

Due Diligence in **Arbitrator Selection: Using interviews and Written “Voir Dire”**

BY JEFFREY P. AIKEN

Jeffrey P. Aiken serves on the American Arbitration Association’s roster of mediators and arbitrators for commercial, construction and large, complex cases. A senior attorney at the Milwaukee office of Whyte Hirschboeck Dudek S.C., he has been involved with arbitration matters as a neutral or party representative for over 30 years.

Trial lawyers have helped create a cottage industry of jury consultants who, for considerable fees, assist them in identifying jurors who have either an inherent bias¹ against certain matters or a leaning in favor of others. “Voir dire” is the name of the process of questioning prospective jurors to determine if they should be disqualified either for bias or for another reason using one of counsel’s peremptory challenges.² The objective of voir dire is to select jurors who are most inclined to find in favor of one’s client and eliminate those who are predisposed to finding against the client.

One should never select an arbitrator out of the air. This article discusses the necessity for due diligence in arbitrator selection and how to go about it.

If lawyers could engage in this process to select the judge hearing the case, they would. The good news is that they can engage in a kind of *voir dire* before selecting the arbitrators and they should.

Judge Richard Posner has observed that judges sometimes make decisions based not on legalistic methods, but on other factors:

[L]egal uncertainty ... creates *the open area* in which the orthodox (the legalist) methods of analysis yield unsatisfactory and sometimes no conclusions, thereby allowing or even dictating that emotion, personality, policy intuitions, ideology, politics, background and experience will determine the judge's decision.³ (Emphasis added)

If law were logical, "good judgment" would not be an admired quality in judges.⁴ But good judgment *is* an admired quality in a judge. It entails, in the words of Judge Posner, "a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a national sense of reality and common sense."⁵

Parties also want good judgment in an arbitrator. It may even be more important due to the arbitrator's role as finder of fact and law, the finality of arbitration awards, and the limited grounds for an appeal.⁶ The arbitrator biographies made available by most established arbitration provider organizations generally are insufficient to make one of the most important decisions in the arbitration process—arbitrator selection. Consequently, it is essential to conduct a due diligence investigation to try to learn the predilections of the candidates for the position of the arbitrator. Indeed, it is difficult to imagine why one would not research each potential arbitrator under consideration.

The American Arbitration Association (AAA) and other arbitration organizations have tried to raise the level of training of arbitrators. Nevertheless, there is a wide range of opinion on arbitrator abilities.

In addition, arbitrators hold a wide range of views on matters that could have an impact on counsel's arbitration strategy and case presentation. For example, some believe in limiting witnesses to only those disclosed in a pre-hearing witness list, while others are more flexible, recognizing that arbitration presents a more fluid process where it is not always known what oppos-

ing witnesses will say—especially when depositions are permitted or held to a minimum.

Arbitrators also have equitable powers not available to judges.⁷ That is because in the United States, unless restricted by arbitration rules or the agreement of the parties, an arbitrator may consider or base a decision on equitable principles.⁸

What may not be as well known is that arbitration has had its foundation in equity going back to ancient times. The fundamental distinction between arbitration and litigation has been stated in various ways but all essentially the same. In 320 B.C., Aristotle wrote, "The arbitrator looks to what is equitable, the judge to what is law; and it was for this purpose that arbitration was introduced, namely, that equity might prevail."⁹

Commenting on Aristotle, Martin Domke is quoted as saying, "Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail."¹⁰

Even in the early 20th century arbitration was recognized in the United States as a part of a dispute resolution system. *Ballentine's Law Dictionary* (1916) defined "arbitrium" to mean "an arbitration award." Both this dictionary and *The Cyclopedic Dictionary of Law* (1901) defined the phrase *arbitrium est iudicium boni viri, secundum aequum et bonum* to mean: "an award is the judgement of a good man according to equity and goodness."

The concept of equity in arbitration remains today. For example, the AAA's Commercial Arbitration Rules and Construction Industry Arbitration Rules both indicate that arbitrators may grant any remedy or relief that they deem "just and equitable," so long as it is within the scope of the parties' agreement.¹¹ Most experienced arbitrators are aware, while they are not entitled to disregard the law in developing an award (unless a case involves a statutory violation), they are not necessarily bound to follow it.

When it comes to case administration, arbitrators also have considerable discretion in managing the procedures in a manner consistent with the expedited nature of arbitration and in interpreting the applicable rules. For example, R-22(d) of the AAA construction rules provides:

Arbitrators hold a wide range of views on matters that could have an impact on counsel's arbitration strategy and case presentation.

“There shall be no other discovery, except as indicated herein or as ordered by the arbitrator in extraordinary cases when the demands of justice require it.” How one defines an extraordinary case is subject to a wide range of interpretation.

Thus, a party who desires to take a few pre-hearing depositions or to seek discovery of electronically stored information in a large, complex case should try to determine what an arbitrator candidate’s inclinations are on these matters before making the appointment.

Consequently, the inclinations of prospective arbitrators on case management and substantive issues are extremely important in gauging the extent to which a candidate may be inclined to look past legal technicalities and apply equitable concepts of fairness. This overlay of equity on top of strict legal concepts creates, in the words

This is, essentially, a written voir dire.

Interviewing Practitioners

When seeking to interview lawyers who have arbitrated before one or more of the arbitrator candidates, be sure to contact a few who prevailed and some who lost so as to obtain a balanced perspective. Keep in mind that some lawyers prefer not to comment on arbitrators they have appeared before on the ground that it would violate their obligation to keep prior proceedings confidential. I personally think that no disclosure violation would result from sharing personal observations about the arbitrator, as long as there is no disclosure of information about the parties or the award.

In order to obtain useful information from these interviews, your list of questions should be

The inclinations of prospective arbitrators are extremely important in gauging the extent to which a candidate may be inclined to look past legal technicalities and apply equitable concepts of fairness.

of Judge Posner, a “gap” between inherent tendencies and strict legalistic analysis. This makes it wise, in most cases, to explore whatever avenues are available to discern those tendencies before choosing who should serve as a neutral. This in essence is “why” voir dire should be pursued in one form or another.

Conducting Proper Due Diligence

The more difficult question is how to engage in an effective due diligence investigation of prospective arbitrators. It requires planning and follow through. On the planning side, immediately after submitting the client’s pleading in the arbitration, decide what you want in an arbitrator in terms of style, personality, management skills, activism at the hearing, and views on specific issues. Make a list of these qualities and use them to develop two lists of questions, one to ask practitioners who have experienced arbitration before your arbitrator candidates, and one to ask the candidates themselves.

After receiving the list of arbitrator candidates from the arbitration administrator and narrowing the candidates down to three, rank the candidates. Ask them for a list of half a dozen lawyers who have argued before them and to include both winners and losers. Then arrange to interview these attorneys. Next, give the arbitrator candidates a list of written questions to answer.

tailored to discover what the lawyer knows or senses about the arbitrator’s views and preferences, without delving into facts that should not be disclosed. The questions should focus on issues that arise in every arbitration, such as the arbitrator’s temperament, style, and approach to the hearing and decision making. For example, with regard to style, you could ask whether the arbitrator was laid back or very proactive. With regard to the hearing, you could ask whether the arbitrator asked questions of witnesses or counsel and whether he or she required strict adherence to witness and exhibit lists (requiring advance identification of impeachment documents previously disclosed). In addition, you could ask if written witness statements or other evidence presentation techniques were used in order to make the hearing more efficient. If the answer is no, you could ask whether these techniques were ever discussed in a pre-hearing conference.

If your case will require pre-hearing interim relief, you could ask whether that issue was involved in the practitioner’s case and if so, whether such relief was granted or denied.

If your arbitration will require discovery, you could ask whether the arbitrator limited discovery or was flexible in allowing anything the parties agreed to. What procedure did the arbitrator follow when a party had a problem with discovery? Did the arbitrator ask for letters instead of

motions and decide discovery disputes over the phone?

You could ask about the arbitrator's familiarity with the applicable arbitration rules. You could also ask which rules applied without violating any non-disclosure obligations. In addition, you could ask whether the award was issued within the time frame required by the rules. This leads to questions about the efficiency of the proceeding and the cost. You could ask whether the lawyer's client was satisfied with both.

In addition, you could ask counsel whether the arbitrator was familiar with the type of subject matter involved in the prior dispute and whether that seemed to help or hinder the prompt resolution of the case.

The answers to these questions could help you determine whether an arbitrator candidate is likely to follow the literal provisions of the law or a contract or focus on overall fairness.

It is also worthwhile inquiring into whether counsel believed that the arbitrator candidate made a tough decision by ruling in favor of one party or reach a divided decision, ruling partly in favor of one party and partly in favor of the other.

The reliability and value of the information acquired from lawyer interviews will depend on how much the lawyer recalls and the quality of his or her insights and observations. For this reason, it may be useful to make inquiries into the qualifications of the lawyers you plan to interview.

Using the Voir Dire Questionnaire

The questionnaire for the arbitrator candidate could provide the answers you need to decide whether to select or eliminate a candidate. But it also may not. People are not always completely candid or accurate when answering questions about themselves since memory is fallible and people interpret events in different ways.

The questions you can ask a prospective arbitrator are much more limited than those you can ask in the *voir dire* of prospective jurors. For example, personal questions are out. For example, you can not ask arbitrator candidates about the bumper stickers on their cars or the schools that their children attend. But there are a host of worthwhile questions that you can include in the questionnaire.

A recent questionnaire I used sought informa-

tion about the number of arbitrations the candidate was or is currently involved where the claims arose out of the same field as your case. In addition, I sought to find out how many of these cases

- involved claims over a specified sum,
- used written witness statements,
- involved writing a reasoned award,
- involved awards of interest on a liquidated sum,
- awards were not unanimous, and
- did the candidate disagree with the award.

If some technical knowledge would be helpful, the questionnaire could ask the candidate to state whether he or she has that knowledge and where it was acquired—for example, at school, a training program or through experience.

To determine familiarity with the industry out of which the dispute arose, the questionnaire could ask the candidate to state the amount of time previously spent in providing services to or writing articles for, entities or trade associations that operate in the businesses of the parties to the dispute. It should also ask whether the prospective arbitrator has ever been a party representative in an arbitration involving issues similar to your case.

The questionnaire could ask if the candidate ever had an award challenged in a judicial enforcement action and the result of those challenges. The sidebar on this page contains a number of “yes” or “no” questions that could also be asked of arbitrator candidates. A final catch-all question that is always important to ask is whether there are other considerations or factors of which the candidate is aware that would be relevant to the parties regarding his or her potential service on an arbitration panel (other than as listed in the candidate's resume), and if the answer is “yes,” to explain them.

If references for an arbitrator candidate cannot be obtained from colleagues, ask the candidate for the names of several parties and counsel on the questionnaire, making sure to ask for arbitration winners and losers.

This investigative process is likely to generate both positive and negative information about each candidate. Make up a grid to compare the views of the arbitrator candidates. With this positive and negative information, it should be possible to decide who would be the most suitable candidate to serve as the arbitrator. ■

Possible Voir Dire Questions Relating to Arbitration Procedure

To uncover arbitrator views on different aspects of arbitration procedure, the questionnaire could ask the following “yes” or “no” questions:

1. Should an arbitrator refrain from requiring activities that counsel for all parties oppose?

2. Should judicial rules of evidence regarding hearsay and the right of a party to cross examine the source of offered evidence be applied in the arbitration?

3. Should a party only be allowed to introduce evidence from witnesses disclosed in accordance with the scheduling order?

4. Should a party be required to disclose to the opposing party only those documents they intend to rely upon at the hearing—as opposed to all documents which relate in any way to a claim, defense or counterclaim in the proceeding?

5. Should a party be required to identify to the opposing party in advance of the hearing the items of documentary evidence that will be used to cross

examine the opposing party’s witnesses?

6. Should a party be required to disclose prior to the hearing all demonstrative exhibits and data compilations prepared for use at the hearing?

7. Should contracts be literally construed regardless of the objectives intended to be achieved and the circumstances surrounding their creation?

8. Do you agree that an arbitrator is responsible for arriving at an equitable result under the particular circumstances of the matter, despite the technicalities of the law?

9. Should evidentiary depositions be allowed for witnesses who reside beyond the subpoena power of the arbitrator?

10. Should discovery depositions be allowed for witnesses within the subpoena power of the arbitrator?

11. Should all experts be required to prepare written expert reports before being allowed to testify at a hearing?

ENDNOTES

¹ The term “bias” has a negative connotation (equivalent to prejudice) although it has also been defined as “an inclination of temperament or outlook.” *Webster’s 7th New Collegiate Dictionary* (1965).

² The French term *voir dire* is defined as “a preliminary examination of prospective jurors or witnesses under oath to determine their competence or suitability.” *American Heritage Dictionary of the English Language*, (4th ed. Houghton Mifflin).

³ Richard A. Posner, *How Judges Think* 11 (Harvard University Press 2008).

⁴ *Id.* at 117.

⁵ *Id.*

⁶ Section 10 of the Federal Arbitration Act sets forth the grounds to vacate or modify an award. See Katherine Helm, “The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck

Stop?,” 61(3) *Disp. Resol. J.* 16 (Nov. 2006/Jan. 2007); David A. Senter & Andrew L. Chapin, “Statutory Grounds for Challenging Arbitration Awards,” 19 *Construction L.* 30-36 (October 1999).

⁷ Courts of equity and courts of law have been merged in this country for centuries and it is usually the rule that one cannot access the equitable powers of the court if there is a legal remedy, even though more restrictive.

⁸ “Fundamentals of the Arbitration Process” in *Training Manual for Construction Industry Arbitrators* 9 (American Arbitration Ass’n 1996).

⁹ Aristotle’s *Rhetoric*, bk. 1, ch. 13.

¹⁰ Quoted in the front matter of *The Arbitrator’s Manual* (Securities Industry Conference on Arbitration, August 2007).

¹¹ These rules are available on the AAA Web site at www.adr.org.