



ARBITRATION: ADVOCACY SKILLS AND TACTICS

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Arbitration is a Creature of Contract

Arbitration is an agreed-upon method of resolving disputes. Parties typically agree to arbitration through an arbitration clause in the contract that forms their relationship. The arbitration clause often sets forth specific details about the arbitration process including:

1. How the arbitrator or panel is chosen, sometimes even with the name of the arbitrator or association;
2. What rules govern the arbitration process, including those set forth in Nevada's Uniform Arbitration Act found in Chapter 38 of the Nevada Revised Statutes;
3. Whether or not the arbitration award is final and binding, which allows the award to be confirmed into a judgment; and
4. Whether or not the prevailing party to an award can recover attorneys' fees and costs.

Because arbitration is based on contractual language, it is critical for an attorney to review the entire contract before advising a client on the best course of action. Furthermore, parties can, and often do, agree to change the terms of arbitration after they enter a dispute to simplify or reduce the cost associated with arbitration. Even if the parties' contract does not call for arbitration of disputes, the parties can nonetheless agree to arbitrate. In such circumstances, arbitration organizations such as the American Arbitration Association provide arbitration agreements that can guide the arbitration process.

Selection of Arbitrator

A successful arbitration begins with the proper selection of an arbitrator. The importance of selecting an appropriate arbitrator is underscored by the difficulty of vacating a binding arbitration decision through the judicial process. Generally, the courts will only vacate a binding arbitration decision if a party can show that, in rendering the decision, the arbitrator exhibited a "manifest disregard" of the law. Because such a showing is often difficult for a party to provide, a party will most likely be bound by an arbitrator's ultimate decision.

While there may be certain constraints on a party's ability to select an arbitrator, a party should work diligently within those constraints to select an appropriate arbitrator. Selecting an appropriate arbitrator requires a party to determine the most important qualities an arbitrator should have given the underlying case. If the case involves complex factual issues, a party should find an arbitrator with the necessary background knowledge of those issues. Likewise, if a party's case relies heavily on legal arguments, the party should find an arbitrator with a deep legal understanding. Furthermore, both parties should seek a neutral, unbiased and impartial arbitrator who is free from material conflicts of interest.

Once a party knows the qualities to look for in an arbitrator, the party should do the necessary homework to select the most appropriate arbitrator. A party

Arbitration continues to be an effective and desirable form of alternative dispute resolution, especially for resolving commercial or construction disputes. The arbitration process allows parties to resolve complicated and technical disputes in a private setting, often using an arbitrator, or panel of arbitrators, with expertise in the particular area of the dispute. Understanding the arbitration process will improve an attorney's chances for success on behalf of his or her clients. This article provides some general guidelines to follow when arbitrating disputes.

should request that potential arbitrators provide references and a disclosure of relative experience. Moreover, a party should conduct thorough research to find pertinent information regarding potential arbitrators. Perhaps the most helpful research will come from talking with your colleagues, both inside and outside your firm, about their experiences with potential arbitrators. Regardless of what research is performed, a party should carefully and wisely select an appropriate arbitrator. Taking the time and energy to select an appropriate arbitrator will greatly improve your chances of success in arbitration.

Appreciate and Utilize the Informalities of Arbitration

While attorneys are generally accustomed to the formalities of court, attorneys should appreciate the relative informality of arbitration. This relative informality often manifests itself in the form of relaxed rules of evidence and condensed or eliminated discovery between the parties. These informalities allow an attorney to present the party's most effective case without being bogged down by cumbersome technicalities. Ultimately, removing these technicalities can often reduce the complexity of a case and reduce the overall cost of resolving a party's conflict.

Arbitration often relaxes the rules of evidence because an arbitrator's award can be overturned if the arbitrator refuses to consider all material evidence. Attorneys should remember that simply allowing evidence to be presented does not mean the arbitrator will give the evidence significant weight in the decision process. Therefore, instead of incessantly fighting to exclude evidence as in a court proceeding, a fight the attorney will most often lose in arbitration, attorneys should spend their time and efforts attacking the credibility of evidence and presenting stronger evidence to support their own case.

Moreover, because arbitrations rely less on technicalities and more on the presentation of an effective case, attorneys should work hard to present their case as part of a compelling theme. A compelling theme can set the stage for persuading an arbitrator to accept a party's version of a case. To employ a compelling theme, an attorney should determine the overall purpose of being in arbitration and interlace that purpose throughout the arbitration. Telling a story with a compelling theme keeps the arbitrators interested and makes your case more personal to the arbitrator. Conversely, attorneys should avoid using overly emotional appeals and irrelevant facts because arbitrators are usually less likely than jurors to be swayed by such tactics.

Attorneys should also utilize creative methods to control damage awards. One method is for both parties to agree beforehand to a floor and a ceiling for potential awards. Both parties can also submit possible awards and request that the arbitrator select the more reasonable of the two awards. These options are particularly helpful when parties' settlement talks are productive, yet insufficient to bridge a gap between the amounts the parties are willing to accept. While contracts may dictate the amount and type of damages that can be awarded, attorneys should also look to statutes, court rules and regulations to determine if an arbitrator can award attorneys' fees or punitive damages in a given dispute.

Retain Formal Advocacy Skills

While the arbitration process is relatively less formal than judicial proceedings, attorneys should not make the mistake of abandoning their formal advocacy skills. Beyond court rules and tradition, there is a significant reason attorneys employ formal advocacy skills in court: persuasion. Therefore, attorneys should remember that effectively persuading an arbitrator will require essentially the same skills as effectively persuading a judge or a jury. Attorneys who employ formal advocacy skills will be much more effective in arbitration.

Effective attorneys have several formal advocacy skills that are employed in arbitration. Like a jury, an arbitrator will appreciate, and be persuaded by, effective cross-examination of witnesses. While an arbitrator will likely be unmoved by leading questions, he or she is often swayed by an attorney's effective exposing of witness testimony in cross-examination. Ultimately, attorneys should make it as easy as possible for the arbitrator to find for the attorney's client. In addition to effective cross-examination, attorneys can simplify the arbitrator's decision process by submitting thorough and well-written briefs of the case before the hearing, being as prepared for arbitration as they would be for court and being concise in their arguments and the presentation of their cases.

Conclusion

In conclusion, to effectively represent their clients, attorneys should understand and be prepared for arbitration proceedings. Attorneys should understand the contractual language that establishes the structure of arbitration proceedings. They should also take the time and energy to carefully select an appropriate arbitrator by determining what qualities are important in an arbitrator given the underlying case and doing sufficient research to find an arbitrator with those qualities. Attorneys should appreciate and embrace the relative informality of arbitration proceedings by attacking the credibility of evidence, presenting a compelling theme and utilizing creative methods to control damage awards. Finally, attorneys should retain formal advocacy skills to persuade an arbitrator by effectively cross-examining witnesses and otherwise making it as easy as possible for the arbitrator to find in favor of the attorney's client. Attorneys who follow these general guidelines will increase their chances of success in arbitration proceedings. ■

To effectively represent their clients, attorneys should understand and be prepared for arbitration proceedings.



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