To Judge or not to Judge,
Retired Judges as Arbitrators

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The past decade has seen arbitration become an increasingly common alternative to formal legal proceedings. This is because arbitration is often perceived to be a similarly-authoritative dispute resolution mechanism without many of the pitfalls of a formal legal proceeding. Businesses, employers and unions have utilized the arbitration process to attempt to expedite proceedings and reduce the costs associated with formal litigation. Arbitration can also be tailored to suit the individual needs of the entities for which it is intended to serve.

Obviously, the selection of the specific arbitrator impacts the success of the process. Parties consider an abundance of factors when choosing an arbitrator, including:

- Experience with the same types of disputes;
- Prior involvement/relationship with the parties;
- Tone, temperament, and ability to fashion a logical decision;
- Industry or company-specific knowledge;
- Demonstrable preferences or positions as evidenced by prior decisions.
- If necessary, the ability to effectively mediate a dispute.
In addition to these considerations, several important skills, particularly in relation to arbitration of labor and employment disputes, include:

- Experience with workplace disputes;
- The ability to avoid damaging the parties’ relationship when fashioning a decision where they have an ongoing relationship;
- Willingness to follow the Parties’ agreed-up arbitration procedure;
- Flexibility in proceedings and willingness to serve as a quasi-mediator if the Parties appear willing to resolve the dispute;
- The capability to issue decisions that are comprehensive and generally unambiguous in order to bring full closure to the dispute existing between the parties.

Some retired or former judges are increasingly seeking to be selected as arbitrators. In many instances, there may be more readily available information about retired judges when compared to other arbitrators. Professional arbitrators undoubtedly recognize that their reputation is more informally developed through “word of mouth” communications from practitioners. Retired judges, on the other hand, will often rely on their past judicial experience as the gateway to arbitration opportunities.

When considering the service of a retired judge, Parities must evaluate whether their dispute can be satisfactorily resolved by an individual who has significant experience serving in a more formal judicial capacity. Further, Parties must determine whether selecting a retired judge will create a greater or diminished likelihood of success. This means that several important questions should be considered before selecting a retired judge as arbitrator.

The following list of questions may serve as a general roadmap for evaluating the candidacy of these individuals:
1. Will selecting a retired judge create a more structured and formal process?

2. Is the retired judge able to adjust to the less “powerful” role of an arbitrator?

3. Is the nature of the prior judicial experience conducive to resolving the immediate dispute?

4. Does the retired judge’s political background impact his or her decision making process?

5. Is the retired judge willing to facilitate compromise?

6. Do the arbitration proceedings involve procedural requirements that would be better addressed by someone with judicial experience?

7. Does the retired judge have the particular skills, traits, or characteristics that can best serve the parties in the instant dispute?

Each of these questions are designed to facilitate answers that, when reviewed holistically, form a collective image of the retired judge’s personality, style and approach. This analysis is more fully addressed below.

First, Parties must decide whether selecting a retired judge as arbitrator will lead to a more formal and structure adjudication process they are comfortable with. Judges hold tremendous power on the bench. This prior structure and authority often leads to a more formalized proceeding. For example, a retired judge can be assumed to favor more formal briefing schedules and evidentiary and procedural restrictions. Parties must determine whether a more formal proceeding will allow all parties to present what they perceive as necessary evidence and testimony. Further, parties must determine whether a formalized proceeding will cause delay in reaching closure of the dispute.

While a retired judge may have relied more heavily on staff and clerks, he or she will lack these resources as an arbitrator. This consideration is especially important for Parties who desire assistance from an arbitrator in “mediating” a dispute prior to a formal arbitration
proceeding. This can result in an informal resolution of secondary issues without being restricted by procedural rules and a more likely resolution of the primary dispute. A retired judge with less arbitration experience like some arbitrators may be less inclined to assist Parties in this capacity.

Next, the Parties must decide whether a retired Judge’s prior service is conducive to resolving the immediate dispute. This means that the Parties should consider whether the individual sat on the Federal or State bench or served as a trial or appellate judge. Obviously, some judges have served in both capacities. These factors will provide insight into the level of exposure the judge has with relevant law or issues in the dispute before the arbitrator. For example, in the context of employment disputes, retired Federal judges are more likely to be familiar with employment disputes which are more often filed in the Federal system, as well as disputes governed by collective bargaining. However, as an appellate judge in the State or Federal system, they may be more familiar with the standards governing the enforceability of arbitrator awards. Finally, former retired trial court judges should be adept at evaluating credibility, and most arbitrators are driven by the facts.

It is also important for Parties to investigate whether a retired judge’s political background reflects a particular position on the issues in dispute. Political affiliation may provide some guidance regarding the retired judge’s perspective relating to employees, employers, or unions. However, a review of their published decisions will be more helpful in evaluating the retired judges’ perspective as an arbitrator, as one’s political affiliation may not accurately reflect their perspective regarding a particular labor and employment dispute.

Parties must also evaluate the strength of their positions and determine whether the retired judge is willing to promote compromise. Retired judges, fresh from the world of heavy
dockets may rely on settlement to move cases to closure. However, they will not feel that level of pressure as the arbitrator and may welcome the opportunity to adjudicate cases. As judges, they were less concerned about the likelihood of arbitrating future disputes with the same parties. They may also be less likely to consider the precedential impact of the award or decision on parties who, after the hearing regularly continue to interact with each if they are parties to a collective bargaining agreement.

The extent to which the dispute is impacted by procedural issues may affect the decision to select a retired judge as an arbitrator. A retired judge is typically very familiar with procedural restrictions and may be well suited to arbitrate these types of disputes.

Finally, the Parties must investigate the individual traits and skill-sets of each retired or former judge. A judge’s demeanor on the bench can often forecast his or her demeanor during arbitration. Similarly, a former judge’s organization skills, decision-making process, and judicial temperament are all indicative of what lies ahead at arbitration. This information can be gathered from colleagues who practiced before the judge or other individuals with first-hand experience with that judge.

In view of these considerations, it is apparent that there are both pros and cons associated with selecting retired judges as arbitrators. Retired judges are experienced at adjudicating disputes between parties. They are often adept at evaluating new issues, without significant experience, according to the facts and circumstances of the case. However, retired judges may be less familiar with the quasi-mediator role of some arbitrators. Additionally, because of the range of cases before them, they may be less familiar with the “law of the workplace” as well as other labor and employment disputes, which are resolved via the arbitration process. Nevertheless, there is no definitive answer regarding preferability of retired judges verses non-
judicial arbitrators being used as arbitrators in proceedings involving labor and employment issues. Further, the analysis set forth above is primarily a reflection of this writer’s (Weisman) experience.