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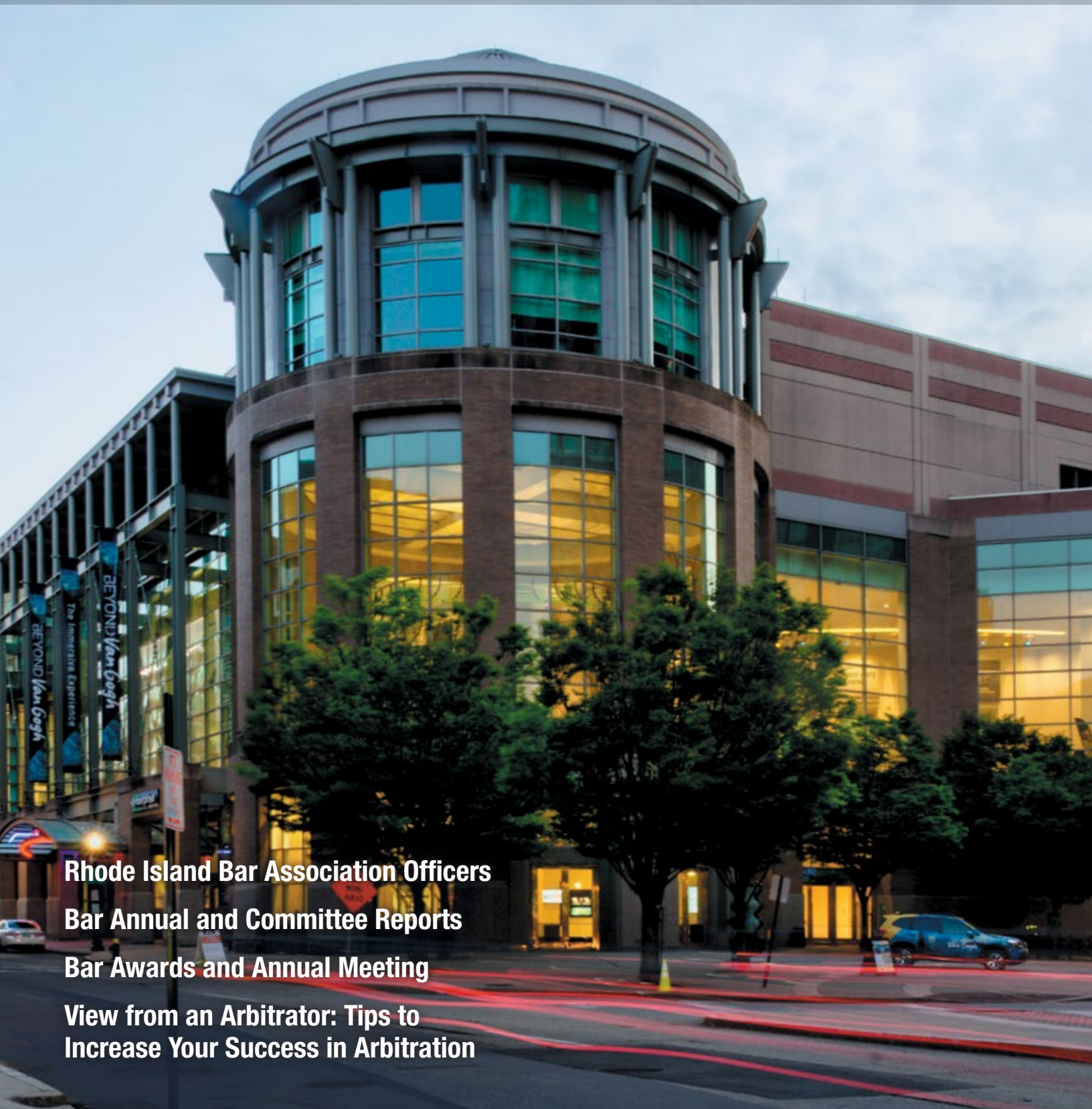

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View from an Arbitrator: Tips to Increase Your Success in Arbitration

View from an Arbitrator: Tips to Increase Your Success in Arbitration

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Arbitration, by design, is a quick, efficient, and less formal means of private dispute resolution.[1] Lawyers have more opportunities for control in arbitration than in court. The following are best practices I have seen lawyers use to maximize outcome, and minimize expense, in arbitration.

1. Know the Rules of the Game.

Litigators look to the applicable rules of procedure. The same habit should apply in arbitration. There are three primary sources of authority in arbitration: 1) the arbitration agreement, 2) the operating rules, and 3) governing state and/or federal law.

First, look to the parties' arbitration agreement, which often states how to choose the arbitrator, limits on discovery, hearing venue, and governing law. The agreement may incorporate a set of operating rules publicly available from a dispute resolution vendor like AAA, JAMS, or FairClaims.

Second, look to the operating rules chosen by the parties. Dispute resolution vendors offer tried-and-true rules for managing the arbitration. Specific practice areas – commercial, construction, employment, labor, financial, and consumer law – have their own sets of rules. Becoming familiar with these rules, just as you would the rules of civil procedure, will put you on a level playing field and minimize procedural disputes. The rules may limit tasks taken for granted in court, like filing motions and conducting discovery.

If there are no established rules of the game, be cautious about proceeding. Parties may think they can devise their own rules, but it often doesn't work. Instead, you can propose to adopt a set of rules at the prehearing conference.

Third, the applicable state or federal arbitration acts[2] may address issues not covered in the agreement and rules. These "gap fillers," for example, have rules on issuing a summons for a nonparty witness to appear and bring documents to a hearing.[3] The arbitrator's authority to enforce a summons over a nonparty witness is questionable. In the face of noncompliance, you can petition the court to compel attendance under the framework laid out in these acts.[4]

2. Choose the Right Arbitrator for Your Case.

One benefit of arbitration is the ability to choose a decisionmaker. Arbitrators run the gamut of experience from litigators to former judges, to nonlawyers with subject matter expertise. Each can add value to the right case. Using only one arbitrator except for the most complicated cases will save time and expense. Consider the following questions before selecting an arbitrator:

1. Is a specialized area of law or practice at play, requiring an arbitrator who has subject matter expertise either as a lawyer or nonlawyer expert?
2. Are counsel or party dynamics especially difficult, requiring an arbitrator with litigation experience who can manage these dynamics?
3. Do the parties desire more creative hearing processes that a former practitioner can apply, or closer adherence to legal and evidence rules that a former judge may apply?
4. Would the client's confidence be enhanced by an arbitrator of a particular personal or professional background?
5. Has the arbitrator practiced on both sides of the "v" to ensure neutrality?
6. What is the arbitrator's track record on timing to get to resolution, billing, and flexibility?

Once you have identified the criteria, how do you find the right arbitrator? Aside from referrals, go online, of course. LinkedIn is an increasingly helpful search engine for qualified arbitrators. Dispute resolution vendors vet and approve arbitrators and carry their resumes, often on their websites. It is acceptable for a lawyer to call and interview an arbitrator candidate. Any *ex parte* communications should be limited to the candidate's expertise, case management style, willingness to serve, and conflicts, without discussing the merits of the case.[5]

Ask the arbitrator candidate to disclose potential conflicts before the appointment. The parties can agree to waive potential conflicts. Getting

Bar Association Mentor Programs: New Veterans Category

Our Bar Association is proud to offer mentorship opportunities to our members, promoting professional development and collegiality, and assistance and guidance in the practice of law. Experienced practitioners can share their wealth of knowledge and experience with mentees, and mentees receive a helping hand as they begin, or revitalize, their legal career. Over the years, the Bar Association has matched numerous new members with seasoned attorneys, and we would like to refresh our directory.

For traditional mentoring, our program matches new lawyers one-on-one with experienced mentors in order to assist with law practice management, effective client representation, and career development. If you would like to volunteer and serve as a mentor, please visit ribar.com, select the **MEMBERS ONLY** area, complete the **Mentor Application** form and return it to the listed contact.

We have revised this Application to include a sizeable list of practice areas, including a new category for Veterans. We are seeking attorney mentors in this area who are currently serving or have served in the military as they transition to civilian legal practice.

As an alternative, the Bar Association also offers the Online Attorney Information Resource Center (OAR), available to Bar members through the **MEMBERS ONLY** section of the Bar's web site, to help members receive timely and direct volunteer assistance with practice-related questions.

If you have any questions about either form of mentoring, or if you would like to be paired with a mentor through our traditional program, please contact Communications Director Erin Cute by email: ecute@ribar.com, or telephone: 401-421-5740.

approval from the client for the arbitrator candidate, knowing potential conflicts, helps with the client at the back end of a disappointing outcome to at least accept the process, if not the outcome.

3. Narrow the Issues with Opposing Counsel.

By working with opposing counsel, you can maximize your input on prehearing and hearing procedures. Arbitrators like to say: "where both parties agree, the arbitrator should not get in the way." Certainly, the arbitrator is the final authority in managing the arbitration. But I defer to reasonable party agreements that reflect the values of arbitration: fairness, efficiency, flexibility, and speed. As a matter of contractual agreement, arbitration can always be modified by subsequent agreement, with the arbitrator's approval. I encourage agreements on timing of the hearing, venue, and scope of discovery.

4. Prepare for the Preliminary Conference to Obtain a Practical Scheduling Order.

The end product of the preliminary conference is a scheduling order that will efficiently move forward towards a hearing. Here is information I find helpful for you to bring to the conference:

- your and your clients' availability,
- a list of your most essential discovery,
- ideas on structuring the hearing for greatest impact to the arbitrator and most convenience to the clients and witnesses,
- areas of agreement with opposing counsel on modified prehearing and hearing procedures,
- anticipated areas of disagreement, and
- anticipated motion practice that may need preapproval before filing.

At the conference you can introduce yourself and your client, so be prepared. This is also the time to manage clients' expectations about what arbitration is (efficient, streamlined) and is not (court litigation).

At the conference, I request a summary of key facts and the parties' positions. Unlike in court, the initial filings – arbitration demand and response – are often sparse, lacking an itemized statement of claims and defenses. You can use this conference to flesh out the issues and share what your client needs to feel validated. Do you have a client who cannot travel due to age or infirmity, requiring a hybrid hearing? Do you anticipate difficulty during document exchange and could benefit from quick responses to email for prehearing disputes? Do parallel proceedings require hearing dates that avoid overlapping rulings? Attempt to reach agreement on as many procedural issues as possible. You can use the arbitrator to fill in gaps and help you enforce the parties' agreements.

5. Don't Expect Federal Court Discovery.

A common mistake of lawyers less familiar with arbitration is to expect court-style discovery. The most frequently used commercial rules allow document exchange and nothing more. Depositions and expert discovery are not provided for. This is not to say that you cannot request additional discovery – for the right case with the right reasons. And having your opponent agree will go a long way toward getting the arbitrator's approval.

6. Use Dispositive Motions Sparingly.

Arbitrators have broad discretion to allow or deny the filing of dispositive motions. Most rules allow filing when a motion is likely to succeed and narrow or dispose of issues in the case. Deciding the motion before a hearing may save the parties time and expense if a clear result is dictated by law or an inability to establish a factual or legal issue. As with all procedures, the arbitrator must balance the goals of efficiency with giving the parties a full and fair opportunity to be heard. When in doubt, most arbitrators will let the parties go to a hearing. In other words, think about filing a dispositive motion only when the other side has no chance.

7. Use Technology to Enhance Your Case.

Technology can save cost and convenience for your client. Arbitration offers the flexibility to use technology *ad hoc*. I encourage hybrid or fully virtual hearings for the right case, for example, when witnesses live around the country. You can best advocate for your client by becoming tech savvy – or bringing a tech savvy assistant – to the hearing. You will want to seamlessly enlarge exhibits on the screen, highlight documents for witnesses, and set exhibits side by side for comparison.

The arbitrator – and counsel, as to client-witnesses – should enforce procedures to ensure the integrity of the virtual witness' testimony. A witness should be alone (other than counsel), without notes, using the exact same set of exhibits as everyone else.[6] The camera should be set to view all room attendees to ensure that the witness is not getting help during questioning. You don't want to risk limiting the value of key testimony by letting a witness testify without these simple procedures.

8. Use Creative Hearing Practices for the Greatest Impact.

Another common mistake is over lawyering the hearing. Treating the arbitration like a court trial will unnecessarily delay an award and increase cost. Arbitrators are practical and paid for their time. You can best advocate by limiting claims and defenses to those most crucial.

Minimize hearing time and expense by preparing joint exhibits and foundational facts to share with the arbitrator before the hearing. Opening statements can then be limited to the facts and issues in dispute.

Plan the presentation of your evidence creatively to have the greatest impact on the arbitrator. Arbitrators have wide latitude in the flow of the hearing. For example, consider letting competing experts meet in advance to hammer out areas on which they agree, saving disputes for the hearing. Then, by presenting both sides' experts back-to-back, or simultaneously, the arbitrator can hear responses to the same lines of inquiry in a logical fashion.[7] For the case with many small claims, develop procedures to group these claims and streamline their presentation at the hearing. A singular presentation for each claim may not be cost effective.

9. Don't Sweat the Liberal Admission of Evidence.

Arbitrators are seasoned practitioners not bound by the rules of law or evidence. This means a liberal approach to the admission of evidence. During the hearing, save your objections to testimony or evidence for only the most essential disputes. Aside from privilege, there are few objections that an arbitrator will grant to deny admission of evidence. As importantly, do not

assume that just because the arbitrator liberally admits evidence that all evidence receives equal weight. Arbitrators rely on their experience and judgment to determine the value of evidence, particularly for matters of authenticity, relevancy, and hearsay.

10. Carefully Choose How You Challenge the Final Award.

Another benefit of arbitration is its decisive finality not otherwise available in court litigation. Before filing a motion to challenge the final award, become familiar with the limited means by which an award can be modified or vacated.

Once the arbitrator issues a final award, the doctrine of *functus officio* – "the office (the appointed task) has been performed" terminates the arbitrator's power over the parties and their dispute.[8] The arbitrator has no authority to revisit or revise the merits of a final award. Only clerical errors, clarifications, and supplements for issues that were submitted but not determined, are permitted bases for a motion to amend.[9] The grounds for a court to vacate the arbitrator's award is similarly limited to the short list found in the state and federal arbitration acts.[10]

Conclusion

There is no one-size-fits-all arbitration. By knowing the rules of the game, and tailoring procedures to your case, you can use arbitration to maximize the likelihood of success for your client and keep expenses under check.

ENDNOTES

1 ***Purvis Sys. v. American Sys. Corp.***, *788 A.2d 1112, 1118 (R.I. 2002), and cases cited therein.*

2 *The Rhode Island Arbitration Act (RIAA), R.I. Gen. Laws §§ 10-3-1 – 10-3-21, and the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, 201-208, 301-307, 401-402.*

3 *R.I. Gen. Laws § 10-3-8; 9 U.S.C. § 7;* ***Washington Nat'l Ins. Co. v. OBEX Grp. LLC****, 958 F.3d 126 (2d. Cir. 2020) (rejecting jurisdictional and Rule 45 challenges to the court's authority to enforce arbitrator's summons under Section 7 of the FAA).*

4 ***Id.***

5 *Code of Ethics for Arbitrators in Commercial Disputes, Canon III (ABA 2004); The College of Commercial Arbitrators' Guide to Best Practices in Commercial Arbitrations 8-9 (Gaitis, James M. et al. eds., 4th ed. 2017).*

6 ***See, e.g.****, AAA-ICDR® Model Order and Procedures for a Virtual Hearing via Videoconference. https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf*

7 *CCA Guide to Best Practices 256-57.*

8 ***Id.***

9 ***Id.*** *at 326-328.*

10 *R.I. Gen. Laws § 10-3-12 and 9 U.S.C. § 10;* ***see also Berkshire Wilton Partners, LLC v. Bilray Demolition Co., Inc.****, 91 A.3d 830, 834 (R.I. 2014) ("Rhode Island has a strong public policy in favor of the finality of arbitration awards."); **Purvis Sys.**, 788 A.2d at 1117 (mistake of law is insufficient grounds to vacate an award).* ◊