For the Young Lawyer

Top 10 Things You Need to Know about ADR

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The practice of law is permeated by the use of alternative dispute resolution ("ADR"). Increasingly young lawyers are retained to handle commercial and business matters that demand knowledge of a broad spectrum of ADR practices and procedures. Competent representation requires that the young attorney fully understand the range of ADR options available, the interplay between the different ADR processes, and how to achieve the desired result for the client.[1] Yet few lawyers receive specialized ADR instruction or skills training during law school. This leaves them ill prepared to deal with the increasingly complex legal nuances associated with the use of mediation and arbitration. This article will attempt to identify the top ten things that every young lawyer needs to know about the current practice and use of ADR.

1. Don't Expect the Clients to Know What They Signed

Don't expect clients, even sophisticated business clients, to know whether their dispute is governed by an ADR provision. Unfortunately, some agreements to mediate or arbitrate include procedural terms and conditions that can impose substantial loss to the client for the unwary attorney. For example, there are clauses that provide for forfeiture of attorney's fees if mediation is not commenced prior to initiation of either arbitration or litigation.[2] Other clauses require the filing of the demand for arbitration within a specified time period to prevent the forfeiture of legal rights and claims. To prevent unwelcome surprises, always request in writing copies of applicable ADR agreements, calendar for follow up, and tag the file for review the moment the documents arrive. Thoroughly review and fully understand the nature of any ADR agreements signed by your client. If you are unsure concerning the impact of a procedural term or condition, seek immediate assistance from someone knowledgeable in the area.

2. There Isn't a Universal Set of Arbitration Procedures

The rules of the major ADR sponsoring-organizations (American Arbitration Association ("AAA"), JAMS, CPR) do not include the same administrative procedures.[3] For example, AAA's rules provide for administration by a neutral third party (AAA). In marked contrast, CPR's rules specify that the arbitrators shall administer the proceeding. In addition, ADR-sponsoring-organizations do not utilize a single set of administrative rules for every type of dispute. For example, AAA has specialized sets of rules that govern the administration of different types of disputes, such as commercial, consumer, construction or employment. These sets of rules differ markedly concerning such matters as permissible discovery and the remedies or relief available.

Adding to the complexity within a single set of rules, such as AAA's Commercial Arbitration rules, administrative procedures may vary greatly depending upon the amount of the claim(s) or counterclaim(s). For instance, the large complex case ("LCC") procedures apply when the claim(s) or counterclaim(s) exceed $500,000. In sharp contrast to the expedited or regular procedures, the

LCC procedures provide for depositions, interrogatories and requests for production of documents and the use of three arbitrators when the claim(s) or counterclaim(s) exceed a billion dollars. To minimize surprise and ensure suitability, prior to either agreeing to the use of a specific set of rules or initiating an arbitration proceeding, practitioners should obtain a copy of and carefully review the referenced administrative procedures.

3. Arbitration Rules Change

The ADR - sponsoring organizations, such as AAA, change their rules. Most of the time the changes are minor in scope, but not always. For instance, on July 1, 2003, the AAA adopted major revisions to their commercial arbitration rules. These changes: (1) provide for the mandatory use of the LCC procedures when claim(s) or counterclaim(s) exceed $500,000; (2) authorize arbitrators under the LCC procedures to order depositions, interrogatories and production of documents; (3) provide that party-appointed arbitrators shall be neutral unless by written agreement of the parties; (4) require disclosure of potential conflicts by both neutral and non-neutral arbitrators; (5) authorize the AAA to remove an arbitrator based upon the content of a disclosure. Prior to either inserting a reference to or initiating an arbitration under a specific set of rules, practitioners should routinely ascertain whether the rules have recently been revised and if so the extent of the revisions.

4. International Arbitrations Differ Markedly From Domestic Arbitrations

Different laws, regulations and customs govern international arbitral proceedings. Thus, the procedures used to administer international arbitrations differ markedly from the procedures used to administer domestic arbitrations.[4] Just as the domestic rules of the different ADR sponsoring-organizations differ markedly, there are major differences in the way that international arbitrations are administered using either the AAA's ICDR rules, the ICC's rules or the UNCITRAL rules. For example, AAA's international rules provide for administration by a neutral third party, AAA. In contrast, UNCITRAL's rules specify that the arbitrators shall administer the proceeding.

If the arbitration agreement does not specify use of a specific set of either domestic or international rules, the AAA applies the UNCITRAL definition of what constitutes an international dispute.[5] If deemed to be international in scope, the AAA's International Centre for Dispute Resolution ("ICDR") will administer the case using the ICDR's International Dispute Resolution Procedures. If the arbitration agreement specifies use of a set of AAA's domestic rules, but the dispute is deemed by AAA to be international in scope, the ICDR will administer the proceeding using both the domestic rules and the Supplementary Procedures for International Commercial Arbitration. Use of the Supplementary Procedures is mandatory if a party seeks to enforce the resultant award in a foreign court under the auspices of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.

5. Revisions to State Arbitration Statutes

In the absence of party agreement, provisions of a state's arbitration statute will govern whenever a dispute does not affect interstate commerce or the applicable state statute contains a procedure that does not conflict with the provisions of the FAA and application of the state procedure is necessary to effectuate an arbitration agreement.

In 1995 the Uniform Law Commissioners decided that the time was ripe to modernize state arbitration statutes by promoting passage of the Revised Uniform Arbitration Act ("RUAA"). In essence the RUAA turns the concept of party autonomy on its head.[6] Under the FAA and UAA, arbitration is essentially an opt-in process. If the parties want a special administrative procedure to apply, such as expanded discovery rights, the parties have to include such a provision in their arbitration agreement. In contrast, the RUAA approaches arbitration as an opt-

out process.[7] Thus, the RUAA includes a number of administrative procedures, some of which may not be waived. To date the RUAA has been adopted without amendment by three states and with amendments by five others. Seven additional states are debating whether to adopt, revise or reject.

6. Class Wide Arbitration

In the recent *Green Tree Financial v. Bazzle* (02-634, 6-23-03) decision, the U.S. Supreme Court held that when an arbitration agreement or submission is silent concerning the availability of class-wide arbitration and the arbitration agreement or submission provides that the arbitrator shall resolve disputes "relating to" the underlying contract, the arbitrator must determine whether the contract forbids class arbitration. In response to this decision, AAA immediately issued Supplementary Rules of Class Arbitrations,[8] which supplement AAA's existing rules (commercial, employment, consumer, etc.) and provide for a very non-traditional arbitral proceeding.

7. Arbitrators Issue Subpoenas, but Courts Enforce Them

Arbitrators do not enforce subpoenas or discovery orders -- courts do. Currently if you want to either take the testimony of a witness or enforce a discovery-related order against a person in another state, a party to an arbitration proceeding must: (1) obtain a subpoena signed by the arbitrator(s); (2) have the subpoena entered as an order of the court in the state where the arbitration hearing is being conducted; (3) take the court order to the state in which the witness resides and have either a subpoena or an order upon which a subpoena can be based issued by that state's court; and (4) if the subpoena is ignored, return to the court of the state in which the witness resides for an order to either compel testimony or find the witness in contempt. Much of this multi-step procedure is pure formality and steps two and three can be done *ex parte*.

On March 12, 2004, the U.S. Court of Appeals for the Third Circuit created a new split among the circuits when it ruled that the FAA does not allow arbitrators to issue subpoenas compelling only the production of documents from parties not involved in the arbitration proceeding (*Hay Group, Inc. v. E.B.S. Acquisition Corp. et. al.*, (No. 03-1161/1162). The ruling directly rebukes[9] the findings of the Eighth Circuit and the Middle District of Tennessee that while an arbitrator is not explicitly authorized by the FAA to require a third party to produce documents alone, it implies that arbitrators may require production of documents prior to a hearing. (*See In re Security Life Ins. Co.* (228 F.3d 865 (2000)) and *Meadows Indemnity Co., Ltd. v. Nutmeg Ins.* (157 F.R.D. 42 (1994)).

8. Party-Appointed Arbitrators

On March 1, 2004, revisions to the original 1977 Code of Ethics for Arbitrators in Commercial Disputes took effect.[10] Although the preamble stresses that it is preferable for all arbitrators to serve in a neutral capacity, the new Canon X addresses exemptions to certain code provisions for party-appointed partisan arbitrators. According to Canon X, partisan party-appointed arbitrators "may be predisposed toward the party who appointed them," but they "should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators." Canon X arbitrators also must disclose whether they intend to communicate with the party that appointed them, which would make them free to communicate without need for continuing updates. Canon X arbitrators, however, are prescribed from communicating to appointing parties certain information, such as deliberations and any final or interim award, in advance of disclosure to all participants. As early as possible, party-appointed arbitrators are obligated to ascertain and disclose whether he or she will be acting as a neutral or non-neutral. In the event of doubt, party-appointed arbitrators will serve in a neutral capacity until such doubt is resolved.

9. Arbitrator Conduct

In addition to applying a presumption of neutrality, the revised code of ethics imposes the following substantive new responsibilities on all arbitrators, including party-appointed

arbitrators: (1) an affirmative and on-going duty to disclose interests or relationships likely to affect impartiality or which might create an appearance of partiality; (2) limits on the permissible communications between arbitrators and parties are clarified and new guidelines are established for communications between party-appointed arbitrators and the chair of the tribunal in tripartite arbitrations; and (3) in addition to imposing impartiality and independence standards that form the basis of the presumption of neutrality, the arbitrator is obligated to determine his or her competence and availability to serve in a case.

In response to the anticipated changes to the ethics code, AAA revised their commercial arbitration rules effective July 1, 2003. The revisions: (1) require that party-appointed arbitrators meet impartiality and independence standards, unless the parties specifically agree otherwise; (2) require all arbitrators to disclose circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence; (3) clarify that the disclosure obligation remains in effect throughout the arbitration; (4) explain that disclosures made pursuant to the rules are not to be construed as an indication that the arbitrator considers the disclosed circumstances likely to affect his or her impartiality or independence; (5) add additional language outlining an arbitrator's responsibility to be impartial and independent, as well as grounds for disqualification; (6) provide that the AAA may on its own initiative disqualify an arbitrator; and (7) clarify acceptable and unacceptable *ex parte* communication between parties and arbitrators or candidates for arbitrator.

10. Old Time Litigation

Arbitration is like old time litigation where you meet your witnesses for the first time at the hearing and you do not know the answers to questions in advance. If you get any discovery it will be far less than what is currently available under the Federal Rules. Since there is an element of surprise in arbitration, it is essential that the attorney question the client carefully to assess the other party's position and legal arguments. You must then tailor the written and oral presentation to fit the knowledge level of the decision maker(s). For instance, if the arbitrator is a non-attorney, the practitioner should consider providing a legal education during the hearing. In contrast, if the arbitrator is an attorney the presentation might need technological or business content. Finally, seriously consider the use of demonstratives to heighten the effectiveness of the presentation since there are fewer constraints in arbitration.

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Conclusion

Widespread use of ADR processes has added to the existing complexities of legal practice a labyrinth of traps for the unwary. A proliferation of ADR related contract clauses, rules, statutes and court decisions has become standard. Young lawyers need to vigilantly seek the expertise necessary to effectively incorporate the increasingly complex use of ADR processes into their commercial and business practices.

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(Endnotes)

[1] P. Jean Baker, *Competent Use of Alternative Dispute Resolution*, Orange County Lawyer (May 1997).

[2] *Id*.

[3] P. Jean Baker, *IP Meets ADR: Selecting the Right ADR Procedures*, American Intellectual

Property Lawyers' ADR Roadshow (March 11, 2004).

[4] *Id*.

[5] A copy of the UNCITRAL definition is available on the AAA website at www.adr.org.

[6] See Editorial Analysis, *A Critique of the Uniform Arbitration Act (2000)(Part One) & (Part Two),* World Arbitration and Mediation Report, Vol. 11, No. 12, pp. 326-334 (December 2000) and Vol. 12, No. 4, pp. 99-110 (April 2001).

[7] *Id*.

[8] The Supplementary Rules of Class Arbitrations is available on the AAA website.

[9] Justin Kelly, *Circuit Creates Split Over Arbitrator Power to Issue Subpoenas,* ADRWORLD.com (March 16, 2004).

[10] The 2004 Revised Code of Ethics for Arbitrators in Commercial Disputes is available on the AAA website.