural aspects of the arbitration process, putting that party in a less advantageous position when it comes to effectively presenting its case. The arbitrator should ensure that the self-represented party understands the process, is available to proceed, and has a "reasonable" or "fair" opportunity to present its case. Communication with all parties must be documented with precision, and the parties' receipt of communication must be timely confirmed.

Posted by steve conover | December 28, 2017 2:07 PM

It is also critical to make sure the pro se party understands that you will not be giving any advice or assisting in any way. They must also understand that they are fully responsible for the results of their decisions.

Posted by Joe Ventola | December 28, 2017 2:10 PM

I adopt all of the foregoing comments and would simply add that I advise the self-represented party that, although I will be fair and considerate, I cannot act as that party's counsel. I also try to insure that the party has a copy of the applicable rules and advise that I will answer questions concerning them. I also have given the party, as part of a conversation with both sides present, a brief overview of how the hearing will be conducted.

Posted by Judge Gerald Harris | December 28, 2017 3:49 PM

I describe the procedure, especially at hearing, and then announce each step as we reach it, i.e., this is your turn to ask questions of the witness, etc. I find myself repeating instructions twice since pro se parties may have not understood or may forget them. A good management tool is to explain that the: (1) cross-examination is asking questions and not rebutting a witness's testimony, (2) rebuttal to a witness's testimony through purported questions does not create evidence, (3) witness is not the fact finder, and (4) the pro se party needs to save those comments for her/his own testimony. This advisement facilitates the curbing of a dialogue between a pro se party and a witness. And I remind myself periodically to be patient.

Posted by Federico C. Alvarez | December 28, 2017 11:02 PM

In 2014, the Wisconsin Supreme Court adopted rules concerning a Judge's role when dealing with pro se parties. The comments contain a list of acceptable techniques a Wisconsin judge can employ when dealing with pro se parties. I've found them a helpful general guideline for dealing with pro se parties in arbitration. I have employed all of these techniques except for 7 and 8:

SCR 60.04 A judge shall perform the duties of judicial office impartially and diligently.

. . .

(hm) A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially. A judge shall also afford to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to the law. A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.

COMMENT
A judge may exercise discretion consistent with the law and court rules to help ensure that all litigants are fairly heard. A judge's responsibility to promote access to justice, combined with the growth in litigation involving self-represented litigants, may warrant more frequent exercise of such discretion using techniques that enhance the process of reaching a fair determination in the case. Although the appropriate scope of such discretion and how it is exercised will vary with the circumstances of each case, a judge's exercise of such discretion will not generally raise a reasonable question about the judge's impartiality. Reasonable steps that a judge may take in the exercise of such discretion include, but are not limited to, the following:

1. Construe pleadings to facilitate consideration of the issues raised.
2. Provide information or explanation about the proceedings.
3. Explain legal concepts in everyday language.
4. Ask neutral questions to elicit or clarify information.
5. Modify the traditional order of taking evidence.
6. Permit narrative testimony.
7. Allow litigants to adopt their pleadings as their sworn testimony.
8. Refer litigants to any resources available to assist in the preparation of the case or enforcement and compliance with any order.
9. Inform litigants what will be happening next in the case and what is expected of them.

Posted by Nancy W. Greenwald | December 29, 2017 11:53 AM

In my experience there are at least two types of unrepresented parties, those with no idea of how arbitration works and those with extensive experience who are arbitration-savvy. It is helpful for the arbitrator to get a sense of where a particular unrepresented party falls on this spectrum. For the truly inexperienced and unknowledgeable party, the AAA video on arbitrating cases with unrepresented parties provides valuable guidance on how much direction an arbitrator might give such a party as to how

the process works and the parameters of what a successful party would be expected to show, without doing the party's work for him or her. Where the unrepresented party is a business person with great familiarity with the arbitration process, there is less need to distinguish between the represented and unrepresented parties to an arbitration, and the unrepresented party's pleas for special accommodation will be less persuasive. One common element of an arbitration involving an unrepresented party is that the party's demands for discovery and appetite for disputing even minor issues will be far less tempered by cost considerations, since that party will not be paying legal fees. In such cases, the arbitrator is likely to face a party making seemingly insatiable discovery demands of a party who is resisting on the basis of undue burden and relevance. Managing disputes of this sort is challenging, because the arbitrator needs to make reasoned decisions about the limits of permissible discovery, as well appropriate time management of the case.

Posted by Mary K Austin | January 2, 2018 10:09 AM

I will try not to repeat what has been said and certainly agree with what has been posted about the need to advise a pro se about his, her or its ability to retain counsel, the benefits of counsel and drawbacks of proceeding without an attorney. I have used a modified Faretta form to review the subject orally and obtain a waiver in writing. I am not sure that the other party or parties should be prejudice by a delay in the matter by returning it to the assigning source, but have considered that when I think the uneven positions could adversely impact the entire proceedings. The tough problem is how to proceed in terms of not unduly prejudicing either side, but that depends on the circumstances and luckily I have had very few pro se cases. In the few pro se consumer cases I've had, I urged that the parties to talk directly before formal proceedings commenced, and one or two matters settled because there had been misunderstandings or something lost by communications along the way.

Posted by Edwin H. Stern | January 2, 2018 1:22 PM

I agree with all of the above. Also, especially for pro se litigants, pay attention to non-verbal cues, such as fumbling to find a document being discussed. Pro se litigants may be more reluctant than lawyers to speak up with a question about which document is being referenced.

Posted by Micalyn S. Harris | January 3, 2018 1:43 PM

7. ARBITRATION LEGISLATION AND INSTITUTIONAL RULES

Taking direction from the courts and clients, various arbitral institutions have introduced emergency measures within their rules. Are such measures necessary and effective? Does one forum provide greater success with emergency relief - as between courts and arbitral By Gerald M. Levine SAVE THE DATES: May 19-21, 2017 – Commercials and Federal Litigation SAVE THE DATES: May 19-21, 2017 – Commercials and Federal Litigation Spring SAVE THE DATES: May 19-21, 2017 – Commercials and Federal Litigation Spring If an arbitrator sees that an advocate Please provide your thoughts/comments below Top of Form

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Assembly Bill A7445 – What are your thoughts?

In late April 2017, the New York State Senate introduced Assembly Bill A7445.

The Bill is available here: AB A7445.

The proposed bill primarily involves consumer arbitration and prohibition of certain contractual agreements to arbitrate personal injury and wrongful death claims. Notwithstanding, is such legislation, introduced with several prohibitions, harmful to arbitration at large?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on May 7, 2017 4:29 PM | Permalink

I don't find the policy unwise but the prohibition on agreements to arbitrate personal injury and wrongful death claims do not appear consistent with Supreme Court precedent.

Posted by Steven Skulnik | May 7, 2017 5:09 PM

Arbitration requirement for disputes or claims is a required clause in contracts between consumers and business entities of enormous power. I don't think any such business will accept any customer/client who crosses out that provision, even if the rest of the clauses are left intact. This is really an adhesion agreement, although I'm not aware of courts calling it that. Consumers/customers/clients need protection, and should have the option to agree or delete the arbitration provisions. If a statute is required to give this option, then I would support it.

Posted by Eli Uncyk | May 7, 2017 8:25 PM

I think legislation requiring clear disclosure, modeled after the warranty limitation requirements in the UCC, is better than prohibition. Our economy runs off "contracts of adhesion", even in commercial agreements signed by businesses. Agreeing to arbitrate is no more odious, per se, than, say, agreeing the bank may foreclose on real property. That's not negotiable, either.

Posted by Robert L. Arrington | May 8, 2017 9:02 AM

Agree with both commentators ... although the Constitutionality of mandatory arbitration provisions, in consumer adhesion contracts, may be vulnerable to the consumer who can prove s(he) did not agree to it.

Posted by Denise Presley | May 8, 2017 9:32 AM

Don't let the camel get his nose in the tent or soon he will be in your bed. The pending Act is the first step in the erosion of the Arbitration process. Granted, it should be stricken down by the Courts, but that is not a certainty. Also, I am not sure how one enters into such an agreement unless it's incident to an employment contract. There has to be some privity with the Plaintiff for the agreement to have affect. I don't think a sign on the back of an 18 wheeler stating " if this truck crushes you and your car, you have to arbitrate', will suffice.

Posted by scott link | May 8, 2017 11:00 AM

I agree with all of the above. Note: contracts of adhesion are not per se illegal so even if a court were to label a contract as a contract of adhesion, that would not end its analysis.

Posted by Micalyn S. Harris | May 8, 2017 2:28 PM

Chances are that whatever the State legislature passes, if it in anyway attempts to restrict or regulate arbitration is a manner that offends the F.A.A. it will end up being preempted. My sense is that any bill submitted to either the State House or Senate is political grandstanding and in the end will be meaningless.

Posted by Paul Bennett Marrow | May 8, 2017 2:44 PM

There is a major difference between the clear language needed for waiver of jury trials and class actions or for mandatory arbitration in consumer contracts and the prohibition of arbitration altogether, although in some states the needed waivers may result in a total prohibition as a matter of reality. And clearly the SCOTUS interpretation of preemption and interpretation of the FAA is different than the view of many state courts (as evidenced by today's opinion out of Kentucky).

But I believe that legislative policy precluding arbitration of certain types of disputes is for the legislature to decide. I would only hope it be done for good and articulated reasons.

Posted by Edwin H. Stern | May 15, 2017 12:01 PM

Jurisdictional Filing Requirements – What are your thoughts?

Section R-4 (c) of the AAA Commercial Arbitration Rules and Mediation Procedures states:

It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as any time requirements associated with the filing. Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.

Should arbitral institutions have an internal body to vet applicable jurisdictional filing requirements prior to case initiation and appointment of the Tribunal? To the degree such requirements are not met, what ought to be next steps?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on May 14, 2017 1:59 PM | Permalink

It is best that fulfillment of conditions precedent be examined early, preferably by the AAA. An inquiry should be made of filing party or counsel as to whether conditions precedent in the arbitration clause (such as mediation, negotiation, etc.) have been met or waived. If not, the filer should be advised to complete those tasks prior to officially filing the arbitration case. To wait till the appointment of an arbitrator just delays the process and causes unnecessary work for the arbitrator.

Posted by James Bowdish | May 14, 2017 2:43 PM

This appears to be a solution in search of a problem. Arbitrators rule on compliance with conditions precedent all the time (and other threshold issues such as time limits, notice, laches, and estoppel). I'm not aware of any problems with this practice.

Posted by Steven Skulnik | May 14, 2017 2:45 PM

It would make economic good sense to have issues of arbitral eligibility determined administratively if the issue is easily resolvable. However, if the answer is not obvious on its face R-4c would seem to delegate the determination to an arbitrator who should then be appointed for that purpose.

Posted by Judge Gerald Harris | May 14, 2017 5:04 PM

If a claimant has not complied with conditions precedent prior to filing, that is an issue that should be raised by the respondent and ruled upon by the Panel, as are all other jurisdictional matters. If the respondent does not raise the issue, it is waived. The arbitral institution should not get involved in this, but rather leave it to the parties and the Tribunal.

Posted by Mark Bunim | May 15, 2017 7:54 AM

I have not found the issue of compliance with pre conditions to be a problem. Considering all that is now on the plate of the case administrator I don't think we need to add another administrative burden.

My Agenda for the preliminary conference includes this issue. The attorneys are aware of it. And it is easily satisfied and in my ten years of arbitrating since leaving the federal bench it always has been.

Not to worry is my answer.

Posted by William G. Bassler | May 15, 2017 8:30 AM

It is the responsibility of the Respondent to raise these issues. The arbitrator or panel will resolve them. It is an interpretation of the contract authorizing the arbitration.

Posted by Tad Deccker | May 15, 2017 9:29 AM

I agree no changes to the rules or to the procedures are required.

Posted by Robert L. Arrington | May 15, 2017 10:05 AM

I agree with the above comments, favoring early and administrative determinations. However, if the matter goes forward the Respondent should be able to re-present any jurisdictional issue to the arbitrator or panel for re-consideration. It is a critical issue for determination on the merits.

Posted by Edwin H. Stern | May 15, 2017 11:53 AM

Having the administrator handle this will create a jurisdictional loop. The only action the administrator can take is to refuse to accept the filing. If the administrator refuses to accept the filing, there is no arbitrator to make any other decision.

If the case is filed the arbitrator can hear any preliminary motion on whether the preconditions to filing were met. It may or may not be that the matter has to be dismissed. Whether it needed to be dismissed would depend on what precondition had not been met.

The administrator rules probably should have a provision in them that says that the failure to meet a precondition to filing arbitration is not an impediment to jurisdiction so that when the arbitration agreement adopts the rules, it adopts jurisdiction to hear these preliminary motions. Otherwise, the argument will be in a court proceeding later that since the preconditions were not met, there was no jurisdiction for the arbitrator to do anything which means that the arbitration award should be vacated. That will simply yield more needless litigation.

Posted by Paul Peter Nicolai | May 15, 2017 11:55 AM

The creation of an administrative body might increase the time and cost of the arbitration. I do not know the percentage of cases that would benefit from this review but from my experience it would appear to be a small fraction many of which can easily be handled by the arbitrator.

Posted by Anonymous | May 15, 2017 12:01 PM

Jurisdictional filing requirements are often determined by the facts unique to each case. The current process for raising these issues with the Arbitrator works well. Creating another layer of case evaluation would seem to complicate what is now a straightforward and efficient process.

Posted by David Andrew Byrne | May 15, 2017 1:28 PM

This does not seem to be a significant issue. Its resolution may depend on the determination of culpable party(ies,) which may require some brief evidence and/or argument. It is better to have the arbitrator(s) decide this issue than to burden the staff with it, who probably have enough on their plates.

Posted by Anonymous | May 15, 2017 10:41 PM

Answering Statement and Affirmative Defenses – What are your thoughts?

Under AAA Commercial Rule R-5(a), if a Respondent does not file an Answering Statement, it is deemed to have generally denied the claims. But in doing so, does the Respondent nonetheless have an obligation to apprise the Claimant of the affirmative defenses it intends to pursue? Conversely, if a Respondent does file an Answering Statement and interposes certain affirmative defenses, is the Respondent now limited to those articulated defenses, even though it had no obligation to file an Answering Statement in the first instance?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on September 9, 2017 8:51 AM | Permalink

The question as framed conjures up the complexity of pleadings in actions at law, a morass that is supposed to be avoidable by providing for arbitration. The concerns implicit in the question, namely unfair surprises at the hearing, can be met by a well conducted preliminary conference which elicits necessary information and insures that the documents to be relied upon are exchanged in advance.

Posted by Judge Gerald Harris | September 10, 2017 8:54 AM

The problem assumes a literal following of Rule R-5(a). This problem never arises in a well-managed commercial arbitration where a thorough scheduling order is entered by the arbitrator after a very early conference with the parties and counsel. Claims, counterclaims, defenses, and affirmative defenses in a well-managed commercial arbitration are discussed in the initial scheduling conference with the goal of getting all claims, counterclaims, defenses, and affirmative defenses disclosed and focused by stated deadlines in the initial scheduling order. The parties know that if claims, counterclaims, defenses, and affirmative defenses are not plead by stated deadlines in the scheduling order, they will not be heard. Yes, to answer the question posed, those matters not disclosed and plead are not heard, subject to what particular due process concerns apply in a specific case. What this problem also raises is the challenge for the arbitrator to get the parties to disclose, focus, and clarify all claims, counterclaims, defenses, and affirmative defenses early in the process. Many litigators relax when they represent a party in arbitration. For many litigators arbitration is a "day at the spa," not the rigorous intellectual and presentation challenge that best arbitration practice requires.

Posted by John Allen Chalk | September 10, 2017 9:04 AM

There is no penalty under the rules for failing to plead affirmative defenses. In order to bar a respondent from submitting its proof in support of an affirmative defense, there would have to have been a prior order from the arbitrator setting a deadline to do so. This is not done in practice, for good reason, viz. arbitration is not litigation.

Posted by Steven Skulnik | September 10, 2017 10:50 AM

I agree completely with the forgoing comments. I would add one point: once it is determined before the hearing what "affirmative defenses" are being pursued, it is also important to clarify, with an opportunity for counsel to be heard, which "defenses" actually carry with them the burden of proof on those issues. In court litigation, many defenses initially asserted as "affirmative" defenses are not that at all; rather, in many instances, an issue raised as a defense actually remains part of the plaintiff's (or claimant's) burden on that issue. The parties are entitled to clarity on this, so they can plan their proofs accordingly.

Posted by mark c zauderer | September 10, 2017 12:38 PM

Good points. Another thing to keep in mind is that in law, very few defenses are truly "affirmative." In litigation many defenses are often plead as being affirmative which in fact are not. If there is a valid "affirmative" defense, it may well be the subject to a pre-hearing motion.

Posted by Peter Altieri | September 11, 2017 7:54 AM

I also agree with the above comments, and particularly with those of Judge Harris about the importance of the preliminary conference. I always enter orders with discovery end dates and endeavor to address these issues at the last prehearing conference when listing the issues to be addressed, if not addressed previously. It seems to me that the issues should be addressed and decided based on the basis of fairness in each matter, with particular emphasis on fairness and surprise. As a last resort, the case can be adjourned for a brief period if necessary to accommodate a fair exploration of all relevant issues.

Posted by Edwin H. Stern | September 11, 2017 11:18 AM

One other thought: If the parties have agreed the Rules of Evidence apply, then the parties can object to evidence that varies from the pleadings.

Posted by Bob Jenevein | September 11, 2017 3:15 PM

The Code of Ethics for Arbitrators in Commercial Disputes – What are your thoughts?

The Code of Ethics for Arbitrators in Commercial Disputes was adopted nearly 15 years ago in 2004. What Canon or provision in that Code would you recommend changing and how?

Kindly see the following:

Code of Ethics

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on November 18, 2017 12:19 PM | Permalink

The AAA should study guidelines regarding social media issues, such as raised by judge-focussed cases involving Facebook "Friends" and conflicts.

Posted by Robert Bartkus | November 19, 2017 2:45 PM

Having just participated in "Arbitrating in a Digital World", in New Orleans, it is clear to me that electronic evidence continues to grow in alternative dispute resolution, involving all digital communication devices including those of social media. This fact not only increases the volume of potential evidence, but places greatly pressure on the code of conduct for the parties, their attorneys and arbitrators.

Posted by Robert Barras | December 12, 2017 10:08 PM

Emergency Measures – What are your thoughts?

Taking direction from the courts and clients, various arbitral institutions have introduced emergency measures within their rules. Are such measures necessary and effective? Does one forum provide greater success with emergency relief - as between courts and arbitral institutions, and as between international and domestic? Why?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on April 11, 2017 10:52 AM | Permalink

Necessary? No. Desirable? Yes. It can prevent a claimant from filing a lawsuit to get a restraining order before filing for arbitration, or at least saving the preliminary injunction state for arbitration. How effective these measures are depends more on the efficiency of counsel than on the forum or the arbitrator.

Posted by Robert L. Arrington | April 11, 2017 11:14 AM

Emergency measures, such as the appointment of emergency arbitrators, are necessary to satisfy user needs in certain cases. Such measures help fulfill the promise that arbitration can provide efficient, skilled and fair resolution without resort to the courts. Emergency measures may be critical in the international context when local courts cannot be relied on to provide fair, timely or effective relief. Of course enforcement is always an issue, particularly in international cases, but emergency measures can be as effective or more effective than court relief in many cases and should be valued as an additional tool for user consideration.

Posted by Gary Benton | April 11, 2017 2:15 PM

Emergency Measures – What are your thoughts?

Many arbitral institutions now incorporate emergency measures of protection into the rules. Is there a guiding practice when a party is better served filing for emergent relief in arbitral proceedings as against court? Where there is mutual party agreement, should an emergency arbitrator continue to serve on the case as part of the Tribunal?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on August 14, 2017 8:20 PM | Permalink

The ability of arbitrators to address emergent requests for relief is an important feature of arbitration and an opportunity for litigants to obtain close oversight that the courts may not be able to provide. I have been an advocate, an arbitrator, and, by consent, acted with the powers of the Supreme Court. There are times when the neutral must spend time with the parties and get "into the weeds" at a time when the neutral's actions can have a profound effect on the life of the parties. Granting expansive authority to the arbitrator is an enormous benefit to the parties.

Posted by Mark C. Zauderer | August 14, 2017 9:10 PM

A party needing emergent relief will be better advantaged going to court. In arbitration there is delay commencing a case because of the need to select an arbitrator acceptable to all parties. Cases can be heard very fast for emergent matters.

Posted by Anonymous | August 14, 2017 10:34 PM

With respect to the anonymous comment, I believe the institutions directly appoint the arbitrator, not the parties, and hold a hearing within 24 hours.

Posted by Anonymous | August 15, 2017 7:46 AM

The findings of the emergency arbitrator (EA) may or may not be binding on a subsequent Panel. If they are not, the Panel must determine whether to accept or reject them in determining the case in chief. It would be inappropriate, not to say awkward, for the EA to participate in making those determinations.

Posted by Judge Gerald Harris | August 15, 2017 7:58 AM

Whether to go to court or to the institution that appoints an emergency arbitrator does not lend itself to an easy answer because there may be questions that need to be resolved by the court rather than by an arbitral panel. That being said, in my experience the emergency arbitrator has acted quickly and decisively. Because the facts found are not found by the arbitral panel I don't think any factual or legal finding would suffice to meet the criteria for claim or issue preclusion or law of the case.

Posted by William G. Bassler | August 15, 2017 9:23 AM

Parties should consider applying to the arbitral tribunal for interim relief when:

* The tribunal has been constituted and is available on short notice.

* The applicant is satisfied that the other party will respect orders issued by the tribunal.

* The federal or state courts at the place of arbitration are reluctant to grant provisional remedies in aid of arbitration (see, for example, Smart Techs. ULC v. Rapt Touch Ireland Ltd, 2016 WL 3871179 (N.D. Cal. July 15, 2016) (declining to entertain motion for preliminary injunction in aid of arbitration in view of availability of emergency arbitrator); and A & C Disc. Pharmacy, L.L.C. v. Caremark, L.L.C., 2016 WL 3476970, at *6 (N.D. Tex. June 27, 2016) (declining motion on the ground that the arbitrator, not the court, should rule on who has the primary power to decide whether the request for preliminary relief is arbitrable)).

* The parties' agreement or the applicable institutional rules empower the arbitral tribunal to grant broader interim relief than would be available in court (see, for example, CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. Pship, 2012 WL 6178236, at *3-*5 (S.D.N.Y. Dec. 10, 2012) (asset freeze) and Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 263 (2d Cir. 2003) (pre-award security)).

* The respondent is a foreign state (or an agency, instrumentality, or political subdivision of a foreign state). Parties seeking judicial relief against foreign states must follow the procedures of the Foreign Sovereign Immunities Act (FSIA), which is the sole source of subject matter and personal jurisdiction over an action against a foreign sovereign (Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela, 863 F.3d 96 (2d Cir. 2017)). The FSIA service of process provisions (set forth in Section 1608(a) (28 U.S.C. § 1608(a))) are tiered in a four-step hierarchical manner than can take months to complete.

* State law requires the posting of security for a particular controversy (see In re MF Glob. Holdings Ltd., 2017 WL 2533353, at *6-8 (Bankr. S.D.N.Y. June 12, 2017)).

The parties will have had no input on the selection of the emergency arbitrator. Therefore, the selection of merits tribunal should follow regular order.

Posted by Steven Skulnik | August 15, 2017 10:20 AM

We just had a lengthy and expensive second arbitration (waiting for the arbitration award). I, as a small business claimant, asked my lawyer why we couldn't get emergency protection of our interests based on the plain reading of the arbitration award. The Respondent was making the same arguments that were rejected by the first arbitration award. Fortunately, the second arbitrator didn't allow those arguments to be entered, saying rightly that the matters were settled. But, if we had the ability to ask for emergency protection based on the plain reading of the arbitration award, we would have been spared the agony and wait for going through the second one.

There is definitely a need for not just emergency protection but for injunctive relief.

Posted by Sanjay Shah | August 15, 2017 3:20 PM

Sometimes it depends on which is the appropriate jurisdiction in which to ask for emergency relief. If it is in a crowded court environment, one may very well be better off seeking emergency relief from a qualified AAA arbitrator. The choice of a separate arbitrator from the one or ones assigned to a case, or using one of the assigned arbitrators really presents a case-sensitive choice on the part of the applicant.

Posted by Judge George D. Marlow (ret.) | August 15, 2017 3:40 PM

Rule 38(f) of the AAA Commercial Rules indicates that the emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel. Thus, it would appear that mutual agreement of the parties does allow for the emergency arbitrator to continue as part of the Tribunal.

Posted by Margarita Echevarria | August 18, 2017 9:54 AM

8. ARBITRATION AWARD

Confidentiality and the Award – What are your thoughts?

An arbitrator is encouraged (if not empaneled) to preserve the confidentiality of sensitive documents or information (e.g. as provided in most institutional rules). Where an award involves a discussion of such confidential and sensitive material (e.g. personal or medical details), should the arbitrator be guided by certain protocols or procedures? If yes, provide examples. Does the analysis change where it appears the award is more likely to be dealt with in subsequent court proceedings for vacatur, confirmation, or the like?

What are your thoughts/comments? Please provide below.

Posted by Jeffrey Zaino on June 10, 2017 4:48 PM | Permalink

I have never seen this done. Parties deal with this issue in confirmation / vacatur proceedings by asking the court for permission to file the award under seal and place redacted versions in the public record.

Posted by Steven Skulnik | June 11, 2017 9:50 AM

The US courts are reluctant to impose confidentiality agreed between the parties on third parties who may seek discovery and also tend to expose any information necessary to their decisions. For example, in Veleron Holding, BV v. Morgan Stanley, 2014 WL 1569610 at *1 (SDNY 2014), the court stated that despite the fact that the arbitration record was confidential under LCIA rules:

"Litigation in an American court is not governed by the principle that 'what happens in Vegas stays in Vegas' – or in this case, in London. Private agreements cannot be used to circumvent United States courts' policy in favor of open litigation ... "

Therefore, if the parties are very concerned about confidentiality, they should seek a bare award. In addition, for material subject to privilege or other protections, confidentiality orders are a must and the arbitrator should not cite the confidential information.

Posted by Laura A. Kaster | June 11, 2017 11:29 AM

Awards should be confidential. If the parties choose to vary that by agreement or otherwise that is different. However the neutral should not disclose unless authorized by the parties.

Posted by Anonymous | June 11, 2017 12:03 PM

Laura correctly notes that some courts are reluctant to seal the record on appeal even if all parties request the record be sealed. Thus the arbitrator should not include any confidential information in the award, but that probably could be done in an award that gives a brief explanation of the reasons for the decision and award.

Posted by Stephen A. Hochman | June 11, 2017 3:29 PM

With agreement of the parties, I have issued a nonconfidential 'summary award' that can be filed and be the basis for a confirmation motion. I believe this can be done under the AAA rules even without full consent, i.e., on the motion of a party. If a party wishes to move to vacate all or part of the award, they may take the ne essay steps to file it under seal.

Bob

Posted by Robert Bartkus | June 11, 2017 7:30 PM

Confidentiality is best protected by the parties by agreement. Complete confidentiality is likely not possible. Protective Orders are appropriate during proceedings. The Award itself cannot be completely confidential, else it could not be confirmed or vacated.

Posted by Robert L. Arrington | June 11, 2017 7:34 PM

Protected Health Information/Personal Health Information should always be protected and not disclosed. PHI issues should be addressed at the initiation of the arbitration and should be subject to carefully drafted protective orders and not disclosed in awards. The Office of Civil Rights at U.S. HHS has a current initiative underway examining how healthcare providers are protecting PHI and the strength of providers' data security measures with large dollar settlements already reached with providers whose data security procedures were questioned. All healthcare arbitration parties have responsibility to protect PHI and this subject should be one of the first addressed in the arbitration process.

Posted by John Allen Chalk | June 12, 2017 9:26 AM

The confidentiality order or parties' agreement could take care of this exposure by providing the award shall not be publicly released until each party has had the opportunity to redact confidential information appearing in the award. In any event, the arbitrator should not be restrained from writing his/her reasons for the Award. The arbitrator should never release publicly or use any information in the award.

Posted by Edward Dreyfus | June 12, 2017 2:45 PM

Unless the parties have agreed otherwise in their arbitration agreement or by later agreement, the presumption is that the existence of the arbitration, the award, and any information disclosed in the course of the arbitration are not to be identified outside of the parties and the forum by the arbitrators. It is good practice for arbitrators to establish at the initial scheduling conference whether the parties want to have a protective order in place to further limit disclosure of certain types of information except to designated party representatives. Short of court order or agreement, awards should not be disclosed by arbitrators.

Posted by Anonymous | June 12, 2017 2:49 PM

My rule is fairly absolute, that is, to protect confidentiality of award and opinion even if award is attacked in court or the public square or both. The parties, of course, can change this by agreement or through waiver, and courts have been responsive through sealing and the like.

Posted by Anonymous | June 13, 2017 11:16 AM

Arbitrators are ethically required to keep arbitration confidential. The parties actually have no such requirement unless they enter into a confidentiality agreement regarding the arbitration and the evidence sought to be introduced. A recommended practice would be to enter into a confidentiality agreement. In the Veleron case Laura Kaster cites, arbitration was pending in London when litigation was commenced in the NY USDC on a related matter. If what parties fear is reference to the award in a vacatur hearing, then the award could be bare bones, or the parties and the arbitrator could agree on the manner in which sensitive data could be referenced in the award so that the data itself is not disclosed.

Posted by Judith Meyer | June 13, 2017 1:47 PM

Would it be helpful if after an arbitrator unintentionally includes sensitive or confidential information in an award a party could ask for the award to be modified to remove that information from the award. This might be done by amending R-48 Modification of the Award to include as a ground the redaction of information that the parties had previously agreed was confidential. The timing of Rule 48 would allow this to occur before the other party can move to confirm.

Posted by Anonymous | June 13, 2017 1:50 PM

Review of Awards by ADR Institutions – What are your thoughts?

Some ADR institutions review/edit a Tribunal's award. To what extent, if any, should a Tribunal's award be reviewed and edited by an institution?

How does review/editing vary by institution and within institutions?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on August 6, 2017 11:00 AM | Permalink

It is useful for an ADR institution to review an award for the purpose of correcting any obvious mathematical miscalculations, typographical errors or misspellings. Such edits should only be made after consultation with the awarding Tribunal.

Posted by Judge Gerald Harris | August 6, 2017 11:51 AM

I strongly believe they should not be edited at all except to conform to a particular format. The award, warts and all, is the arbitrator's, no one else's. Howard Edelman

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Posted by Howard Edelman | August 6, 2017 11:53 AM

On the question of review, I think it needs to be handled with care as arbitrator's I respect write with precision and meaning based on the record before them and the credibility of witness. At the same time there may be an obvious error inconsistency, ambiguity or failure to address a claim so that it would be helpful to know that in advance as an arbitrator. Those committed to such a review function need to be well trained, respectful, knowledgeable and understanding of the arbitrable role and function. Anonymous

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Posted by Anonymous | August 6, 2017 12:05 PM

Provided that the arbitrator retains the final authority over the substance and language of the award, I find it helpful to have the neutral forum provider review a draft for clarity, completeness and consistency. The arbitrator must retain final authority.

Posted by William H Ewing | August 6, 2017 12:06 PM

Everyone deserves an editor, and lawyers (who are also arbitrators) are not known for their pristine writing style. Every party in arbitration deserves a clear and well-written award. If the institution can afford an editor, I would suggest that the award be read for clarity. If the editor does not understand it, likely the parties, too, will be confused. The editor should not change it. She should tell the author simply that certain thoughts or reasonings are not clearly expressed. Certainly, the editor should never weigh-in on the award itself (unless, of course, it leaves something out or does not reflect the reasoning in the opinion). In my experience, AAA reads an award for the inclusion of certain boilerplate language that protects the award from challenge, and that AAA suggests in a template given the arbitrator. It also reads the award for mathematical correctness and the awarding of fees and costs. JAMS, I believe, attempts to read the award for carefully expressed reasoning, and grammatical and syntactical errors. The ICC does the same, I believe. (I could be wrong about JAMS and the ICC and I would love to know more.)
Judith Meyer

Posted by Judith Meyer | August 6, 2017 12:37 PM

I think it's valuable to have a fresh set of eyes review awards and I always appreciate the feedback. There's been a few times when I've had to convince the tribunal's reviewer that some factual text was important to understanding the award, but on balance their input makes awards stronger.

Posted by Denise Presley | August 6, 2017 12:46 PM

I strongly believe they should not be edited at all except to conform to a particular format. The award, warts and all, is the arbitrator's, no one else's. Howard Edelman

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Posted by Howard Edelman | August 6, 2017 2:11 PM

My Awards benefit from an AAA review to insure that certain formula driven information is contained in the Award. The information is standard for each award. However, at no time should an institution review an award on its merits, second guessing the basis for the award, or even suggesting an alternative outcome. Should a review see a red flag, such as a total misstatement of the law or should a review feel that a fundamental constitutional right has been violated, then perhaps pointing that out to the Arbitrator for the Arbitrator's evaluation might be in order.

Posted by Michael Orfield | August 6, 2017 2:36 PM

I find it helpful when they do review an award, since they have caught a wording I have used that isn't completely clear or is not specific enough. That kind of administrative involvement is useful, but I don't think they should be offering advice on the content of the award, since they weren't present at the hearing to hear all the evidence.

Posted by Raoul Drapeau | August 6, 2017 3:05 PM

The ADR Institution's proof-reading can be helpful and much appreciated. Nor is an edit that supplies the amount of forum fees, and totals the arbitrators' compensation out of line. I personally do not mind a question about clarity or syntax. But the institution should not edit the substance of the arbitrator's decision. I hasten to add that I have never had that happen.

Posted by Robert L. Arrington | August 6, 2017 3:37 PM

This is a subject about which I have strong views. The Case Manager should be the first line of defense. The Case Manager presumably sees many awards and can recognize when one is not up to standard, which means format, language, grammar, citations, completeness, and comparability to AAA-approved awards in similar matters. Such an award should be returned to the arbitrator or chair for correction/revision.

When I served on the federal bench, we had one particularly invaluable Clerk of Court who took it upon himself to act as a safeguard against a judge's making a fool of himself. It was the judge's option to accept or reject the advice.

I would recommend that the AAA institute three procedures: 1) a mandatory 5-day submission deadline before the date of issuance of the award for Case Manager review and arbitrator/chair correction; 2) a training regimen for Case Managers in this important aspect of review; 3) a monthly alert/list to all panel members of common errors/omissions that have been detected in the last month's awards. Of course, the Case Manager should submit all poorly drafted awards to headquarters.

Anonymous

Posted by Anonymous | August 6, 2017 4:29 PM

Not a good idea. Individuals are engaged to offer their reasoning and opinions. Thanks

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Posted by Anonymous | August 6, 2017 5:19 PM

Since each arbitral institute has its own expected format and rules (particularly on how to list costs), I want that review whenever I'm drafting my first award for any arbitral institute. Since most awards I've issued have been as a sole arbitrator, I appreciate a review -- it the award makes sense to the institute, it should make sense to the parties.

Posted by Paul G, Huck | August 6, 2017 6:22 PM

The AAA has the needed information on fees and costs so they are the only ones in a position to insert that. I appreciate having another set of eyes on an award - even with Word, typos are possible and the occasional comment - always on wording - never on substance, and having the chance to review and edit if I think the concern is justified.

Posted by Micalyn S. Harris | August 7, 2017 2:41 PM

I have no problem having my written work reviewed, but only if the editor consults me before making any suggested constructive changes. However, if we disagree on a change, I believe my opinion on any change should control.

George D. Marlow

Posted by George D. Marlow | August 7, 2017 3:11 PM

I recently had the language of an award questioned because the reviewer didn't understand some of the language which was unique to the parties' contract. After a question was raised about the language of the award, I re-read it to satisfy myself that I got it right. After I explained why it was written the way it was, it went out as I originally drafted it. I appreciated the second pair of eyes on it. It required me to satisfy myself that it was complete, accurate and would. E clearly understood by the parties. The review was welcome even if the final word was mine.

Posted by Michael A. Levy | August 7, 2017 7:31 PM

Awards should be reviewed for clarity. If the case manager cannot understand the award and/or reasoning, it likely needs clarification. However, no substantive changes should ever be made without the prior approval of the arbitrator. Findings of credibility should never be changed, since the arbitrator had the benefit of seeing the witnesses and assessing their demeanor. Sanitizing awards is a dangerous practice unless the arbitrator accepts the changes.

Posted by Nelson Timken | August 8, 2017 8:07 AM

Review yes. Edit no.

The institution can suggest improvements and even help the tribunal avoid errors, but it's the tribunal's responsibility to recognize bad suggestions and reject them. (Even then, though, it doesn't hurt to be made to think.)

Complication: An institution I work for has started asking for completion of supplemental data survey forms for statistical purposes. At times I've disagreed with staff about how a form question should be answered. I've deferred to them in these cases because it's their survey, although I wouldn't be so flexible if we were talking about the decision itself.

Posted by anrew gerber | August 8, 2017 12:19 PM

9. ATTORNEY'S FEES AND COSTS

Attorney's Fees and Costs to Prevailing Party – What are your thoughts?

When the parties' arbitration agreement contains a provision permitting the award of attorneys' fees and costs to the prevailing party, is it the better practice to (a) have all the parties submit their respective attorneys' fees and costs applications along with any post-hearing submissions so that a final award can be issued that decides all issues, including the attorneys' fees and costs issue or (b) issue an interim award, and then request supplemental briefing on attorneys' fees and costs so that it is at least clearer who is the prevailing party and to what extent?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on September 30, 2017 2:44 PM | Permalink

I have done it both ways. For me, it usually makes sense to discuss it with the parties and if they agree on an approach, follow that. If they disagree, I take the cost submissions with the final merits submissions so as not to slow down the issuance of the final award.

Posted by Steven Skulnik | September 30, 2017 4:59 PM

For arbitrators with cases using Florida law there is some important case law to consider. Florida courts have typically not accorded the power decide entitlement and amount of attorneys' fees and costs to arbitrators. Written agreement of the parties and specific language in the arbitration clause can, of course, move the attorneys' fees decisions to the arbitrator(s). Further, Florida courts typically require that the award of attorneys' fees be tied to specific law that allows such an award. In so making that tie, Florida courts will require, at a minimum, a reasoned award indicating prevailing party by count of the demand and specific authority for award of attorneys' fees. It may be valuable to address this issue at the outset of the matter so that, to the extent practical, time may be kept by the lawyers relating to each count for which relief is sought.

Posted by Steve Platau | October 1, 2017 8:17 AM

I think it only makes sense that if a party wants to have attorney's fees & costs awarded to the prevailing party, that they state in advance of the evidentiary hearing what those costs are.

Having this information in advance of composing an award is helpful, because sometimes it is not clear which is the prevailing party when the arbitrator(s) do not award all that either party demanded?

Posted by Raoul Drapeau | October 1, 2017 9:40 AM

Without further definition or explanation, the term "prevailing party" suggests that the claims at issue will result in an easy-to-determine winner and loser. Unfortunately, the results are seldom that clear, and as a result, as an arbitrator I must sift through the various causes of action asserted by each party in their claim or counterclaim. When faced with a poorly worded fee-shifting provision, I invite briefing on the definition of "prevailing party" to accompany the details of each party's accumulated legal fees. The timing of this submission varies.

Posted by steve conover | October 1, 2017 10:03 AM

This question in my opinion demands a simple answer: You award fees and costs when the contract containing the arbitration provision says you can, and don't when it does not. The degree to which the prevailing party "prevailed" influences the amount, but not the fact, of the award.

Posted by Robert L. Arrington | October 1, 2017 10:04 AM

In my opinion it is the better practice to have both sides submit attorney's fees and cost application with post hearing submissions.

Having both sides submit is not a problem since time is electronically and not a burden to assemble. It then allows you to assess the reasonableness of the fee application by having a comparison.

A colleague of mine issued an interim award and the disgruntled party then filed a spurious challenge to his impartiality, holding everything up.

I see no reason why after receipt of fee applications the Final Award cannot be clear as to who is the prevailing party and to what extent.

Posted by Hon William G. Bassler | October 1, 2017 10:45 AM

I have always issued an interim award determining liability and damages on the claims and counterclaims and entitlement to attorneys' fees and arbitration costs without setting forth an amount. If no party is entitled to attorneys' fees, then there is no need to do an interim award on that issue and a final award can be entered on arbitration costs and expenses. The interim award determining entitlement to attorneys' fees should clearly be entered as a non-final award not subject to court confirmation, and I always make that clear in my interim award. The interim award should provide for the attorney fee submissions to be made by a certain date and state that the fee submissions are still part of the hearing process such that the hearing will not be closed until the fee submissions are made, after which the arbitrator then declares the hearing closed.

I never require in-person hearings or expert testimony to determine the amount of the fees. The amount is determined on written submissions to include the attorneys' engagement letter, time records, and, if desired (but not required) any fee affidavits supporting (or opposing) the amount of the fees. If this procedure is followed, then the 30 days for entry of the final award will not start until after the hearing is formally closed, and I don't declare the hearing closed until the submissions on the amount of fees are finalized and sent to me by all concerned.

To require the parties to submit their fee applications before entitlement to fees is determined would be a huge waste of time and resources for all concerned. Better to determine entitlement first in the interim award and then the winner can submit his or her fee application and the other parties can submit their opposition responses to the amount of the fee award being sought.

Whatever procedure is used should discussed and agreed to at the initial preliminary hearing and clearly described in the scheduling order as an agreed procedure to be followed.

Posted by James Bowdish | October 1, 2017 11:12 AM

I, too, have done it both ways, depending on the size of the case and the quantum of fees anticipated. In a small matter, both parties can submit a fee application along with post-hearing submissions, with only a small amount of additional labor. In a larger matter, however, a fee application may involve substantial additional labor; in that case, I issue an interim award and request a fee application from the prevailing party. And, of course, if the parties agree on an approach other than that, I "go with the flow..."

Posted by Deanne Wilson | October 1, 2017 1:02 PM

Steve Platau's comment on record keeping has importance beyond Florida. In every arbitration proceeding in which fees and costs may be awarded, whether by contract or by each party requesting it, thus amending the contract, counsel needs to be instructed to detail their fees and costs to each claim and counterclaim where there are multiple claims and counterclaims. Also recognize that fees and costs will have accrued before the preliminary hearing.

It enables the tribunal to more accurately award fees and costs for the claims and counterclaims on which a party prevails when they do not prevail on all claims and counterclaims.

A related question is whether or not to award fees and costs to a prevailing party when the arbitration clause provides for the recovery of fees and costs by one party and is silent regarding such recovery by the other party.

Lou
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Posted by Lou Coffey | October 1, 2017 1:43 PM

I commonly have attorney's fee-shifting situations in my cases, so we always discuss this in our case management hearings. My view, normally accepted by the parties, is that it wastes the parties' time and resources to require a presentation before the award is made on the underlying claims, so fees should be bifurcated. That mirrors the practice in Federal courts. Bifurcation also gives the parties an opportunity to settle the attorneys' fee claims in light of the award, avoiding another hearing.

In commercial cases, fees are sometimes liquidated or simple, so that it would make sense to include them in the award on liability. In some of my cases, the claimant has announced at the merits hearing that the fee claims are waived.

Since one size does not usually fit all, I like to talk with the parties about what makes sense in their case. In my early days as an arbitrator, this was often the first time they had thought about a lot of the questions. To give more time for consideration, I now usually send out a pre-case-management-conference interim order asking the parties to consider and confer about a stated set of questions that will come up in the case management conference. That works sometimes.

Posted by Richard T. Seymour | October 1, 2017 1:50 PM

I second Arbitrator Arrington. I will usually request that counsel submit time records together with final briefings and then determine which side is entitled to recover attorney's fees and what amount is reasonable.

Posted by Judge Gerald Harris | October 1, 2017 2:09 PM

I've lobbied for a rules change to provide for prevailing party recovery and a recognition of the "calderbank" offer of settlement from the British system. Would do wonders for settlement of cases.

Posted by Joseph McManus | October 1, 2017 2:10 PM

In Large Complex cases, I think the better approach is to bifurcate attorney's fees and decide that issue after rendering a "partial final" award on the merits. This way only the prevailing party needs to submit their attorney's fees information and the other side can submit its opposition to the amount being claimed. In regular commercial cases (and in consumer cases) where the amount at issue in not as significant, I think handling the attorney's fees issue is best done as part of the overall dispute since the amounts involved would not justify a separate proceeding.

In either situation, I discuss the attorney's fees issue (assuming the contract provides for the prevailing party is be awarded attorney's fees, or if the claim in one of statutory fee shifting) during the preliminary hearing and ultimately abide by the parties' wishes in terms of the process that will be used.

Posted by Mark Bunim | October 1, 2017 2:38 PM

(1) I think you get more candid evidence before you announce the beneficiary of that evidence.
(2) A low-ball submission by one side that can be an indication it expects to lose on the merits. I always find that helpful.

Posted by Bob Jenevein | October 2, 2017 9:57 AM

If the contract calls for an award of attorney fees I require the parties to submit their proposed attorney fee award along with all details on the billing within 10 days of the close of the evidentiary hearing or the award of attorney fees is waived. If attorney fees are under consideration because of a statutory provision, I require the same information split by cause of action so that I can determine what attorney fees were expended for those causes of action where the statutes allow for the award of attorney fees; again in 10 days.

Requiring the submission after the hearing allows the attorneys to submit all of the legal fees incurred in the matter. Requiring it to be within 10 days of the close of the hearing makes the timing such that the award is not unduly delayed.

Posted by Paul Nicolai | October 2, 2017 10:29 AM

I am currently serving on a FINRA employment related case. I was informed that since the organization permits only one Award, arbitrators are not permitted to issue an interim award, and then request supplemental briefing on attorneys' fees and costs.

Posted by Patrick Westerkamp | October 2, 2017 10:35 AM

Two quick comments when deciding reasonableness of fees we must take into account the actions of the attorneys whether their side prevails or not including refusing to follow an arbitrators prehearing order or schedule. I find that might be better to address after the award on the merits has been issued so as to give both parties full opportunity to brief what may be considered a "sanction ".

Second an issue for another day, boy how do you handle payments to the litigation funder of the successful party in the cost awards?

Posted by Eric Wiechmann | October 2, 2017 11:20 AM

I would like to follow up on a comment by Steve Platau about Florida law.

Florida has adopted its Revised Florida Arbitration Code, which is based on the Revised Uniform Arbitration Act.

The new statute, unlike the old one, expressly authorizes an arbitrator to award attorney's fees and reasonable expenses, if such an award is authorized by law in a civil action involving the same claim, or by the agreement of the parties to the arbitration proceeding. S. 682.11(2), Fla. Stat.

Under the transitional provision, the Revised Code became fully applicable effective July 1, 2016. S. 682.013, Fla. Stat.

I agree with Mr. Platau that (even under the new statute) it will be necessary to determine the prevailing party and it makes sense to address the fee issue with the parties early in the process.

Posted by Gerald Cope | October 3, 2017 11:06 AM

I, too have done it both ways. Where fee awards are authorized by agreement, I've issued a partial final award and asked for fee information from the prevailing party. In the cases I've handled, even where one party is awarded less than requested, the prevailing party is clear.

This procedure avoids putting the non-prevailing party to additional expense and expedites resolution of the merits.

In FINRA cases, where both parties have asked for attorneys' fees, counsels usually submit the required information at or within a few days of the final hearing. (If at the hearing, all recognize that the last day's number is an estimate.)

Posted by Micalyn S. Harris | October 10, 2017 12:39 PM

Attorney Fees – What are your thoughts?

May a party in an arbitration unilaterally withdraw its demand for attorney fees after both sides had demanded fees? If so, is there a cut-off for the withdrawal? Before the hearing? Mid-hearing? After the hearing?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on December 17, 2017 8:36 AM | Permalink

Unless this is a trick question, while a party may not add a new demand without leave of the Arbitrator, a party may abandon or withdraw a claim at any time. The fact that it is a claim for relief/remedy does not differentiate it from a substantive claim. "At any time" in arbitration means at any time the Arbitrator has jurisdiction. If the withdrawal is post-hearing, and the record is closed, and the Arbitrator is functus officio, then it would be too late to withdraw or amend anything. While I would be curious as to why one party would withdraw a demand for attorney fees, without other facts, she may do so until the record is closed. I would love to hear a dissenting point of view.

HAPPY HOLIDAYS.

Judith Meyer

Posted by Judith P Meyer | December 17, 2017 9:16 AM

Obviously, the governing rule is 47(d)ii and one must assume, for the purposes of this question, that neither local law nor the agreement make provision for the award of attorneys' fees. Thus, the remaining basis for such an award is that both sides initially requested it. My view is that the withdrawal of the request by one side should not abrogate the entitlement of the non-withdrawing party to seek such relief if it is done only after the withdrawing party has heard some or all of the evidence and determined it is likely to lose. Fairness would seem to dictate that the withdrawal, to effectively remove authority to award attorneys' fees, should be made before the hearing is commenced

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Posted by Judge Gerald Harris | December 17, 2017 9:39 AM

Rule R-6 does address this issue, in that after the arbitrator is appointed, any changes in claims require the arbitrator's assent.

Since the rule doesn't address when such proposed changes occur relative to the hearings, the arbitrator ought to be able to accept or deny any such changes in claims.

However, if one of the parties wants to withdraw a claim on attorney's fees, I would be favorably disposed to allow it. If the claim is to add such a claim, then I'd want to have a good explanation as to why now.

Posted by Raoul Drapeau | December 17, 2017 10:02 AM

Assuming a general and broad arbitration clause, under New York law the parties authorized a fee award when they both requested attorneys' fees during the pendency of the arbitration (In re Arbitration Between Gen. Sec. Nat. Ins. Co. & AequiCap Program Administrators, 785 F. Supp. 2d 411, 422 (S.D.N.Y. 2011)). While a party can withdraw its own claim, once the tribunal has jurisdiction to award fees to the prevailing party, the jurisdiction cannot be withdrawn by only one party. If that were the case, then any party could claim that it no longer agrees to arbitrate any claim.

Posted by Steven Skulnik | December 17, 2017 10:50 AM

Initially I was of the opinion that a party should be able to withdraw a claim for counsel fees at any time.
But I see the wisdom of precluding that to avoid gamesmanship where a case has reached a point where a party sees the handwriting on the wall and decides to withdraw the claim for counsel fees. Perhaps the best way to deal with this issue is to bring it up at the preliminary conference. And spell it out that the claim can't be withdrawn.

Some attorneys still aren't aware of the case law that says even though attorney fees are not in the contract a claim by both sides authorizes the Panel to award them. The pleadings by both sides for attorney's fees amount to an agreement to award them. Best no avoid that kind of "gotcha" tactic.

Posted by William G. Bassler | December 17, 2017 12:42 PM

I agree with the comments of Judge Harris and Steven Skulnik. If under the applicable rules - for example, the AAA Construction Industry Rules - the initial request for attorneys' fees by both parties created the basis the arbitrator(s) authority to award those fees, then I would allow the withdrawal of the claim but make it clear that the withdrawal does not change the tribunal's authority to award attorneys' fees to the other side, if appropriate.

Posted by Nancy Wiegers Greenwald | December 18, 2017 9:36 AM

There is no reason why a party cannot withdraw its claim for attorney fees, but the jurisdiction of the arbitrators remains intact and the other party is free to continue to pursue its claim for attorney's fees. I think this is consistent with the views of other above.

Posted by Anonymous | December 18, 2017 10:49 AM

Deposit Issues with Claimant – What are your thoughts?

What are some practical ways to prevent or minimize the problem of claimants who delay or refuse to pay their share of any required deposits because they realize that they are unlikely to win on the merits of their case?

Please provide your thoughts/comments below.

Posted by Jeffrey Zaino on November 26, 2017 5:47 AM | Permalink

This seems to be significant in some multi party cases.

Posted by Anonymous | November 26, 2017 7:09 AM

The risk of non-payment would be reduced by request deposit amounts from arbitrators and obtaining deposit payments before scheduling the preliminary conference.

Posted by Anonymous | November 26, 2017 8:40 AM

This seems to be a particular problem in a fast moving emergency case; the Respondent is often not incentivized to pay promptly. Maybe the Claimant should be required to pay upfront for both parties, and sort it out later.

Posted by Richard Dunlap | November 26, 2017 9:58 AM

Either AAA requires a minimum deposit before the PH, or requires a full deposit based on the Arbitrator's total estimate after the PH. In either case the arbitration does not continue beyond the date to have such deposits in place. If the matter goes forward with deposit issues, the Arbitrator must be prepared to shut it down unless one party is prepared to pay all and take care of that issue in the Award, or see it through, enter the Award, and hope AAA can collect. What are the collection rules for AAA anyway? I really try to stay out of the fees side of the case. Certainly galls me when one party seems to be manipulating the process in this way.

Posted by Michael Orfield | November 26, 2017 10:54 AM

The other party or parties may choose to pay the cost of the arbitration and any unpaid deposits may be assessed in the award. The paying party will then have the means to collect whatever is due them. This alternative should be wholly voluntary and the arbitrator should not intervene in the arrangement. Any negotiations to this effect should be undertaken by the arbitral institution. The arbitrator would then be apprised of the arrangement in the award preparation phase. The AAA rules or practices do provide for this.

Posted by Jose W Cartagena | November 26, 2017 11:49 AM

The easiest way is to have the Claimant post the full deposit. The arbitrator will then make the decision of who should be liable for the costs, and state so in his award. It has that ability anyway, so no party approval is required.

Posted by Allen Thompson | November 26, 2017 12:22 PM


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