The Legal Intelligencer

How to Develop Facts in Arbitration, Without Court Authorized 'Discovery'

Litigating a commercial case is fundamentally different from arbitrating one. Lawyers who represent parties in commercial arbitrations need to understand the significant differences between court processes and those used in arbitration.

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Litigating a commercial case is fundamentally different from arbitrating one. Lawyers who represent parties in commercial arbitrations need to understand the significant differences between court processes and those used in arbitration. Counsel also need to know how those differences affect the development of hearing proofs. The cornerstone of a lawyer's duty, competent and zealous representation, requires no less.

Federal policy has long favored the enforcement of private agreements requiring the arbitration of disputes, as in *Stolt-Nielsen SA v. AnimalFeeds International*, 559 U.S. 662, 681-82 (2010). The U.S. Supreme Court's recent unanimous decision in *Harry Schein v.*

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Archer & White Sales, No.17-1272 (Jan. 8) again confirms that "arbitration is a matter of contract and courts must enforce arbitration contracts according to their terms."

To effectively represent clients in hotly contested "big money" commercial arbitrations, lawyers must be prepared to conduct a hearing without the type of discovery that is a common fixture in litigation. This is underscored by the fact that two thirds of all commercial arbitrations filed with the American Arbitration Association (AAA) settle before the hearing, with a full third proceeding to final award (http://info.adr.org/arbitration-myths/). With the stakes that high, lawyers need to understand how to prepare.

Court discovery processes are well known. They start with robust disclosures required by Rule 26. Under this rule, parties identify the type and location of documents in their possession; witnesses with knowledge, along with a short statement regarding what each witness knows; and applicable insurance information. Federal Rules 27-36 and 45 identify additional discovery tools available as of right. These include document requests, interrogatories, depositions, discovery of nonparties, requests to admit and the like. Discovery is time consuming. Since it represents the primary method of factual development in an adversarial system, discovery disputes are frequently bruising and expensive. With some individual variation, state court rules provide similarly liberal discovery mechanisms.

"Discovery" under the AAA rules is more limited. For disputes involving claims in excess of $500,000, AAA rules require production of all documents "relevant and material" to the parties' claims and defenses, see AAA Rules L- 3 and R-22(b). Beyond that, a limited number of depositions may be allowed, but only in "exceptional cases," at the "discretion of the arbitrator" and upon a showing of "good cause." Where depositions are permitted in a AAA case, it is safe to assume that they will be far fewer in number and shorter in length than the federal default provision of ten depositions, each lasting seven hours. Indeed, the AAA cautions parties and arbitrators that "care must be taken to avoid importing procedures from court systems [which are] not appropriate to the conduct of arbitrations," which are intended to provide a "simpler, less expensive and more expeditious" resolution than courts. Its rules seek to promote the "efficient and economical resolution" of disputes while advancing "equality of treatment and safeguarding … the opportunity to fairly present … claims and defenses."

Lawyers are trained to use court authorized discovery to evaluate claims and develop trial evidence. Depositions are at the heart of this effort. The process is a familiar one. Interrogatories, document production requests and pleadings are all reviewed to prepare deposition outlines. Depositions, in turn, are intended to allow counsel to "learn" their adversary's case, permit witness evaluation, gain admissions, "exhaust the witnesses' recollection" and "lock in" the witness so that their trial testimony cannot vary from what is expected.

As noted, counsel preparing for a complex arbitration lack many of the tools used to prepare a court case. While document production is plainly required in arbitration, the AAA rules do not contemplate interrogatories or requests to admit. Depositions are discretionary and permitted in "exceptional cases" upon a showing of "good cause." Because of this, preparation for an arbitration requires different methods than trial preparation.

In short, AAA cases present lawyers with challenges and opportunities. By definition, parties to AAA proceedings previously enjoyed some type of business relationship. The existence of that relationship is likely one reason why judicial discovery is not contemplated by the AAA. It is typically not needed. Rather, the parties' prior conduct, practices and knowledge contain a rich history of available facts that can be developed without the necessity of formal discovery.

Counsel should consider factual development in an arbitration using at least the following sources:

- Documents: As noted, the AAA Rules require parties to produce documents "relevant and material" to their claims and defenses. All client and adverse party documents need to be carefully reviewed. In addition, documents that reflect the parties' relationship *prior to* their dispute should be reviewed to understand their pre-dispute conduct and whether (and how) they previously addressed issues similar to those involved in the current dispute.
- Conduct: Carefully interview client representatives and, where necessary, former employees. While the language of the parties' contract is critical, so is their conduct. Understand how the parties conducted business before their current dispute arose. Consider whether the parties' current positions are consistent with their prior practices. This is critical since the parties' prior conduct under their agreement is strong evidence of what they understood their contract to require. In this fashion, the law recognizes the somewhat modified axiom that "Actions speak at least as loud as words," see *Atlantic Richfield v. Razumic*, 390 A. 2d 736, 741 n. 6 (Pa 1978), citing the Restatement (Second) of Contracts Section 228 Comment g (Tent. Draft No. 5, 1970) ("the parties to an agreement know best what they meant, and their actions under it is often the strongest evidence of their meaning") U.C.C. 2-202 comment 1(c) (relating to course of performance). Be sure to carefully explore the basis for any variance between prior conduct and a party's current position.

Consider interviewing former employees of your adversary, particularly those who are knowledgeable and who you have reason to believe may be helpful. This is permissible in most states, including Pennsylvania, as in *State Farm Mutual Automobile Insurance v. Sanders*, Civ. A. No. 12-3052, 2013 U.S. Dist. LEXIS (E.D. Pa Sept. 25, 2013), Philadelphia Bar Assosiation. Professional Guidance Committee Opinion 2014-3 (May 2014).

- Public Information: This can be a treasure trove. First, review your adversary's website to see whether it contains statements or claims that are consistent with

its current posture. Second, social media can be chockful of relevant information. Consider mining it. Third, conduct

Google searches on your adversary and likely witnesses. Fourth, if your adversary is a publicly traded company, review its SEC filings. Pay particular attention to the management discussion and analysis (MD&A) found in company 10-K filings for information respecting your adversary's market challenges, lines of business the company plans to expand (or exit) and other topics which may be reflected in the filing. Fifth, the Secretary of State's website in most states contains information reflecting when particular entities were created, a fact that can be critical in cases involving claims such as breach of fiduciary duty, unfair competition, breach of a covenant not to compete, etc. Sixth, you can locate federal cases by party through the PACER system. Check prior cases for inconsistent litigation positions, witness statements, etc. Notably, many state courts, particularly in urban regions, have similar electronic filing requirements which allow for third party access. Last, expect your adversary to thoroughly review your client's web site, social media, public filings, prior litigation. Beat your adversary to the punch: Examine your client's publicly available information and discuss with your client any issues that may arise.

While this factual investigation is important in any large case, it takes on added significance in an arbitration, precisely because the opportunity for formal discovery is limited.

Lawyers and clients frequently complain that cases get "bogged down" in time consuming and expensive discovery, including discovery disputes. Not so in arbitration. Even large cases involving significant sums proceed to arbitration with sufficient, but not suffocating, discovery. Lawyers who approach factual development in a thoughtful and inquisitive manner will find themselves more than adequately prepared to zealously and competently represent their clients in complex AAA cases.

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