RECLAIMING THE PROMISE OF ARBITRATION

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From the earliest days of the Washington Territory, arbitration has been a recognized method of dispute resolution in our state;[2] the Legislature enacted Washington's first arbitration act in 1869.[3] Historically, arbitration has been popular, especially among businesses; notwithstanding its higher forum costs (the parties pay not insignificant filing fees and bear the cost of compensating the arbitrator), it offered parties a number of benefits not available in a litigation forum: the opportunity to select the decision-maker, usually someone experienced in resolving business disputes; confidentiality; an early opportunity for a hearing on the merits; and a final award, not subject to interminable appeals. Moreover, arbitration was a more expeditious and less expensive alternative to litigation, largely because "discovery" and motions practice in arbitration were limited and parties had no need for significant case preparation time.

Over the last 20 years, however, arbitration has taken on more and more of the hallmarks of litigation, with parties saddled with the sort of wide-ranging discovery and motions practice common in litigation. The reasons are many and varied, and lawyers, their clients, and arbitrators all bear responsibility for the change. Lawyers are used to litigation, where extensive discovery and motions practice are the norms, and frequently ask – often jointly – that the arbitrator use court rules as a template for discovery and case management. Since arbitration is fundamentally contractual,[4] if the parties agree (as manifested by their lawyers' agreement) on a process that more resembles litigation,

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[2] *Bachelder v. Wallace*, 1 Wash. Terr. 107 (1860). *See also*, *Zindorf Const. Co. v. Western American Co.*, 27 Wash. 31, 67 Pac. 374 (1901).

[3] Laws 1869, An Act to Regulate Practice and Procedure in Civil Actions, Ch. XX, Arbitration and Award [Sections 264 through 274], reprinted in Laws of Washington (1895). The arbitration act remained, essentially unchanged, a part of Washington statutory law until 1943 when the Legislature enacted the Washington Arbitration Act, later codified in RCW Chapter 7.04. The Legislature completely revamped the statutory framework for arbitration in 2005 when it enacted the Revised Uniform Arbitration Act, RCW Chapter 7.04A, and repealed the 1943 statute.

[4] *See* RCW 7.04A.040 (substantially identical to RUAA Sec. 4).

arbitrators have been understandably reluctant to impose their own views of how that process should work.

In response to growing complaints from arbitrators, lawyers and corporate counsel that commercial arbitration had become as slow and costly as litigation, in 2009 the College of Commercial Arbitrators,[5] in conjunction with five of the principal organizations involved in commercial arbitration[6] and the Straus Institute for Dispute Resolution at Pepperdine University School of Law, convened a national summit of lawyers, commercial users of arbitration, and arbitrators. The result of the summit was the development and publication of *Protocols for Expeditious, Cost Effective Commercial Arbitration*.[7]

Recognizing that reclaiming the promise of arbitration can only be achieved if all those involved – lawyers, both in-house and outside counsel, arbitrators, users and provider-organizations – work together, the *Protocols* are organized with specific action steps that each should take. This article cannot begin to comprehensively treat the *Protocols*; it will, however, highlight key recommendations for counsel, arbitrators and provider organizations.

Counsel Should Understand and Pursue the Client's Goals Expeditiously. Clients are most satisfied when the arbitration process recognizes and reflects their goals.[8] They and their lawyers should discuss those goals at the outset of a dispute and revisit them periodically to be sure that the process supports them. Lawyers, both in-house and outside, must be familiar not only with the substantive law involved in the case but also with state and federal arbitration law[9] and the rules and procedures of the arbitration

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[5] The College of Commercial Arbitrators (*see* www.thecca.net) is a by-invitation only association of leading arbitrators.

[6] The ABA Section of Dispute Resolution, the American Arbitration Association, JAMS, CPR (the International Institute for Conflict Resolution and Prevention), and the Chartered Institute of Arbitrators.

[7] The *Protocols* may be downloaded from the CCA's website: www.thecca.net.

[8] Although arbitration can result from a post-dispute "submission agreement", most commercial arbitrations flow from a dispute resolution clause included in a contract that defines the parties' agreement. When drafting such a clause, it is critically important that counsel thoroughly understand the types and nature of disputes that may arise and both the client's and its trading partner's goals in establishing a framework for resolving them, tailoring the clause to meet them.

[9] The Federal Arbitration Act, 9 U.S.C., governs and applies to contracts involving interstate, foreign and maritime commerce. State arbitration acts (*e.g.*, Washington's Uniform Arbitration Act, RCW Chapter 7.04A) apply to contracts

forum. Counsel also must realistically evaluate whether they possess the needed advocacy skills, and the time, to see the case through to resolution in a manner consistent with the client's goals.

Counsel Should Assess Settlement Opportunities Early and Often. Much has been written about the "vanishing trial" in litigation, with less than 5% of filed cases proceeding to trial. The experience of most arbitration providers is to the opposite, with a substantially higher percentage of cases proceeding to hearing and award – anywhere from 25% to 50-plus%. There is no data explaining why this is so, but since the cost of arbitration can be significant – even where the case is effectively managed by counsel and the arbitrator – lawyers should assess opportunities for settlement and counsel their clients appropriately. The initial assessment should be revisited periodically as the case progresses and the interest of one's own client, as well as the opposition, in settlement should be explored as the case unfolds. Settlement becomes increasingly difficult when the transaction costs exceed either the amount in controversy, or what realistically might be obtained by an award.

Arbitrators Should Actively Manage Cases and Provider Organizations Should Train Their Arbitrators to do so; Counsel and Clients Should Select Arbitrators with Proven Case Management Skills. Judges are most often randomly assigned to a case. Arbitration is different: ordinarily the parties have the opportunity to select their decision-maker, or at least have substantial input into who is appointed. While many factors impact the cost effectiveness of arbitration and the speed with which the dispute is resolved, three of the most important are the skill of the arbitrator in managing the case to that end, the ability of lawyers to recognize and educate their clients on the differences between litigation and arbitration, and their and their clients' commitment to tailor the arbitration process so that the benefits of arbitration are realized. The major arbitration provider organizations train their panel members to be active and effective case managers, shaping the process to the needs of the case from beginning to end, and require periodic refreshers in case management skills. Those efforts should be continued and lawyers and clients should insist that provider organizations do so. Counsel can, and should, welcome and seek the appointment of a managerial arbitrator as their clients will be more satisfied with the process if it results in a total cost lower than traditional litigation, an early opportunity for the arbitrator to hear and decide the case, and a durable award. While arbitrator involvement does not come without cost, counsel should keep their arbitrator informed of significant case developments and seek assistance at the earliest sign of problems.

Clients, Their Counsel, and Arbitrators Should Insist on Tailored Discovery. As clients and litigators know well, discovery in litigation is wide-ranging and is commonly

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involving intrastate commerce, and interstate, foreign and maritime commerce, to the extent not inconsistent with the Federal Arbitration Act. Most state arbitration acts are modeled on the 1956 Uniform Arbitration Act or the 2000 Revised Uniform Arbitration Act.

the single most costly component of litigation. It is costly not only due to the lawyer fees involved in drafting and responding to discovery, it normally requires heavy client involvement, particularly in responding to discovery, distracting clients from the business of their business. In arbitration, however, unless the parties' arbitration agreement provides otherwise, discovery rights are not nearly as wide-ranging as in litigation. Indeed, the historically narrower scope of discovery in arbitration has been one of the most attractive features of arbitration. The Washington Uniform Arbitration Act and the rules of most arbitration provider organizations vest the arbitrator with the power to determine and manage the scope of discovery so that it is appropriate to the case and consistent with relevant factors, such as the amount in controversy and the complexity of the issues.[10] While counsel may be tempted to seek the importation of litigation-style discovery into arbitration, they should temper that inclination with a realistic evaluation of their and their opponent's case preparation needs and the cost to their clients of using specific discovery vehicle; clients can help reduce their costs by insisting that their lawyers do so. For their part, arbitrators should thoroughly understand the essence of the dispute they have been engaged to decide, thoughtfully analyze the sort of discovery necessary to allow the parties to prepare for the hearing, and insist that counsel approach the case realistically. Any discovery permitted should be specifically tailored to the case. Blanket use of interrogatories, repetitive and broad requests for documents ("…all documents related to…") and numerous depositions serve to raise the costs of the arbitration and delay final resolution.

Arbitrators Should Discourage Unproductive Motions and Limit Dispositive Motions to Those that Show Promise in Streamlining and Focusing the Process. In litigation, there are countless motions that counsel can bring; while clients bear the cost of their lawyers bringing such motions, for the most part the out-of-pocket cost of resolving motions is fairly nominal as the judicial system is publicly funded. Arbitration is different: clients not only bear the cost of bringing or responding to motions, they bear the fees of the arbitrator to decide them. While dispositive motions are permitted in arbitration,[11] the managerial arbitrator will require counsel to demonstrate how a summary judgment motion – and the timing of such a motion – will narrow the issues and speed the case to resolution. Unless a dispositive motion is likely to result in streamlining the case or expediting the hearing, it should not be permitted; motions brought simply to "educate" the arbitrator ought to be discouraged as they serve mainly to run up costs and delay the process. Counsel should discuss with their clients the cost and benefits of motions practice and arbitrators should discourage lawyers from filing any motions that delay resolution or increase the cost without significant benefit to the client's goals or the process.

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[10] *See* RCW 7.04A.170 (substantially identical to RUAA Sec. 17); *see also* RCW 7.04A.150(1) (substantially identical to RUAA Sec. 15).

[11] *See* RCW 7.04A.150(2) (substantially identical to RUAA Sec. 15).

Counsel and Clients Should Rethink the Number of Arbitrators; Use the Opportunity to Select the Panel Chair and Refer Discovery and Minor Procedural Matters to the Chair. One key difference between litigation and arbitration is the cost to the parties of compensating the decision-maker: judges are paid by the public at large; arbitrator fees are paid by the parties. Even if the arbitration agreement provides for a three-arbitrator panel, counsel and their clients should think carefully about whether the case really merits the cost of such a panel; unless the dispute is one where a significant benefit is obtained by bringing the experience of three arbitrators to bear on it, use a sole arbitrator. Too, melding the schedules of three busy arbitrators can substantially delay case processing. When a case justifies a three-arbitrator panel, give the arbitration provider input on the appointment of the panel chair as he or she serves a key role in ensuring the case is handled effectively and efficiently; reduce costs and avoid delay by delegating resolution of minor procedural matters and discovery issues to the chair.

Arbitration is not broken; the basic framework for a workable non-judicial dispute resolution process exists. In order for its promise to be realized fully, however, clients, their lawyers, arbitrators and arbitration provider organizations must work together to make the process less like litigation and more like the expeditious and less costly alternative that made it attractive originally.