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LOOK BEFORE YOU LITIGATE



By Robert D. "Bo" Links

There are, fundamentally, two types of clients. The first presents a proposed contract to his lawyer and asks, "What do you think?" The second cuts the deal on his own, signs the contract, and only then asks his counsel, "Is this OK?"

First of Two Parts

The first fellow is smart. You will derive great satisfaction working with him. The second is an idiot but much better for your practice. The sad truth is that lawyers make more money unraveling disasters created by clients than they do counseling clients to avoid trouble in the first place.

It doesn't have to be that way.

Aside from helping to frame deal points, lawyers can provide a great service by assisting the parties to structure dispute resolution procedures. Although lawyers are often derided when they raise the specter of a future dispute, disputes do occur, and planning for them is wise.

But how do you do it? Start by re-reading the statutory provisions that govern in the absence of a detailed alternative dispute resolution clause. Arbitration is covered generally in Sections 1281 through 1294.2 of the Code of Civil Procedure. The code also has subject-specific sections for certain commercial contracts, such as medical malpractice, public contracts and international cases. For mediation, see Evidence Code Sections 1115-1128 and Rules 3.850, et seq. of the California Rules of Court.

Break down your thinking the way newspaper editors analyze stories: What? Who? Where? When? How? Why? If you cover them all, you will be a long way toward drafting an intelligent recipe for ADR.

What?

The most basic ADR question is, What do you want? Do you want to meet and confer? Mediate? Arbitrate? Litigate? If it's litigation you prefer, stop right here. Say nothing in the contract, and let the first disputant load his cannon and fire on Fort Sumter.

But if you are looking to save time, money and angst, consider providing for ADR before launching the army. ADR can be far more

efficient than traditional litigation. The first ADR inquiry is the choice between a casual meet-and-confer session, a formal mediation and arbitration.

These procedures can be invoked later on, but agreeing to them ahead of time is better. If you think negotiating ADR clauses is a pain, the pain is magnified when you try to do it after the dispute has reared its ugly (and expensive) head.

With a meet-and-confer clause, the parties agree to at least talk before running off to a neutral. Although this can be helpful, it may overload the process. If the parties aren't intelligent enough to discuss their differences without prodding, a rigid contract requirement may just delay a more productive course of action. Nevertheless, a mandatory meet-and-confer procedure is at least worth thinking about.

In formal mediation, a neutral helps the parties reach a voluntary resolution. It may not work well, however, if the parties are dragged into it kicking and screaming. Should you force mediation on the parties with a contractual clause? That is a subject of some debate. Even if you don't include a mediation provision in the underlying contract, the parties can agree to it later.

If you include a mediation clause, you should consider an arbitration clause if the mediation fails. What type of arbitration will it be? Is it possible to specify how the process will work? That gets us to the next questions.

Who?

You are entitled to include specific arbitrator qualifications in the contract. Do you want to specify that your mediator be a retired judge? A practicing attorney? An industry professional? For example, if the parties are at odds over a real estate commission, you may want the arbitrator to be a real estate broker or an attorney who specializes in real estate work.

If you are going to stipulate qualifications, be specific. If you have a dispute over a lease commission in a large commercial building, you might want to specify that the arbitrator be someone with at least 10 years of experience negotiating commercial leases for multitenant

buildings. The point is to find the right person without disqualifying half the world.

An advantage of specifying an industry professional as your arbitrator is that it offers a better prospect for informed decision making. It also should reduce the possibility of a "runaway" award or one that doesn't make business sense.

A related issue is whether you want a single arbitrator or a panel. Three heads can indeed be better than one, but the more cooks in the kitchen, the more expensive the meal. If cost is a factor, you probably should specify a single arbitrator.

Last, if you opt for a panel, do you want neutral arbitrators or party-appointed arbitrators? Some clients prefer a procedure that allows each party to appoint one arbitrator of its choice, with the two party-appointed arbitrators selecting the third arbitrator, who is neutral in the classic sense of the word. Although party-appointed arbitrators exercise judgment independent of the party appointing them, they usually are at least sympathetic to a party's point of view. In practice, party-appointed arbitrators often work to persuade the neutral of their point of view. Many commercial contracts specify this type of procedure.

Bottom line: If you don't provide for the appointment of the arbitrator, the court will do it for you, and you will be surrendering an excellent opportunity to control a key part of the process. See Code of Civil Procedure Section 1281.6.

Where?

Once you know "what" and "who," you need to know where you're going to arbitrate.

When the parties are located on opposite coasts, the venue question can overwhelm everything else. The last thing a small company in San Francisco wants to do is arbitrate in Florida, where it may be "home-towned?"

If venue can't be negotiated, there are several ways to deal with it. In the above example, the contract can provide that the first to file gets to choose venue. Although such a provision might prompt a filing race, at least there is a rule to live by. Another way to deal with venue is to let the agency administering the claim decide the question.

In my experience, this question often gets resolved according to the commercial power of the negotiating parties. If a small West Coast company wants the business of a big East Coast outfit, the price may, in part, be a concession to ADR on the East Coast. Sometimes, that's just the way the cookie crumbles.

Closely related to venue is the issue of which state's law will govern. A choice-of-law clause negotiated at the outset will avoid later uncertainty and contention.

When?

Some contracts specify a time frame for claims, hearings and awards. Others simply leave the timing issue to the arbitrator. The code doesn't provide much guidance. The drafting consideration for counsel is not whether to establish a time frame; you definitely should do so. The issue is how extensive the schedule

should be. As we will see in a moment, this issue can be resolved by incorporating a comprehensive set of pre-established and time-tested procedures.

How?

Now you face one of the most important questions: How will the proceedings be conducted?

Do you want to proceed according to the rules of an established provider, such as JAMS or the American Arbitration Association? Or do you want to re-invent the wheel and write your own protocol?

One advantage of incorporating established rules is the comfort that they have worked in the past in thousands of cases. Unless you have very specific requirements, you probably can do what 98 percent of all ADR drafters do: provide that "the arbitration shall be conducted pursuant to the rules of the (insert organization) in effect at the time the dispute arises." If the provider has industry-specific rules, you should specify the particular set you prefer.

If a variation from established protocol needs to be made, you can stipulate that a provider's rules will govern, "except as set forth below." Just remember to draft appropriate clauses to describe the variations in procedure.

Even in cases where established rules will be used, decisions remain. Do you want to limit the issues the arbitrator is empowered to decide? Or do you want to state simply that "all disputes arising under this contract shall be decided by arbitration?" The most important principle in arbitration is that the arbitrator draws his jurisdiction from the parties' agreement. The arbitrator must stay within the allotted boundary, or the award will be subject to attack under Section 1286.2 of the Code of Civil Procedure.

What type of award do you prefer? Do you want a simple statement declaring the winner and the amount, but without a statement of reasons? Or would you prefer a "reasoned" award.

In my experience, the quality of the decision is enhanced if arbitrators are required to explain their reasons. It may cost more, but you get what you pay for.

How About Discovery?

A key difference between arbitration and litigation is that arbitration usually includes very limited discovery. Certain statutes transfer traditional discovery to the arbitration process (such as in the personal-injury context; see, for example, Sections 1283.1, 1283.05). But absent such mandates, the parties are left to the discretion of the arbitrator.

If you want to guarantee the right to pre-hearing discovery, make sure to include such rights in the ADR clause itself. You might state simply that "the parties shall retain in arbitration all the traditional discovery rights they have under the California Code of Civil Procedure," or you can be more specific.

Robert D. "Bo" Links is an attorney and arbitrator practicing at Berger, Nadel & Vanelli in San Francisco.

Letter to the Editor

Stop Prosecutor Bashing

Bias is wrong. Bias is bad. Attorney bashing is wrong and bad, particularly so when proffered by the fourth estate with purported legal expertise. This lawyer, current prosecutor, former public defender, and former VISTA Legal Services Corporation Lawyer was disappointed to say the least in the March 6, 2007 Daily Journal front-page blurb ("All's Fair") that was repeated in large font on Page 5 in the Judicial Spotlight on Santa Clara County Superior Court Judge Griffin M.J. Bonini, declaring that "Despite his background as a deputy district attorney, Santa Clara County Superior Court Judge Griffin J.J. Bonini has gained a reputation for evenhandedness." Despite his background? What did you mean. Shame on you!

Judith B. Sklar
San Jose