ISSUES IN ARBITRATION OF EMPLOYMENT CASES

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Kathryn E. Miller, Esq.
Littleton Alternative Dispute Resolution, Inc.
Katy@LADRmediation.com
www.LADRmediation.com

David Stacy, Esq.
Stacy and Associates, LLC
dstacy@stacy-law.com
www.stacy-law.com

Meghan W. Martinez, Esq.
Martinez Law Group, PC
martinez@mlgrouppc.com
www.mlgrouppc.com

I. Selection of the Arbitrator

A substantial difference between court and arbitration is that parties to arbitration select their own "judge(s)". Most employment cases in this jurisdiction are tried to a single arbitrator. The choice of arbitrator is, without doubt, one of the most important decisions that you will make in the process. How do you select an arbitrator in whom you will have confidence?

If you are using an arbitration provider service such as AAA or JAMS, you will receive a list of potential arbitrators shortly after filing the Demand. Their rules will provide the process for striking names off the list or ranking the names by order of preference. *See e.g.*, www.adr.org. Generally, each party has ten to fifteen days to review the list and return it to the administering agency. If you do not return the list, you are deemed to have agreed to all of the persons. Inaction, therefore, allows your opponent to make a unilateral selection. If the parties are unable to agree on an arbitrator on the list, the agency will choose an arbitrator who will serve, absent provable cause for dismissal. Therefore, it is in your client's interest that you exercise your right to select carefully.

Arbitrators are encouraged to write complete biographies for parties to consider so that they at least have basic information relating to the arbitrator's experience and training. But often this is not enough. It is important that you make effort to learn more about the potential judge of your case.

If a potential arbitrator has heard traditional labor-management cases, his or her opinions may be published in the Labor Arbitration Reports. You can then telephone those lawyers who have been identified in the cases, and obtain information about the arbitrator's unpublished rulings, possible bias, ability to understand the case presentations, and courtesy or demeanor during the hearing. It is more difficult to research arbitrator's opinions in employment law cases, although the AAA may provide you with prior decisions of panel arbitrators in similar cases, so be sure to ask your case manager.

Another source of information is the Internet. Many arbitrators and/or mediators maintain websites, some of which contain information on cases the arbitrator deemed to be particularly noteworthy. Since most arbitrators are lawyers, Martindale Hubbell is an information source. Westlaw or LEXIS may direct you to cases in which the arbitrator has appeared. Finally, many organizations such as CTLA, PELA and DRI maintain list-serves which can be helpful. The simple question: "What do you think of [Ms. Doe] as an arbitrator for an employment discrimination case?" will usually produce numerous responses.

Three-arbitrator panels. In cases with three arbitrators, each party selects one, then those two select the third. Many arbitrators refuse to serve on tripartite panels unless all the members are neutral. Therefore, at the beginning of the case, you and your opponent must determine whether the arbitrators each of you select will be representing each party, respectively, or will be neutral. The difference is significant, as a "party" arbitrator is expected to represent the interests of the selecting party, but a neutral is, as named, neutral. Because in tripartite cases you delegate the choice of the neutral to the arbitrator you selected for your side, it is obviously important to

choose someone you believe will do the necessary research to obtain an appropriate neutral.

Arbitrator's Duty of Disclosure. Any arbitrator tentatively selected by the parties has a duty of disclosure, which all arbitrators should take seriously. Arbitrators must disclose any interest or relationship which may affect impartiality or create an appearance of bias. They must disclose any direct or indirect financial or personal interest in the outcome, or any financial, business, professional, family or social relationship of the same nature. They must also disclose all prior cases with any party, counselor counsel's law firms. *See e.g.*, AAA Rule 11(b). If this disclosure suggests that the arbitrator may lean one way or the other, you have a right to appeal to the administering agency, which may disqualify the arbitrator from that case. Generally speaking, however, a "party" arbitrator may not be disqualified in this manner, only neutrals.

You can assist the Arbitrator with the disclosures by giving full information as to the nature of the case, the preliminary list of witnesses and interested parties. If desired, counsel can ask the case administrator not to give the list to opposing counsel. It is for the sole purpose of assisting the Arbitrator in making disclosures.

II. Discovery Issues

A. How Much Discovery Should You Seek?

The discovery process is a product of the litigation process and was traditionally scorned in arbitration. Discovery is much more common in arbitration today, even though it remains discouraged. Moreover, it has been identified as the culprit behind the delay that characterizes "arbi-litgation," which dispute resolution services such as AAA and JAMS see as hurting their brand and their business. Outside of employment cases, the baseline is that you will likely get documents, particularly those that you can identify with some particularity, if they seem to be relevant. If you get depositions at all, it will likely be limited to one or two unless both parties agree otherwise. But there is also great variability among arbitrators on this subject.

Within the employment arena, there is a different standard. This is because of the "due process protocol," which was adopted in 1995 by a task force of arbitrators and bar organizations. AAA and JAMS have specifically endorsed the protocol, as has the Labor & Employment Section of the American Bar Association and the National Academy of Arbitrators, an organization of the elite labor arbitrators. The protocol specifically addresses the problem of employees obtaining access to relevant information, a concern that is present in all employment litigation.

One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pretrial discovery is to be encouraged. Arbitrators experienced in this area generally understand that employers have far more access to relevant information, and that employees need access to all information reasonably relevant to mediation and/or arbitration of their claims. Experienced counsel often confer to reach agreements on a scheduling order much as is used under Rule 26 in the court system. Arbitrators are happy to see the parties agree on these points and will not normally interfere with the process unless asked to resolve a dispute.

Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available. This is not to say that discovery in arbitration is as open as it is in a courtroom setting. The "reasonably likely to lead to the discovery of relevant evidence" standard of Rule 26 is not necessarily the standard that is going to be applied to your case in arbitration. Strict relevance or something akin to it is more likely to be required, but ultimately it is up the arbitrator. When arguing for more discovery, be prepared to articulate to the Arbitrator exactly what your client needs, and how that discovery applies to a legal element or damages claim at issue.

B. Third Party Discovery Can be Difficult

There are general rules regarding the discovery of evidence before hearing. For example, the AAA Employment Arbitration Rules and Mediation Procedures provide that ". . . an arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently." Rule 30.

But as a practical matter, if you are attempting to obtain discovery from third parties, it can be costly and even impossible. The best way to try to gain information or documents is by agreement or informal cooperation.

Should you issue a subpoena to a third party, but not receive cooperation, your options are limited. The first is to file a Motion to Compel in the U.S. District Court for the District of Colorado. Under the FAA, "if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators[.]" *See* 9 U.S.C. § 7.

Other circuits have held that an arbitrator may order the production of documents. *See In re Sec. Life Ins. Co. of Am*., 228 F.3d 865, 870-71 (8th Cir.2000) ("implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."); *Am. Fed'n. of Television and Radio Artists, AFL–CIO v. WJBK–TV (New World Commc'ns of Detroit, Inc.)*, 164 F.3d 1004, 1009 (6th Cir. 1999) ("a labor arbitrator is authorized to issue a subpoena duces tecum to compel a third party to produce records he deems material to the case either before or at an arbitration hearing").

Or one could argue that there is a "special need" for production of documents from the third party because an arbitrator has the power to issue a subpoena to a non-party for prehearing discovery upon a showing of a "special need." *See COMSAT Corp. v. Nat'l Sci. Found*., 190 F.3d 269, 276–77 (4th Cir. 1999). Note, however, that other courts have held that the FAA Section 7 does not include the authority to subpoena nonparties or third parties for discovery even if a special need or hardship is shown. *See Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216-17 (2d Cir. 2008) – one of the seminal cases holding that the FAA § 7 does not include the authority to subpoena nonparties or third parties for prehearing discovery even if a special need or hardship is shown.

III. Authority of the Arbitrator

A. The arbitration provision controls

The operative arbitration clause can range in format from a simple sentence with very little description to several detailed paragraphs to a separate written contract for arbitration entered into by the parties. However, the authority of the arbitrator does not necessarily extend as far as an Article 3 judge. What are the limits of the arbitrator's authority?

1. Dispositive Motions

a. AAA Rule 27 Dispositive Motions states:
The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.

b. JAMS Rule 18 Summary Disposition of a Claim or Issue of the Employment Arbitration Rules & Procedures, Effective July 15, 2009 (hereinafter JAMS Rules) states:

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the motion.

Because both rules require application or leave from the arbitrator, it is simpler if the parties have written their desire for dispositive motions into the arbitration agreement. For example, *[t]he Parties shall have the authority and ability to file, and the arbitrator shall also have the authority to hear and decide, dispositive motions and motions for judgment as a matter of law in the context of such arbitration, under the guidelines and legal standards set forth in F.R.C.P. 12, 56 and 50, respectively*.

2. Can the Arbitrator Issue Injunctive Relief?

It is best if the parties' arbitration agreement provides that the arbitrator has the authority to issue injunctive relief or at least "all relief." There is, however, a provision in the AAA Employment Arbitration Rules that could provide the basis for injunctive relief: "At the request of any party, the arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court, as stated in Rule 39(d), Award." *See also* JAMS Comprehensive Arbitration Rules & Procedures at Rule 24(e) (Awards; Interim Measures); F.R.C.P. 65. A counterargument is that the provision quoted above applies only to interim, not permanent, measures.

3. What About Sanctions?

In *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co*., 264 F. Supp. 2d 926 (N.D. Cal. 2003), the court addressed the question of "whether arbitrators have the authority to sanction non-compliance with their orders." *Id.* at 943. The court concluded that the Federal Arbitration Act "does not affirmatively grant inherent authority to impose" the sanctions at issue. *Id*. at 944; *see also id*. ("Nothing in the explicit language of the FAA authorizes such inherent power upon arbitrators."). The court recognized that the parties could agree by arbitration contract to confer on the arbitrator power to impose monetary sanctions for non-compliance, but found no evidence of such conferral of power in the governing agreement. *Id.* at 944-45; *see also InterChem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG*, 373 F. Supp. 2d 340, 358 (S.D.N.Y. 2005) (court stated that it was unable to uncover any authority holding that "an arbitrator has the inherent authority to award sanctions").

IV. Conduct of the Hearing

A. Exhibits

Counsel should take the time prior to the hearing to talk about exhibits. Arbitrators prefer that most of the exhibits are offered once as joint exhibits. Only tender as party exhibits (i.e, Claimant or Respondent) those exhibits that are objected to either as to authenticity or relevance. Reach an agreement as to how the separate exhibits will be referred to. Normally the Claimant uses letters (Claimant's A) and Respondent uses numbers (Respondent's 1). Objections to relevance are rarely sustained. One of the few ways of overturning an arbitration award is to argue that the arbitrator refused to consider relevant and probative evidence, arbitrators are very likely to take all evidence "for what it is worth."

It is important for counsel to conduct the proceedings at a pace that allows the arbitrator to keep thorough and accurate notes. When you are introducing exhibits, be sure to give the arbitrator time to read the portion of the exhibit that you consider to be particularly relevant. Flying through the exhibit is certainly faster, but the arbitrator may lose the import of your questions if she has not read the exhibit yet.

Finally, be cognizant of the fact that Arbitrators (like jurors) can benefit from summaries or outlines, especially if the exhibits are voluminous. Try to group your exhibits together by topic, order them chronologically, or prepare a Rule 1006 summary that highlights what you want the Arbitrator to take away from that particular exhibit or groups of exhibits.

B. Demonstrative Aids

Good demonstrative and graphic exhibits can be helpful. Timelines are generally essential, particularly in hostile environment or retaliation cases. Power point presentations should probably be limited to opening or closing argument, unless there is a specific reason such as a thorough presentation of damages. Past and future economic loss often requires some sort of understandable spreadsheet, even if an expert witness is testifying about this subject.

C. Use of Court Reporter

There is often a question of whether there will be a court reporter at the arbitration and who pays for the transcript. Rule 20, AAA Employment Rules provides:

> "Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator."

Thus, if one party to the dispute wants to hire a court reporter, but the other party does not, then generally the procedure is that the requesting party will pay all of the charges, including the cost of providing a copy of the transcript for all parties and for the arbitrator. If there is no court reporter, then the arbitrator's notes are the official record.

In matters involving more extensive pre-hearing motions or conferencing, a dispute may arise if one party has been obligated by the arbitration agreement to pay "all costs". For example, in a matter where an employee wants all motions heard "on the record," the employer may be forced to choose between added costs or pursuing a ruling over what the cost requirement entails. Practitioners may want to consider what type of cost and excessive limits language they can place in the arbitration agreement.

D. Alternative Types of Testimony

There are a number of ways that arbitrators will take testimony. They have basically unreviewable discretion to allow testimony other than in person. Testimony by telephone is often requested, particularly for short examinations on a specific point. Most arbitrators will grant such a request to the extent that there is a safeguard that the witness is testifying without documents except for relevant exhibits that the witness has received. However, use telephone testimony sparingly. It is normally less persuasive than live witnesses. The witness on the phone sounds disconnected and the questioning is unnaturally formal. The arbitrator's ability to evaluate credibility is much lessened.

Arbitrators can also take testimony by affidavit, but unless the affidavit is about an essentially uncontested topic, affidavits can be met with a hearsay objection and a great deal of skepticism. Attorneys can request that the arbitrators consider depositions, in lieu of live testimony. If that is the case, it is important to get agreement from opposing counsel that this process will be used. It helps to show that the witness is unavailable, and with some arbitrators it may be essential to show that.

Keep in mind that it may be more beneficial at this point if the parties summarized the proffered testimony in a Statement of Undisputed Facts pleading jointly filed by the parties. That way the Arbitrator does not have to make any findings of credibility as to the proffered witness, and the record is cleaner.

Finally, witness testimony can be taken by video. If that is the case, again it is important to have agreement on how and when it will be presented. The person requesting the video presentation will be required to supply the equipment, and also set up a location for viewing.