The Attorney and The Non-Attorney Arbitrator

Attorneys representing a client in arbitration always want to go all-out to provide their client with the best chance of gaining a favorable judgment. But in hearings before an arbitrator who is not an attorney, special circumstances may arise regarding conduct, technique and presentation of evidence. This article examines the various problems that may arise in such situations and prescribes simple solutions aimed at promoting a smooth interaction between the attorney and the non-attorney arbitrator.

By **Raoul Drapeau**

The author has 15 years' experience as an arbitrator and over 30 years' experience in high technology and business. He is also a member of the American Arbitration Association's panel of arbitrators. He supplies a valuable perspective on the special problems that can arise between attorneys and non-attorney arbitrators.

Much has been written about the successes and failures of arbitrators in conducting a fair hearing. Their evaluation, decision-making and meeting-management skills are crucial to producing an equitable award. Because there are winners and losers in such matters, it is not surprising that an arbitrator's performance is called into question from time to time. This is especially true when the arbitrator is not an attorney, because a non-attorney arbitrator can understandably miss legal subtleties or stumble on important points, such as not hearing relevant evidence.

On the other hand, very little has been written about the performance of the attorneys who represent clients in arbitration hearings held before such a non-attorney arbitrator. This is an important issue, because an attorney's behavior can certainly have an effect on the outcome of the hearing.

The use of arbitration as an alternative dispute-resolution process has grown strongly in recent years, and many more attorneys are now involved in the process. Unfortunately, their formal classroom education usually does not cover the differences in procedures and customs between the courtroom and the arbitration hearing room. Thus, unless they frequently participate in arbitrations, they either may not know those differences or fully appreciate their importance. Even if they do know them, they may forget them in the heat of the moment, an oversight that can get in the way of the progress of an arbitration hearing, regardless of who the arbitrators are.

However, there is an additional dimension to this situation that can cause trouble for the unmindful attorney, and it is the subject of this article. Commercial arbitration cases can involve a wide and complex range of technical and legal issues. Thus, many disputants select a multiple-member panel. Often, at least one member of these panels is not an attorney, but instead an expert chosen because of technical or business savvy in the issues involved. This person is surrounded in the hearing room by legal experts, some of whom might be panel colleagues, and the disputants' attorneys. All of these people speak a curious and sometimes incomprehensible language that is quite different from that used in the usual technical or business environment. In addition, the litigating attorneys can behave in ways that seem to such arbitrators to confound common sense and work against the avowed objective of getting to the truth. This dichotomy is one of the most troublesome aspects of such hearings, since it can result in avoidable misunderstandings and interruptions.

At the same time, the attorneys may feel uncertain about the technical issues and their own unfamiliar lingo. Clearly,

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their understanding of these matters can be crucial to making an effective representation of their client's position. In addition, attorneys can worry about how knowledgeable the non-legal panel member(s) are on issues of the law that may arise. This difference in experience can lead to additional misunderstandings and even more serious trouble. But more often it is an avoidable irritant as both sides stumble forward to educate each other in real time in the search for an equitable solution to the dispute.

The issues presented in this article are taken from actual experience and are intended as a guide for attorneys who are participating in an arbitration conducted by a non-attorney arbitrator.

Introductions

This is probably the first time that you will have met the non-attorney arbitrator. Just as in a job interview, a lasting impression—for better or worse—is formed in these first few minutes. But this works both ways. The non-attorney arbitrator will be anxious to display competence in his or her field of expertise, as well the appropriate temperament to manage the hearing and carefully weigh the evidence. Likewise, this is the best opportunity you may get to demonstrate that even though you come from a different business culture and educational background, you respect his or her abilities. In no small regard, the outcome of your case and its effect on your client depends on these mutual perceptions.

Discovery

Some attorneys are used to demanding great amounts of evidence during discovery to buttress their case. However, when carried to extremes this tactic may be seen by a non-attorney arbitrator simply as a means to unnecessarily burden a less-well-heeled opponent. This is because most business people and engineers are used to making decisions from adequate, but not perfect or even complete data. They realize that it is not generally practical or even possible to get every shred of evidence or background data that might apply. So when someone attempts to do just that, it can create a negative impression.

The Non-Attorney Arbitrator and the Panel

Many commercial-arbitration panels are made up solely of attorneys. When the risks are higher or in larger cases, one or more technical members are usually included because of their knowledge of the technical issues. This helps the disputants in that they can have confidence that the technical matters are understood by the panel. But it also helps the arbitrator's non-technical colleagues to do a more effective job, because the technical arbitrator can translate issues into terms that they can better understand.

Naturally, these technical and business professionals rarely know as much about the fine points of law as the protagonists in the hearing. On the other hand, the attorneys may not have had as much experience in arbitration hearings as an experienced non-attorney arbitrator. In fact, because non-attorney arbitrators often serve alone on cases, they may know a lot more than many attorneys do about the practical side of arbitration hearings and their customs. This is particularly so if an attorney's litigation experience has been mostly in the courtroom. Furthermore, a non-attorney arbitrator certainly knows more about his or her technical specialty.

To be sure, attorneys on a panel will naturally be well-equipped to deal with any legal matters that may arise. Technical panel members know their shortcomings in these matters, but are also well aware that they can influence their attorney colleagues on the panel in other, more relevant ways. For example, an attorney member will often turn to a non-attorney arbitrator during or after the hearing for advice, explanation or recommendation. In such situations, a non-attorney arbitrator can tip the balance.

Rules of Evidence

The well-known courtroom rules of evidence are an important aspect of formal legal tribunal procedure. For the most part though, they aren't rigidly adhered to in arbitration hearings. Still, some attorneys try to impose their personal view of what the rules of evidence should be, rather than conform to the arbitrator's presence. In a forum where the preferred emphasis is on substance and equity, rather than on procedure and law, such behavior is sure to be poorly received. An arbitrator possessing only limited legal experience will not appreciate having to continually deal with such unfamiliar matters, or feeling insulted by a lack of intimate knowledge in that area.

Conflicting Evidence

The situation often occurs when opposing attorneys present seemingly irrefutable evidence conclusively proving conflicting points. It can be difficult for even a technically competent panel member to straighten it all out. However, in attempting to do just that, the non-attorney technical panel member will try to focus on what he or she perceives as the matters that were proven technically, not necessarily those that were presented in the most elegant manner or that fit some cited legal precedent.

Expert Witnesses

Even when panel members are experts in the field in question, attorneys should exercise care when deciding to make the testimony of expert witnesses the focal point of their case. For example, when the technical panel member hears from your opponent's expert witness that the bridge collapsed due to your client's egregious design error, he or she knows that you will probably counter with an expert to swear that the fault instead lies in defective materials. These confusing conundrums are stock-in-trade to engineers and business people, who know that real-life situations are commonly filled with seeming contradictions, but that the real truth can usually be rooted out by a careful examination of the right evidence. It is difficult to put yourself in that other person's shoes to determine which piece of evidence they will think is the most important, but you can often get a clue by the questions that they ask.

In any case, contradictory claims and testimonies by

experts do not necessarily make the proceedings more interesting or even more helpful to the technical panel member, regardless of the fame or reputation of the witness.

Line of Inquiry

If the arbitrator looks puzzled, it may be due to an uncertainty as to where you are going with your line of inquiry. Remember: In keeping your point obscure so as not to expose your hand to the opposition prematurely, you are also keeping the arbitrator in the dark. So if you are asked to provide some context because the arbitrator is unclear as to why your argument is relevant, giving a vague answer will not provide the expected level of comfort.

Panel Questioning Witnesses

One of the most striking differences between courtroom and hearing-room practice is that your witness may be examined by an arbitrator in a way that a judge rarely would. Arbitrators are generally well aware of the need for the attorneys to bring out their own case, and try not to get ahead of them. But the attorney must recognize that non-attorney arbitrators are searching for the truth, and are not especially concerned with adhering to artificial rules of engagement. If you are finished with a line of questioning and the arbitrator needs to know the answer to a question he or she thinks is logical and important, but one that you have not yet asked, he or she will surely ask it. You may view this as disruptive, but the non-attorney arbitrator is not likely to be dissuaded.

Objections

Litigating attorneys experienced in the adversarial process of the courtroom are used to putting up an aggressive struggle to make sure that every piece of evidence they wish to put before the court is accepted, while vigorously objecting to every shred of evidence that their opponent tries to register. This process is an integral part of the courtroom culture.

On the other hand, non-attorney arbitrators are interested in listening to anything that can help them reach a decision. Thus, they do not see extended discussions about admissibility as helping them in their search for a solution. Consequently, they are inclined to hear all the evidence, because they believe they can decide for themselves what is and is not important. It is also simple human nature for an arbitrator to suspect that an attorney may have something to hide if he or she continually objects to information that seems, on the surface, to be informative.

In the final analysis though, experienced non-attorney arbitrators are likely to rule against excessive objections because they know that one sure ground for overturning an award is if they do not hear evidence that later turns out to be important. Thus, they will usually err on the side of caution.

Jargon

Using complicated technical words and concepts that you believe to be relevant to the case at hand will not impress a technically astute arbitrator who believes that you do not have a clear understanding of their meaning. To avoid this problem it is helpful to define any unusual terms at the outset, or even provide a glossary or graphical presentation to make sure that everyone present has the same understanding.

Remember: Your objective should be the arbitrator's comprehension of your client's position, not merely creating the impression of legal expertise. In fact, it is probably a good idea to go to the opposite extreme and avoid legal jargon whenever possible.

Hearing-Room Style

No matter how many courtroom cases you have successfully prosecuted, and even won, it is no sure claim to success in the hearing room. A style that works in one forum might not go over so well in another, and this is particularly so if your style is aggressive. Whatever their background, arbitrators are used to a more collegiate approach. Aggressive attacks on the opposition and frequent histrionics are likely to work against you in an arbitration hearing before a businessperson who is used to consensus-building, or an engineer used to more thoughtful, analytic probing for the truth. Such panel members will not be amused by these displays, even though they may provide an interesting break in an otherwise dry hearing.

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Hearing-Room Humor

By their very nature, arbitration hearings are a serious process with serious consequences. But by intention, arbitration hearings are a less formal setting than a courtroom. As a result, humorous situations occasionally and unexpectedly occur, such as when an exhibit spontaneously crashes to the floor or a weary participant nods off.

Businesspeople, even engineers, are used to injecting humor into a tense situation as a way of defusing tempers, even in serious matters, and so may be the first to laugh. On the other hand, no one likes a humorless sourpuss who glares at every attempt to lighten the mood. So enjoying one of these situations or even laughing at a panel member's attempt at humor is quite acceptable to lighten the mood.

Exhibit Books

Exhibit books can be of great help to any arbitrator in studying the evidence after the hearing. But they are especially useful to the technically oriented arbitrator who may want to delve more deeply into a document than time allows during the hearing. This can occur when the arbitrator discovers an important point deep in the details that neither side brought out during the hearing. However, this examination can be made difficult due to labeling inconsistencies, lack of organization, duplication in the books or torn pages resulting from an overstuffed binder. Since both sides use many of the same documents, often to prove opposite points, there can be considerable overlap in exhibits that could be eliminated by better coordination between the two sides.

It is true that businesspeople and engineers are used to slogging through voluminous reports and analyses on the job. Some are even guilty of preparing them. However, in an arbitration you should not assume that arbitrators with that kind

of professional background will also enjoy poring over excessive exhibits, obscure rulings, rambling deposition transcripts and agonizingly detailed technical documents of your documentary evidence, unless they need to for some issue. Technical panel members are not impressed by the poundage of materials they must examine, particularly when they have to carry them back and forth to the hearing each day.

Cumulative Evidence

One might think that the engineer or businessperson would want to hear as much evidence on a particular point as possible. However, that is a luxury that does not often arise in their business. Most of the time, there is a broad range of facts and opinion to evaluate, and not a preponderance of anything. So when they are faced with too much data, it can seem to be "piling on," and can create suspicion as to the true import of that evidence. It can also raise the question as to why other seemingly important points were not equally stressed.

Handling the Unexpected

Unexpectedly, the quiet, unassuming non-attorney arbitrator who hasn't said boo to that point, might pipe up with, "Excuse me...," and then call into play the obscure smoking-gun document hidden away in the back of the exhibit book—the one you hoped would not surface. Perhaps the arbitrator might ask the one question that you would rather not be asked. Or in the face of an unanticipated question from the technical panel member, your star witness may inadvertently blurt out the one thing you hoped he would not say.

None of these turns of events is necessarily a crisis, but continuing to barge ahead with your now-irrelevant line of questioning, or worse, putting off the questioner, is not likely to serve your cause well. The engineer or businessperson arbitrator is used to unexpected and unwelcome turns of events, and is not surprised when they happen. What they will look for is to see how you handle it.

Graphical Presentations

Engineers and business executives are trained to think in graphical terms. They will commonly use charts, tables and graphs to express relationships between variables. Thus, when they are sitting on an arbitration panel, it can be less effective if an attorney attempts to make a point purely by exposition, when an engineer would use a graph to express it. So if the sequence of events, the results of a technical evaluation or the visualization of a concept are important in your case, it can be very helpful to the technical panel member if you provide a graphical exhibit.

Post-Hearing Briefs

Post-hearing briefs can be a very useful tool in the hearing process, especially in a complex case. This is especially true if your style does not make your direction clear as you go, but reserves it for the summation and/or closing briefs. However, the utility of briefs to the non-attorney arbitrator is not necessarily in the illumination of fine legal points. They can be very helpful when a point of law is the issue and you were specifically asked to address it. In such a case, the brief provides the opportunity to once again show that you have proven your case legally. However, knowing that the contract is more important than legal precedent in arbitrations, the non-attorney arbitrator is not usually looking for legal proof, but instead a summary of your evidentiary proof. In addition, non-attorney arbitrators are not well-equipped to evaluate purely legal arguments, and may consequently give them less weight.

Most non-attorney arbitrators are also intimately familiar with the mechanical techniques of cutting inter-line spacing, printing in smaller-than-usual type size and putting some of the arguments in tiny footnotes, all to cram as much information in a brief of an agreed-upon length. They have probably done it themselves in technical reports on the job. However, if such legerdemain is seen as violating the rules of fair play, it is counterproductive.

Reconsideration

There are many procedural issues that can be crucial in court-tried cases when it comes to seeking a reversal on technical grounds. As a result, the award of a non-attorney arbitrator may be more likely to come under suspicion than that of a lawyer-arbitrator, who has been trained in the minutiae of the law. Thus in arbitrations, some losing attorneys will immediately leap into action to seek to obtain a reconsideration or even an overturning of the award. They ignore the fact that the governing body of the arbitration—the American Arbitration Association, for example—discourages this activity, and that the courts aren't interested in the merits of the case for that purpose. They file several pounds of additional unsolicited briefs to support their case, even though the arbitrators are now *ex officio*. Their usual argument is that the non-attorney arbitrator obviously ignored the preponderance of evidence that so clearly proved their case. Naturally, the non-attorney arbitrator who persevered in this peculiar and often difficult environment in an attempt to grasp the issues carefully and rule wisely, can easily feel insulted by these actions.

Conclusion

I hope that these examples will show attorneys how to improve their style and, conceivably, their success when presenting before a non-attorney arbitrator. At the very least, they may help keep you from shooting yourself in the foot. See you in the hearing room. ■

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