The ABC's of Alternative Dispute Resolution in Employment Cases

Discovery and Motions in Arbitration: Getting the Most Out of the Process

Discovery and motions are the trench warfare of litigation, and it's true of arbitration as well. But there is a big difference: in litigation, we have a set of pre-determined rules that are presumed to spell out what information we get and what happens procedurally during the case; in arbitration, it's all mostly left up to the discretion of the arbitrator. Getting what you need [forget about getting everything that you *want*] is a matter of finding hooks that will allow you to get the arbitrator to see the disputed issue your way. This will require appeals to fairness, efficiency and reasonableness, but also some bargaining and also quietly threatening the arbitrator with the one thing the arbitrator fears: the prospect of reversal when the award is reviewed.

The first thing to do is to do some homework on your arbitrator—this is best done *before* the arbitrator is selected. Find out, if you can, who else has had an arbitration with him or her and how the discovery and motion practice went. Just as with judges, there is likely to be a consistent pattern. See what arguments have been effective and which elements of the process seem to be most important to the arbitrator.

The second thing to do is to take a careful look at the contract or handbook containing the arbitration clause to see what it might have to say about the process. Sometimes the clause specifically calls for discovery, and if so, this can be a powerful tool in your arsenal for seeking discovery. Be familiar with the arbitration rules under which the process will proceed—your arguments should be phrased in the language of the applicable rule.

<u>Discovery</u>

The discovery process is a product of the litigation process and was traditionally scorned in arbitration. Discovery is much more common in arbitration today, and it remains somewhat frowned upon. Moreover, it has been identified as the culprit behind the delay that characterizes "arbilitgation," which dispute resolution services such as AAA and JAMS see as hurting their brand and their business.

Outside of employment cases, the baseline is that you will likely get documents, particularly those that you can identify with some particularity, if they seem to be

relevant. If you get depositions at all, it will likely be limited to one or two unless both parties agree otherwise. But there is also great variability among arbitrators on this subject.

But within the employment arena, there is a different standard. This is because of the "due process protocol," which was adopted in 1995 by a task force of arbitrators and bar organizations. AAA and JAMS have specifically endorsed the protocol, as has the Labor & Employment Section of the American Bar Association and the National Academy of Arbitrators, an organization of the elite labor arbitrators.

The protocol specifically addresses the problem of employees obtaining access to relevant information, a concern that is present in all employment litigation:

> 3. Access to Information
> One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employee's representative should also have reasonable pre-hearing and hearing access to all such information and documentation.
> Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available. …

The due process protocol was brought about in part because of the recognition that, in employment cases, the employer is in possession of most of the relevant evidence. This point should be made to arbitrators over and over again—the employer already has likely reviewed and analyzed this evidence and has chosen not to put it forward in defense.

This is not to say that discovery in arbitration is as open as in court. The "reasonably likely to lead to the discovery of relevant evidence" standard of Rule 26 is not the standard that is going to be applied to your case in arbitration. Strict relevance or something akin to it is more likely to be required, but ultimately it is up the arbitrator. Here are some tips to help you get the discovery you need:

1. **Plead Your Way Into Discovery.** This litigation trick is as effective for arbitration as for court. The "Statement of Claim" that initiates an arbitration proceeding has little substantive importance, at least under the AAA arbitration rules. It need not plead facts as may be required under State civil procedure, or even sufficient information as may be needed to lend inferential support to the claim, as in federal court. Nevertheless, this is the document that initially spells out what the claim is about. Since you can

anticipate difficulty in obtaining all of the discovery you will want, identify what you think are most important issues in the case and include specific factual allegations to which you can refer when seeking that discovery. If you are worried about getting personnel files, make specific allegations, even if they must be upon information and belief, directed to comparable employees, and add particular supporting details if your client knows them. If a particularly sensitive document is likely to be a bone of contention, make that document the center of what you plead and mention it in particular. Plead that the respondent has exclusive possession of whatever information you believe will be important to the case and specify what that information is.

2. **Pare Down What You Seek.** Unlike court litigation, where you can plead a number of alternative theories and then see which one holds up best through discovery, it's a good practice to commit earlier in the process to a theory on which you will rely. Drop out the weaker claims early—you can rattle the saber about them in your Statement of Claim and then not take any significant discovery on them. This will allow you to point out that you have been quite restrained in the discovery you are seeking by noting the many issues on which you have not asked for any discovery.

3. **Bargain With and Work Your Adversary.** The ultimate discovery victory is one that you win without having to ask the arbitrator to intervene. A discovery conference should precede any motion to compel just as it should in court—and most arbitrators will accept your proposal for a conference with opposing counsel before motions are brought when you are in the initial pre-hearing conference. Here are some discovery conference strategies:

   - A good way to start the conference is to suggest to the other side that you both focus on just the items you really need to be able to try the case.
   - Probe to find out what the practical difficulties are with obtaining particular documents—it may be that 90% of what you want is easy to obtain.
   - Offer to trade—giving up something that the defense wants if they will drop an objection to providing what you are after.
   - Point out to the defense that if they refuse to allow certain discovery, they could be foreclosed from presenting evidence on the point to which the discovery relates—or in the best case will be required to produce documents on a very short deadline during the hearing itself.

- Make concessions carefully, demanding openness to a *quid pro quo* whenever you make one—say that the concession is contingent on getting something you need, even if that something is not immediately identified.
- Argue that the arbitrator is not going to prevent you from putting on a case by denying you the information that the defense wants to withhold.
- Narrow broader requests during the conference, by time period, subject matter, individuals involved. Offer to take time-limited depositions or suggest an overall time limit on all depositions. These are popular limiting tools and may be appealing to the arbitrator as well.
- Take careful notes so you can make points in argument to the arbitrator. Make sure that when the conference is ended, you read through what has been agreed upon carefully and follow up with an immediate e-mail containing what you read in the conference—and nothing more.

4. **Pick Your Battles.** Once the dust has cleared from the discovery conference, consider in a calm and deliberate way what evidence you have been unable to get is likely to impact the outcome of the case. Your chances of having a motion to compel granted are much greater if you have only one or two things you seek than if you have a dozen or more.
5. **Fairness Arguments To The Arbitrator.** The points above apply to what can be argued to the arbitrator if you don't get what you need from opposing counsel. Some other things you can say
   - The defense has exclusive possession of this evidence, I am being prevented from determining whether the evidence supports my client on this claim and you are denying yourself access to the same information if you don't allow this discovery.
   - How can I possibly present my case on this issue without having the documents that, let's face it, make up the best evidence on this issue?
   - "This evidence is core evidence in a case like this. If you don't know how the other employees were treated, how can you even make a decision on whether there was discrimination?" or "A really critical issue you are going to have to decide is whether these racist statements were made or not—how can we put on our case without knowing who was present and what they heard?"
   - We have opened up completely to the defense. They know all about every position my client applied for, which former employee told her

what, and all about the intensely personal aspects of her life from a psychiatric IME. But they will not provide us with this very basic and innocuous business information that we think will allow us to make out our case.

6. **Economy Arguments.** There are a number of these that you can make—

   - According to what counsel told us in the discovery conference, we are talking about a handful of documents, maybe a single manila folder. There is nothing particularly sensitive about them. They are plainly going to shed some light on an important issue in the case.
   - Here's what's going to happen if you decline permission for a deposition of this important witness. She will be subpoenaed and will testify at the hearing, but her testimony will go on for hours because we will be trying to find out what the deposition will tell us—what she knows about and what she hasn't a clue about. Why not get that out of the way before we start?
   - I would hate to start the hearing and then obtain new information from this witness that we would be required to investigate and then present new witnesses about. If what he says checks out in an investigation, we not only won't contest the point, we will stipulate to it and save the witness the trouble of being questioned in the arbitration.
   - If the defense is so sure that this witness has no relevant knowledge, contrary to what my client tells me, then it's going to be a very short deposition. But if there is relevant evidence we are all better served getting it before the hearing starts so we can all be better prepared.

7. **Threats.** There is very little that can lead to an arbitration award being vacated, and arbitrators will do all they can to avoid that outcome. Your approach, while polite and certainly not hostile, should be sufficiently aggressive that the arbitrator assumes that if anyone is going to challenge a ruling in court, it will be you. At the discovery stage, a point you may wish to make is that denying access to the information can amount to a refusal to hear and consider the subject evidence, as the arbitrator is required to do. One way to say this is "All of us share a common interest in holding one hearing on this case and not risking that it might be sent back for more. The award could end up being vacated if you don't hear important relevant evidence because we are precluded from discovering it. That's something I am getting concerned about with this evidence being withheld."

Motions

Because it is a little more complicated than sending out a notice for a few days off and showing up in court, motions tend to be more limited in arbitration proceedings. But the services allow them to be brought up when circumstances demand a motion, so there is no inhibition.

Motions on Arbitrability. The defense sometimes seeks to have an individual defendant kicked out of the arbitration because he or she is not subject to the arbitration clause. Arbitrability motions early on in the case generally suffer from a serious problem—an incomplete record. Particularly if the Respondent does not make the factual case with supporting evidence, you should point out that it would be appropriate to approach this question somewhat the way a motion to dismiss under Rule 12 would be approached—with all inferences indulged in your favor and with the Respondent having to exclude the possibility that you can prove that you have an arbitrable claim. Similarly, if the motion relies on affidavits, you can ask leave to depose the affiants and contend that without cross-examination, the evidence is not sufficiently reliable to make so serious a decision.

But the non-abritrability motion might actually be a welcome move from your standpoint—there is nothing like having a defendant establish that a claim against him is not arbitrable so you are free to pursue the action in court. The substantive question is beyond the scope of this paper, but there are interesting tactical considerations. Most jurisdictions embrace the federal standard for *res judicata*, which is transaction-based. If there is privity between the individual defendant and the corporate defendant, you risk being collaterally estopped to assert the claim in court by the outcome of the arbitration.

This can be so even if the individual is not subject to arbitration. So if a motion is made and granted, you may not precluded from pursuing the individual because of *res judicata* unless you dismiss the arbitration. On the other hand, the prospect of going to court against an individual defendant may be sufficiently inviting that you might want to agree to the motion on arbitrability, drop the arbitration and pursue the case against the individual defendant—a kind of legal "rope a dope."

Deposition Misbehavior. If you anticipate deposition shenanigans from your opposing counsel, find out from the case manager if the arbitrator will entertain motions directly from the deposition, if that is needed, say, over a privilege question. Then, if you encounter obstructionism, take advantage of the opportunity for an on-the-spot call, just as you might be able to do in court. It usually ends misconduct when counsel knows that the day of reckoning is today.

Protective Orders are an issue of particular concern in arbitration, because the arbitration has a limited life span. The arbitrator also lacks the power to initiate criminal of civil contempt proceedings. While there is reason to fear an

arbitrator's power to invoke an adverse inference, the remedies are no solace if the potential violation of confidentiality has far-reaching implications and your client needs the threat of criminal prosecution to keep the danger at bay. In such circumstances, it is appropriate to ask the arbitrator to issue an "interim" award, which would be based on facts supporting a finding that a protective order is needed and spelling out the terms. You would then take that to court to have it entered as an injunction, so contempt power would be invoked. You could ask that the final award incorporate continuation of the protective order after the arbitration is concluded.

Summary Disposition

Arbitration is historically hostile to summary disposition motions—until not that long ago, there was simply no option to seek summary judgment in arbitration. At least you were guaranteed your chance to present your case. Now, the rules provide that summary disposition is permitted, either as to the whole claim or as to part of the claim.

All the usual approaches to defending against a summary judgment motion are applicable here, including starting from the beginning of the case to anticipate the motion and have the materials ready to refute the motion. In taking depositions, don't overlook the need to develop detailed factual disputes that bear on the outcome of the case. You should find arbitrators much less inclined to grant such motions than federal judges typically are.

Build In An Obstacle To Summary Disposition. When the schedule is being set and consider suggesting that the arbitrator adopt a practice some federal judges have used. Anyone wanting to bring a motion for summary judgment is required to spell out in at a prehearing conference what the motion would be and its basis. Then you will respond with an explanation of the material issues of fact that preclude summary judgment. Then the arbitrator decides whether the motion is worth entertaining. You can argue that this could save thousands of dollars in legal fees and months of delay by allowing the arbitrator to save everyone the trouble of working on a futile summary judgment motion.

If you get the chance to respond to a motion in this way, or can force the respondent to say that they plan on such a motion in a prehearing conference, you should respond with surprise how the defense could think that there are not material issues of fact in the case. You can say things like:

- "With all due respect, there are fact issues all over the place this case."

- [To the arbitrator, in a fact-intensive case] "This isn't the kind of case where you should be finding the facts of the case without hearing from everyone."
- "We could consider dropping [certain claims identified in outline of motion for summary judgment] if that makes it unnecessary to have to brief a summary judgment motion in this case."
- "It seems to me that this summary disposition motion is an extreme form of trying to persuade you to issue an award without ever hearing our evidence. Keep in mind that we are not in a position to assemble the kind of record we would have if this case was in federal court with no restrictions on discovery."

However unlikely the arbitrator may be to grant a summary disposition, she or he may be reluctant to deny the respondent the opportunity to make the presentation. If this is the case, then in the interest of economy, you can also suggest that the brief in support of the motion have a severe page limit. The theory is that if such a motion is sufficiently compelling to justify serious consideration, it will have to be capable of succinct presentation in a short space.

On the Merits. In arguing against summary disposition, keep in mind the observation in Justice O'Connor's concurring opinion in *Reeves v. Sanderson Plumbing Products, Inc.* that the falsity of a decision-maker's statement of the reason for an employment action is in itself sufficient to allow a fact-finder to treat all of that witness's testimony as lacking credibility. If your case is pretext, this is the pathway to defeating summary judgment. Remember that arbitrators have less concern about the latest decision of your Court of Appeals and can operate from the broad principles because they find facts and law at the same time. Moreover, the arbitrator's denial of a motion for summary disposition is not subject to any appeal.

Attack the Quality of the Evidence. It is a well-accepted principle in arbitration that while the arbitrator *will* admit evidence even in the form of an affidavit, the arbitrator should give less credence to testimony that has not been subjected to cross-examination. This is where the limitation on discovery can actually be helpful to your client. If the employer submits an affidavit, you can scoff at its reliability and scream foul play because you have not had a chance to cross-examine the witness. More important, you can argue that summary disposition would amount to a refusal to hear material evidence on your side of the case—the cross-examination of the affiant.

Resist the Motion Using Rule 56(f). In this regard, it is worth paying attention to and employing the approach called for by Rule 56(f). That subsection provides that if the party opposing summary judgment cannot answer the motion because evidence is not readily available, the party can specify what evidence might be presented and from which witness or witnesses it could be secured. In court, this means that the party opposing summary judgment is given an opportunity to secure the evidence by way of discovery. You can offer the arbitrator an alternative—either allow me to take the several depositions to develop the evidence I need, or better yet, deny the motion and allow the disputed factual issue to be pursued at the hearing itself.

Conclusion

Arbitration is a different forum, one largely dependent on the discretion of the arbitrator. Procedural decisions are almost entirely discretionary in nature. Thus, mastery of your arbitrator is the key to success. The arbitrator will be careful not to do anything that will risk a decision vacating the arbitration award. People skills are important in making any of the arguments suggested here, and reading the reaction of the arbitrator is key.

The arbitrator has every reason to want your case to be resolved after hearing all the pertinent facts. Carefully targeting your discovery to the central issues of the case and encouraging the arbitrator to hear all of the evidence in the case on the merits are your best pathway to a successful outcome for your client.