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ALTERNATIVE DISPUTE RESOLUTION

Using Good Judgment To Select Your Judge

ATTORNEYS OFTEN HAVE OPTIONS IN THE NUMBER AND BACKGROUND OF ARBITRATORS

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Experienced litigators have had to get comfortable with the fact that you cannot pick your judge. Sure, you can narrow the field a little by selecting federal over state court (or vice versa) or, in Connecticut, requesting a particular Complex Litigation Docket venue. But, generally, you take what you get.

In arbitration, you choose the fact finder. Shouldn't that be a welcome change? However, it is not uncommon to see otherwise fearless litigators paralyzed by indecision when selecting an arbitrator. This article provides some insight into successful arbitrator selection.

Single V. Multiple

Because arbitration is a creature of contract, the parties' arbitration agreement is

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always the starting point for arbitrator selection. That agreement will typically stipulate whether a single arbitrator or a panel of three should be used. However, if the arbitration agreement does not address this issue, the dispute resolution forum's rules generally will.

For example, the JAMS Comprehensive Arbitration Rules and Procedures assume that the parties intend that a single arbitrator be appointed. Rule 7(a) provides: "The arbitration shall be conducted by one neutral Arbitrator unless all Parties agree otherwise." Rule 15 of the Commercial Arbitration Rules of the American Arbitration Association provides that if the arbitration agreement does not specify the number of arbitrators to hear and determine the case, then the "dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed." (The Rule also provides that a party, in its demand or answer, may request that three arbitrators be appointed.)

If the arbitration agreement requires



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that a panel of three arbitrators be appointed, the AAA will enforce that provision and will appoint three arbitrators. The AAA also has additional rules when larger and more complex commercial cases are involved where the number of arbitrators depends on the amount of money at stake. (See Rule 2 of the AAA's Procedure for Large, Complex Commercial Disputes.)

Some arbitration agreements provide that each party shall select one arbitrator and that those two are then to select the third arbitrator. This process is often criticized as unwieldy. Some practitioners as-

sume (rightly or wrongly) that the neutral third arbitrator will ultimately decide the case, since those practitioners believe that each party-appointed arbitrator will reflexively favor the party appointing them. As a result, the parties may end up paying thousands of dollars in unnecessary fees for the two party-appointed arbitrators, each of whose “vote” cancels the other’s out.

Parties often prefer to have a single arbitrator because it is frequently quicker and almost always less expensive. That is because arbitrators usually charge their hourly rates for all time that they spend working on a case (or a per diem rate with respect to hearing dates). In addition, having one arbitrator conduct the proceedings can streamline the administrative process. However, some believe that there is greater risk of improper motive, prejudice or bias in proceedings conducted by a single arbitrator rather than a panel of arbitrators, and that binding decisions made by a panel may be more likely to be “correct” than decisions made by a single arbitrator.

In any event, whatever a particular lawyer’s preference, the party is generally stuck with the number of arbitrators specified by the parties’ arbitration agreement or selected forum unless the parties modify that agreement after the dispute arises..

Factors To Consider

If arbitrator selection is done through an organization like the AAA or the American Dispute Resolution Center, the organization generally will provide a list of possible arbitrators and short biographies and descriptions of their education, experience and the

fees that they will charge. If the parties are selecting the arbitrators on their own, they should request similar information. The parties will then have the opportunity to “strike” unsuitable candidates. Whether a limit exists on the number of strikes varies by administrative organization.

The most pertinent factors to consider include the professional reputation, experience and education, the nature of the case, and the arbitrators’ hourly rates and fees. Arbitrators need not be lawyers but, in the authors’ experience, usually are. Some are also retired judges. The agreement may also list particular required arbitrator characteristics, such as having particular industry experience or having practiced law.

Beyond the basic issues of experience and cost, some intangible factors may also come into play when choosing an arbitrator, just as they do when choosing a jury. Counsel should review the biographies/descriptions of experience for each candidate carefully to try to glean some information, or to make “educated guesses” regarding the suitability or possible biases of the arbitrator candidate. Counsel should also keep in mind the particularities of the matter at hand – a candidate might have the proper temperament or skill set for one type of matter or party but not for another.

Overall, in choosing an arbitrator, counsel must serve two masters: being objective and practical in assessing what qualities are best for a particular case while at the same time not ignoring their instincts and intuition. Counsel usually should elicit input from colleagues and clients who may have experience with any of the proposed arbitrators.

Conflicts And Disclosures

Many arbitration organizations’ rules require that the named arbitrators be “neutral.” Accordingly, it would generally be improper for counsel to select an arbitrator with a known conflict or close personal or professional relationship with either counsel or party. In addition, most administrative organizations require some level of conflict disclosure by a proposed arbitrator before he or she is officially named. Counsel will then have the opportunity to object based on that disclosure or other information obtained and may also request additional information about a particular disclosure.

Conclusion

While there are certainly pros and cons to arbitrating rather than litigating, the ability to participate meaningfully in selecting the decision maker belongs firmly in the “pro” column and is not as daunting a task as neophyte arbitration counsel sometimes fear. Investing a little time and effort into the process will likely result in the selection of an arbitrator or panel that (win or lose) will fairly and sensibly preside over the case. •