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Chicago Daily Law Bulletin®

VOLUME 165, NO. 148

LAW BULLETIN MEDIA

Tri-panel arbitration: A time when three heads can be better than one

MEDIATION CIRCUS

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I used to wonder why anyone would want three arbitrators instead of one. Having done a bunch of them now as a neutral, I have to say that I really enjoy the process, especially the deliberations after the hearing.

Surprisingly, I have nearly always obtained unanimous decisions, and I really feel that fair results were reached.

A kind of surprising thing happens when party-appointed arbitrators walk into the hearing room.

Although they have been appointed by friends or even co-workers and although they have ongoing relationships with the lawyers who appointed them, and although they definitely know they are expected to advocate for "the one who brung them," once they get into the room those feelings usually change.

I've experienced this as a party-appointed arbitrator. There is a real sense of responsibility in making these decisions that may not always transcend loyalty but certainly competes with any feeling of partisanship.

It is like being a judge for a day. No matter how small the stakes, the case is important enough to the parties that they have gone through all preliminaries and retained three lawyers to decide it.

Trial lawyers always want to win. But trial lawyers who are appointed as arbitrators understand that they have a responsibility and, amazingly, I've not yet had anyone take intransigent or unreasonable positions in the private deliberations that follow the hearing.

They feel the sense of duty and fairness.

While the parties may stipulate to other process, tri-panel arbitration is often contractual and, beyond that, it just works.

Tri-panel has advantages of a bench trial. It's fast. You present your case. Parties get their "day in court." You can make any kind of stipulations as to evidence. You can get a decision then and there. High-low agreements can effectively manage risk.

Tri-panel also has advantages similar to a jury trial. With one neutral appointed by each side, the decision-makers usually represent a well-balanced, cross-section of opinion. The independent neutral may preside, but he or she cannot determine anything without at least one other neutral's agreement.

Like a jury, the three neutrals are required to deliberate and act together. Tri-panel gives a good likelihood of a fair result.

As an independent neutral, I consult the other neutrals on objections and motions. When it comes to deliberation, I tell them I very much want to try for a unanimous award. Each neutral gives their views and facilitated discussion ensues.

We require our 12-person juries to decide unanimously and the neutrals should recognize that a unanimous decision is very important to the parties.

Just as few cases are actually tried — and the ones that are serve as a benchmark for the rest — arbitrated decisions influence how parties value their other cases.

Just as jurors negotiate to reach consensus, striving for unanimity may require compromise.

The neutral should do his or her best to try to get the other arbitrators to an agreement. That has to be a genuine agreement, pretty much like a mediation. No one should feel coerced.

If the two other neutrals are at extreme positions, they are forcing the neutral to elect one or the other position unless some compromise can be made. Usually it can.

If one of the neutrals is simply not comfortable signing an award, he or she can always dissent. However, the question usually becomes whether they feel dissent preferable to a decision that could be brought at least closer to what they would wish. Sometimes dissent is unavoidable and no arbitrator should ever feel pressured to sign anything they do not want to sign.

Sometimes additional language helps. For example, a specific finding that some part of the claim is not found to be related may help a plaintiff negotiate liens.

What the appointed neutrals choose to discuss with the counsel appointing them, before or after the award is up to them. Ethically, they are called "Section X" neutrals and have entirely different ethical requirements from the independent neutral.

An advantage of having three arbitrators is that, like juries, someone may hear or see something that the others have missed. It's not uncommon for one of the arbitrators to see something in a completely different light. It's not uncommon for someone to have a real insight into something produced.

The real key to a tri-panel arb is having a neutral who can make sure that all of the arbitrators are working

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together. Discussion should never devolve into conflict. No one has to sign. All discussions are private. No one should feel that he or she has a vested interest. The neutral needs to keep an open mind and to listen very carefully to each of the other arbitrators.

The neutral definitely needs to read all material carefully before the arbitration. He or she has to be able to knowledgeably discuss the key points with both sides.

Advice to lawyers going to a tri-panel or any arbitration:

1. Make things easy for the arbitrators. Present the case simply and clearly.

2. Make agreements with your opponent that allow you each to file written materials like summaries of bills, timelines, Powerpoint or written summaries of testimony or medical issues or jury instructions or case law or legal briefs. These are helpful to the arbitrators in making a decision.

3. Present as you would to a jury. Do not assume that your arbitrators are knowledgeable.

4. Use visuals. Use demonstrative aids, let the arbitrators see what you want them to believe.

Most important, never go in expecting a particular result. Just like any process of enforced decision, anything can happen. Go in knowing that. Just do all you can to present your very best case.

I've found tri-panel arbitration to be a great method for expeditious case resolution while still retaining some of the balance we hope to find from a jury.