6-1988

Preparing and Presenting an Arbitration

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This is the fifth article in a series by members of the State Bar's Alternative Dispute Resolution (ADR) Committee. The author, William L. Corbett, is a UM Law School professor and an arbitrator. He is a member of the National Academy of Arbitrators, and is listed on the American Arbitration Association Labor Panel and by the Federal Mediation and Conciliation Service.

Lawyers frequently ask how the preparation for and presentation of an arbitration compares with traditional civil litigation. In both arbitration and the judicial trial, a third party (judge/jury or arbitrator) determines the outcome. However, there are important distinctions between these two processes.

Generally, parties select arbitration over a judicial trial because they want a specialist of their choosing to hear and decide their dispute, and/or a less formal method of adjudication. The differences between arbitration and civil litigation are in large part a consequence of these factors.

This article will draw a comparison between arbitration and the judicial process at the pre-hearing, hearing, and post-hearing stages.

PRE-HEARING

• Discovery

Once it has been decided to submit a dispute to a court or arbitrator for decision, the next step typically is to commence discovery.

Absent a provision in the arbitration agreement, arbitration discovery is limited to avoid the expense and delay of formal discovery procedures. If the parties believe that discovery should be available, they may so provide in the arbitration agreement. It is not uncommon that the parties will provide for limited forms of discovery in the arbitration agreement. Indeed, the arbitrator may construe general arbitration agreement language e.g. "the arbitrator has the authority to establish the rules of procedure to govern the hearing" to authorize limited discovery. See Fairweather, Practice and Procedure in Arbitration, 2nd, p. 138, BNA Books (1983). Unless discovery procedures are allowed in the agreement, a party seeking discovery must look elsewhere for authority for discovery.

Discovery is not a significant problem in the arbitration of labor-management disputes under a collective bargaining agreement. The National Labor Relations Act has been construed to provide that the parties must supply information to their opponent for the purpose of collective bargaining and contract enforcement, including the processing of grievances and arbitration of disputes. Acme Indus. Co. v. NLRB, 385 U.S. 432, 437 (1967). One could reasonably expect a similar construction of the Montana Collective Bargaining for Public Employees Act.

In the arbitration of other than labor-management disputes, and absent a contract provision authorizing discovery, discovery may be obtained either through the federal or state arbitration acts or pursuant to court order.

The United States Arbitration Act (9 U.S.C. § 7) and the Montana Uniform Arbitration Act (§ 27-5-215(1) M.C.A.) provide the arbitrator with subpoena power to compel the attendance of witnesses and relevant books, documents, or materials. The use of a subpoena is a worthwhile method in requiring the opponent to reveal information. The Montana Uniform Arbitration Act also provides for depositions when a witness cannot be subpoenaed or is unable to attend the hearing. See § 27-5-215(2), M.C.A. Additionally, some courts have compelled discovery when the arbitrator has determined that discovery is appropriate. Cavanaugh v. McDonnell & Co., 258 N.E. 561 (1970). See Willenken, Discovery in Aid of Arbitration, 6 Litigation Vol. 2 (Winter 1980). Finally, if a suit is originally filed in court, the parties may initially utilize the discovery procedures authorized by the Rules of Civil Procedure.

• Pre-hearing Motions and the Pre-hearing Conference

In the judicial setting, the pre-trial conference is important. Pre-hearing motions narrow the issues and may dispose of claims or the entire cause of action. The pre-trial conference may be used to narrow issues, stipulate evidence, and address other preliminary or procedural matters. In the arbitration setting, unless other arrangements are made, the first time the parties meet with the arbitrator is on the day of the hearing. As a consequence, there is generally no opportunity for a separate pre-hearing conference. As an alternative to a pre-hearing conference, the parties may agree to submit pre-hearing memoranda or briefs to familiarize the arbitrator with the issues, contentions of each, and the evidence. Pre-hearing motions are accepted by arbitrators. However, the arbitrator may not rule on any such motion until after the receipt of oral argument at the time of the scheduled hearing.

• Transcript

The parties should consider whether to have the hearing transcribed, and may address this issue in the arbitration agreement.

Three reasons for transcribing the hearing are: (1) To aid in writing a post-hearing brief; (2) to compel the arbitrator to make fact findings based on the record, and (3) to preserve the record for judicial review. Arranging for a reporter is generally the responsibility of the parties. A cost-effective alternative to a court reporter is for the parties to arrange that the proceeding be tape-recorded. If judicial review is necessary, the tapes or relevant portions of the tapes may be transcribed. In the absence of an "official record," the arbitrator may record the hearing to augment his or her own notes of the proceeding.

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• Venue

Frequently, the arbitration agreement will specify where the arbitration hearing will take place. The Montana Uniform Arbitration Act provides, with little room for exception, that where a Montana resident is a party, the venue must be in Montana. See § 27-5-323. However, for those transactions involving interstate commerce, the United States Arbitration Act, which does not restrict venue, may pre-empt the Montana Uniform Act venue provision. See Corbett, The Legal Status of Arbitration in Montana, 11 Mont. Lawyer Vol. 11, No. 2, p 6 (1985); Perry v. Thomas, __U.S.__, 107 S.Ct. 2520 (1987).

THE HEARING

• Stipulations

The initial task of the arbitrator is usually to have the parties stipulate to as much as possible, e.g. jurisdiction of the arbitrator, a statement of issue(s), joint exhibits, other evidence, the remedy, etc. If stipulations are achieved, the amount of time necessary for the hearing may be reduced. Additionally, during this process the arbitrator may gain an important insight into the case. Unless there have been pre-hearing briefs, this may be the first opportunity for the arbitrator to learn about the case.

• Process

The process of the arbitration hearing follows the typical judicial format of opening statements, presentation of evidence by the moving party, cross, and redirect, followed by the presentation of evidence by the responding party, cross, and redirect. The hearing is concluded with closing statements and/or the agreement to file briefs. If the case is factually or legally complicated, or there is a perceived need to reduce the arguments to writing, post-hearing briefs should definitely be considered. The arbitrator usually will not direct briefs, but will generally ask whether the parties want to submit briefs.

• Evidence

A topic that often commands considerable attention is the standards the arbitrator uses in ruling on evidentiary issues. Absent an agreement to the contrary, the arbitrator is not bound by statutory or common-law rules of evidence. Thus, the arbitrator will often admit evidence over objection, "for what it's worth." Receiving testimony or physical evidence that might not be proper under the Rules is not error unless the evidence is ultimately relied upon in making a finding of fact that would not otherwise have been made. Courts have long recognized that in a non-jury trial, or in an administrative hearing, it is not prejudicial error for a judge or administrative law judge/hearing examiner to admit evidence, which should have been excluded under the Rules, when the evidence is not thereafter relied upon in making a finding that could not have been made absent the evidence. Multi-Medical Convalescent v. N.L.R.B., 550 F.2d 974, 977 (4th Cir. 1977); In re Moyer, 173 Mont. 208 (1977). Courts recognize that "reversible error" occurs only when the inadmissable evidence is relied upon in making a finding that would not have been made absent the evidence. Thus, the issue is not what is admitted, but what is relied upon. The arbitrator, like the judge in a non-jury trial and the administrative law judge/hearing examiner in an administrative hearing, may receive inadmissible evidence under the Rules. To the extent the evidence is not relied upon in reaching a decision, no error is committed. Thus, evidentiary issues in an arbitration closely resemble those encountered in a non-jury trial or the administrative hearing.

A problem occurs if the arbitrator relies on the inadmissible evidence in making a finding that could not have been made in the absence of the evidence. This would result in reversal of a trial judge or administrative law judge/hearing examiner. However, because of the limited scope of judicial review of an arbitrator's decision, absent an agreement that the arbitrator is bound by the Rules of Evidence, this error will probably not result in reversal. See discussion infra.

POST-HEARING

After the close of the hearing, the arbitrator receives briefs, if submitted, and issues a written opinion and award. The Montana Uniform Arbitration Act requires a written decision. See § 27-5-216(1) M.C.A. While the United States Arbitration Act does not require a written decision, as a practical matter the award should be in writing. This conclusion is based on the fact that, if a party refuses to comply with the arbitrator's award, enforcement of the award requires judicial "confirmation." Confirmation requires submitting the "award" to a court for enforcement. Thus, to confirm the award, it must be in writing.

The due date for the arbitrator's opinion and award and the method for payment of the arbitrator's fees and expenses are most often stipulated in the arbitration agreement. See § 27-5-216(2) and § 27-5-218, M.C.A.

Finally, the arbitrator's decision may, on limited grounds, be reversed on judicial review. See § 27-5-312 M.C.A. and 9 U.S.C. § 10. The reason for the limited grounds of reversal is because the parties selected the arbitrator, not the courts, to determine their dispute. Accordingly, it would be inappropriate for the courts to reverse the arbitrator except on the most limited grounds. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

SUMMARY

Preparation and presentation of an arbitration case follows the judicial trial model. The major difference between the arbitration and the judicial trial is the scope of pre-trial discovery and the limited grounds for reversal of the arbitrator's decision. These differences occur because the arbitration process is premised on the assumption the parties want a specialist of their choice to decide their dispute, and a less formal process. If the parties want a process that more closely parallels that found in civil litigation, they need only so specify in the arbitration agreement.

When the case involves issues of fact or law that are better resolved by a specialist, or the judicial process otherwise does not meet the needs of the parties, i.e. cost and delay, arbitration is a viable alternative to civil litigation. — ML