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# Tips from an arbitrator and mediator – Getting off to a good start

By Linda A. Michler

An agreement to arbitrate or to mediate can be empowering – but only if lawyers are willing to take advantage of the opportunities that arbitration and mediation afford.

A list of types of disputes could go on and on. Healthcare disputes involving hospitals, medical practices, doctors, patients, business torts, employment disputes with or without a contract or subject to a labor agreement, vendor contracts disputes, consumer, business intermediary or end user, construction disputes just to name a few.

What now? An agreement to arbitrate or mediate can be empowering. Work with clients to formulate the business goals of the arbitration/mediation, not just the litigation goals. It also requires strategic planning to manage the process – and the arbitrators and mediators – to achieve a successful outcome while ensuring an efficient proceeding.

Another possibility: consider mediating early, even before a legal claim has been filed. In mediation, a skilled neutral helps parties negotiate an agreement. The costs, time, and friction associated with the process are far less than what parties commonly experience in litigation or arbitration. Plus, it produces better results because the parties retain control over the outcome.

## Early Considerations: Arbitrator/Mediator Pool

Pre-dispute agreements usually specify an available arbitral body that will administer the dispute and the choice of law, or a process to select an arbitrator or mediator. This will determine the rules that will govern. But from the moment a party begins to consider filing its case, opportunities to take control of the process are available. In addition to specific arbitral bodies, American Health Law Association, American Arbitration Association, FINRA to name a few, consider whether it is possible to use a mediator or arbitrator agreed by the parties. Make sure it is permitted per agreement or, if applicable, the regulatory entity governing the topic and issues.

Other items that can be addressed at this early stage include arbitrator/mediator candidates' rates, whether expertise or availability might be important enough to justify the added expense of an out-of-town arbitrator/mediator, and the exclusion of any candidates with onerous cancellation policies if a last-minute settlement is likely. Also, in person, virtual, or perhaps a mix including by telephone and sharing documents in advance.

Another example of a critical early consideration surrounding selection is whether a former judge would be a good choice. How likely is it that this case will have a final hearing? If you are planning for a mediation, does your agreement contain a clause to permit a conversion to an arbitration, whether binding or not binding. If a final hearing is likely, would your client or the other side benefit more from an arbitrator who had been a trial court judge adept at ruling on hearing surprises? Does this factor outweigh other factors being considered?

Keep in mind, however, that the more restrictive your definition of an ideal arbitrator or mediator, the fewer candidates there will be. Sometimes that is a disadvantage.

## Narrowing the List to One

Once you have the list of potential neutrals, really study their resumes and websites, and discuss with your clients. Pay particular attention to the types of cases that the arbitrators and mediators in roles as legal advocates have handled. Reach out to colleagues about potential neutrals and their temperament, and encourage your client to do so too. Is one arbitrator/mediator likely to be a bit dictatorial during discovery and hearings, or will she be more receptive to counsel seeking flexibility on procedural matters? Which type of personality would be more useful given (1) the strengths and weaknesses of your case and (2) the personalities of counsel and the client representatives? Consider, again, how booked a particular neutral tends to be: this could impact the likelihood of a continuance being granted or the duration of any delay in the final hearing if a party seeks a continuance.

In rare instances, the list of potential arbitrators or mediators is problematic. If you have concerns based on obvious conflicts, lack of qualifications, or other legitimate issues, talk to the case manager. Arbitral organizations are businesses; they want satisfied customers.

Once the arbitrator or mediator has been confirmed, again review that person's experience and disclosures. Don't be the advocate who, at the first hearing, explains to a 30-year healthcare lawyer the role of a third-party administrator. (Yes, I have witnessed that.) Also become familiar with the rules of administered cases. At the outset of one case, I was surprised when a relatively new attorney representing one of the parties in the arbitration during preliminaries prior to the hearing questioned when he would be permitted voir dire. I explained there is no jury and that arbitrators are selected during the initial appointment and disclosure stage. You do not want to be in either situation with your client.

## Initial Conference: Covering the Bases

Extensive preparation for the initial scheduling/preliminary conference is critically important. In an arbitration, discovery procedures and key deadlines are established at the initial scheduling conference. In a mediation, the conference held before the mediation is just as important as the initial conference where counsel and the mediator discuss matters they deem important to accomplish a successful mediation. Think of your client's needs in discussing parameters of any mediation statements, how to craft a mediation process tailored to your dispute, when the mediation should take place and who should attend, how to exchange information and whether opening statements will be allowed and issues the mediator should be aware of that are not included in the written statements.

Advance consultation between the lawyer and client is essential to ensure that the client's business goals are considered. These may or may not be evident or consonant with the client's litigation goals, especially when the parties to the dispute are contemplating a continuing business relationship.

This also is the time for the lawyer and the client to set expectations – particularly when business-side personnel rather than a corporate law department are supervising the dispute. Set expectations and ensure that everyone understands the differences between judicial litigation and contractual arbitration.

This is the time to discuss with the client key witness availability, including experts, to appear for discovery, the final hearing or mediation session. Failure to involve a client before the scheduling conference may result in a key person being unavailable, or the selection of hearing dates that conflict with the client's deadline for closing its books or finalizing time-sensitive items such as an annual report or a securities filing.

## Discovering Arbitration Discovery Rules

Consider what discovery is necessary for you to prove your case and for your adversary to prove its case. Does it make sense to push for strict limits on discovery? Rules of the arbitration service provide an opportunity to do exactly that. Perhaps, potential parties could agree to exchange certain limited information they believe is needed to resolve the dispute which again can be a time and money saver. Many would agree that very few litigants actually end up using (shall I say, or even reading) all the material they request. Remember too that unless an agreement can be negotiated with opposing counsel, you may be left to plead for discovery to the arbitrator, who is charged with running a fair and efficient arbitration.

## Communication with Opposing Counsel

When you are familiar with the rules and have outlined an effective arbitration or mediation strategy for your client, communicate with opposing counsel. This is a good practice for both arbitrations and mediations.

For an arbitration, run through the scheduling order form, if any, that the case administrator sent. Try to work out agreements on how the case will proceed and the deadlines that make sense. Discuss whether dispositive motions are appropriate and, if so, under what briefing schedule. If you have (wisely) encouraged your client to listen in on the scheduling conference, let opposing counsel know that your client will be on the call.

In a mediation, contact opposing counsel to discuss the mediation process, your client and your thoughts on opening statements, and possible areas of agreement. Of course, settlement discussions during counsel's discussions are always a plus.

## Conclusion

In short, be proactive. And be strategic in all aspects of selecting a neutral and planning for the preliminary scheduling conference. Your clients, and your arbitrators and mediators, will thank you. ■

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