Some Tips for Conducting Muscular Arbitration Hearings

by Charles J. Moxley, Jr.[1]

The Overriding Imperative – That We Become "Muscular Arbitrators"And Choose "Muscular Arbitrators" For Our Cases

Following are some tips that have occurred to me in presiding over many arbitrations, as to how arbitrators might begin to become the vaunted "Muscular Arbitrator" and as to how litigators in arbitration may improve the prospects of their receiving a "Muscular Arbitration."

The Muscular Arbitrator

- The Muscular Arbitrator will proactively manage the hearing from the beginning.
- The Message: Both sides will get a full and fair opportunity to present their case/defense, but we will move it along.
- Limit opening statements where appropriate and enforce the limits.
- Give guidance to counsel, at the first provocation, to not engage in repetitive or cumulative testimony or argumentative behavior and advise that redirect and recross will be limited.

Opening Statements: Tip to Counsel

- A colorful and engaging PowerPoint can add wonders to an opening statement—and, with a good one, the arbitrators may refer to it throughout the hearing.

All the Exhibits Are In

- Arbitrators should be very clear (unless there is a reason to do it differently in a particular case) that all pre-marked exhibits, except ones that have been objected to, are fully in evidence as of the beginning of the hearing.
- And further – that objections to objected-to documents will be heard when the documents are offered.
- This should be in the context of making the parties understand that, generally speaking, all exhibits come in, subject to issues as to authenticity, privilege, extreme irrelevance/prejudice or prior failure to pre-designate the documents.

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Study the Witness Statements and Experts' Reports in a Timely Way

- The Muscular Arbitrator will study the Witness Statements/Experts' Reports and related exhibits in advance – and will review them closely the night before, so as to be as familiar with them as she would have been had the substance thereof been presented by live testimony.
- The Muscular Arbitrator will tell the parties at the opening of the hearing that she will be doing this and that they can count on it.
- The same applies to reviewing the Key Exhibits in advance.
- Tips to Counsel:
  - Remember that arbitrators do not have a staff of junior attorneys and paralegals working with them on the arbitration.
  - Faciliate the arbitrators' access to Witness Statements, Experts' Reports for upcoming witnesses, and the like and keep them advised of changes in the order of witnesses.
  - It is generally a good idea for counsel to provide the arbitrators with *dramatis personae*, summaries, copies of earlier papers -- whatever counsel would like the arbitrators to be looking at or thinking about at any given point in time.

Having the Necessary Papers

- The Muscular Arbitrator will have copies of the pleadings and other important papers at ready access.

Paper Exhibits

- It is a very nice touch when the exhibits are in binders that are small enough that one can open and close them and not break one's back lifting them.
- Two-sided copies save a lot of trees and are easy on arbitrators' backs.
- It also can be a wonderful if the documents are organized in some sensible way, whether by chronology or by topic or the like.
- Another very handy device is for counsel to Bates stamp the individual pages of all the exhibits consecutively before having the copies made, so that one can reference any page of any exhibit by its unique page number.
- Further Tip to Counsel: Some arbitrators aren't in firms and have no real support staff. Helping the arbitrators with the set-up of the Exhibits and the shipping and/or storage of them between hearing days, when there are gaps, can be a nice touch.

The Electronic Hearing

- The Muscular Arbitrator will increasingly be ready for the fully electronic hearing.
- Tips for Counsel
  - Providing a thumb drive or the like containing all of the pleadings, Witness Statements, Experts' Reports, briefs, transcripts (if any), exhibits, copies of cases, *etc.* can be very helpful to arbitrators when evaluating the case and writing the award.
  - Particularly helpful are briefs that are hyperlinked to the exhibits and authorities cited.

- It can also be helpful, with the permission of the arbitrators, to mark up the important parts of exhibits and cases, etc.

Some Nice Touches with Respect to Individual Witnesses

- In a long case, it can be a nice touch for counsel to provide photos of individual witnesses.
- It is often a good idea to provide a CV of each witness, where applicable, in advance of her testimony, and to hand a copy of the CV to the arbitrators as the witness starts to testify, thereby making it possible to save time on foundations.
- Tip to Counsel: It's not unreasonable for counsel in such circumstances to make a nice summary statement of what the CV shows.

Organizational Charts as to the Positions and Responsibility of Witnesses and other Such Guides Can Be Helpful

- Tips to Counsel
  - Basic chronologies can be helpful.
  - A *dramatis personae* can be helpful where there are many witnesses.
  - Again, counsel are well-advised to recall that the arbitrators do not have a team of junior lawyers and paralegals to assist them in organizing materials for the arbitration.
  - In addition, arbitrators don't necessarily live with the case during the breaks, so it can be helpful to provide copies of materials like the forgoing to the arbitrators when the hearings resume to bring the arbitrators back into the picture (though the Muscular Arbitrator will obviously have done this on her own).
  - Accordingly, it is always a good idea for counsel to make available to the arbitrators whatever they would like the arbitrators to be looking at or thinking about at the time.

Argumentative Counsel

- It not infrequently happens that counsel are inclined to engage in heavy and sometimes vituperative colloquy among themselves.
- While parties have a right to make any objections they want and to be heard with respect to objections, there is no room for vituperation (not to mention that it is counter-productive), nor is extended colloquy helpful.
- These practices must be squelched when they first appear.
- Approaches:
  - Direct counsel, when they are too disputatious with one another, to direct everything to the arbitrators; and
  - Don't be afraid to limit argument once the point has been made.

Reviewing Upcoming Witnesses and Areas of Testimony at the End of the Day

- The Muscular Arbitrator will review upcoming witnesses and their anticipated areas of testimony with counsel at the end of each day.
- Particularly after the matter has gone on for a while and the arbitrator has heard enough testimony to have a sense of the matter, she will advise counsel as the case proceeds as to

what witnesses and what areas of testimony seem potentially helpful, and what ones do not.

- The Muscular Arbitrator will provide for extended days when necessary to get the job done on time --- and will remember that the court reporter (if there is one) has to be on board for extended days to be an option.

Limiting Direct Testimony When the Witness' Direct Testimony Has Been Presented by Witness Statement, Experts' Report or the Like

- A lot of time can be saved by avoiding extensive repetition of direct testimony when that testimony has already been provided by Witness Statement, Expert Report or the like.

Offers of Proof and Unnecessary Testimony

- The situation will arise where a party is going to put a witness on to testify to something that the party needs to establish but that the other side is not really going to be in a position to dispute anyhow, although they would not necessarily stipulate to it.
- In this situation, a quick compromise can be to have an offer of proof put on the record by offering counsel – and have that offer be stipulated to as testimony, *i.e.*, not that the matter is true, but that this is what the witness would have testified to.

Hearing Expert Witnesses on a Particular Topic at the Same Time

- It can save time to have expert witnesses on a particular topic testify at the same time, with all such witnesses being present when each testifies.

Arbitrator's Stream of Consciousness Notes at the End of Each Day

- A practice that some arbitrators follow – and that can be quite helpful in terms of helping the arbitrator understand a case and organize her thoughts on it, and also to get back into it promptly again after a break – is to dictate a stream of consciousness memorandum at the end of each day's hearing, setting forth in some detail the arbitrator's impressions and tentative conclusions based on the day's testimony and her overall analysis of the issues in the case, as they appear in the hearing to date, along with any questions the arbitrator has going forward.
- These dictated notes can be much more helpful than the notes arbitrators take on yellow pads or laptops during the hearing, since they typically provide more of an overview and analysis.
- Arbitrators who follow this practice find that it increases their understanding of the case and their sense of what will be most helpful in the case going forward.

Form of Award

- Reasoned awards are expensive and time-consuming.
- The Muscular Arbitrator will challenge the parties, as with discovery and motion practice, as to why they want a reasoned award, and will point out that, given the limited scope of review, in many instances, a standard award may be sufficient.
- Where the parties want a reasoned award, the question becomes what level of reasoning they want.
- Different arbitrators and counsel have markedly different views of what is meant by a "reasoned award."

- This should be a matter of explicit discussion: The Muscular Arbitrator will discuss with counsel what level of reasoning they want, conducting this discussion with reference to the potential costs of different levels of reasoned awards.
- The Muscular Arbitrator will also remember that at times, when counsel advise that they want a standard, non-reasoned award, this means not only that they do not want to incur the expense of a reasoned award, but also that they *affirmatively want to avoid having a reasoned award.* When this is the case, obviously the arbitrator will want to respect this.

Avoiding Post-Hearing Briefs When It Makes Sense/The Closing Statement Alternative

- Post-hearing briefing adds a considerable level of expense to arbitrations and results not only in substantial delay, but also in the arbitrators' not addressing the matter and writing their awards until weeks, or typically, months after the close of the hearing.
- Often — although counsel may have a hard time letting go — the arbitrators will know the case as well as counsel by the end of the hearing, so that post-hearing argument and briefing will not really be all that helpful to the arbitrators. This is worth discussing with counsel. Nonetheless, if, as often happens, counsel nonetheless want to brief the matter and/or have closing statements a week or two subsequent to the closing statements, that should generally be permitted.
- Closing statements can be an efficient alternative to post-hearing memoranda when counsel are satisfied with them.
- Where the parties and counsel are local, it is often convenient for them to come back a week or two after the hearing to provide their closing statements (in some instances after the transcripts (if any) are received.
- While this takes some time, it is generally more efficient and quicker than post-hearing briefs and, in many cases, may be more helpful to arbitrators because of the dialogue the closing statements make possible.
- Tips to Counsel:
    - A good closing PowerPoint presentation, annotated to the record can be helpful in an appropriate case (if counsel don't then just read it).
    - Also quite helpful and handy is a small binder of the key documents from the hearing, marked up to highlight the points counsel like (it can be particularly handy if the documents are somewhat reduced in size and 2-sided).

Attorneys' Fees and Costs

- In cases in which the arbitrators will be awarding attorneys' fees and costs, it becomes very important how this process is administered.
- Many arbitrators believe that the best practice is to ask both sides to submit their statement of their fees with their final briefs and to agree that the arbitrators may decide attorneys' fees based on those submissions.
- Assuming one gets buy-in for this approach, substantial potential delay in the future can be avoided. However, in the unusual case where either side objects and says they reserve the right to have a hearing as to fees, allowance will have to be made at a later time for such a hearing, since factual questions will presumably be presented.
- While this approach results in the winning party's having had to submit its fees as well, this should not be a significant burden because lawyers in most cases will have recorded

their time on a regular basis anyhow. Plus the fact, having the two submissions to review can be helpful as to reasonableness.

- The alternative – the submission of fees applications after the award – can take up much more time, as the losing party may, by that time, be quite uncooperative.

Dealing with Those Last Minute Troublesome Issues That Come Up

- It often happens that issues come up late – sometimes quite late in arbitration – which are really a nuisance.
- The Muscular Arbitrator, to protect the record of the case and avoid the risk of issuing an award that is unclear or in some way subject to challenge, will give fair consideration to such matters and, as appropriate, create a record as to that consideration, rather than simply brushing such matters aside.

Important Words to Add at the Very End

- Nothing can more derail the efficiency and economy of arbitration than to have the award be subject to challenge in court.
- Running a good hearing is obviously a way to decrease the likelihood that any such court challenge will have merit.
- One important stopgap is to very carefully and comprehensively ask counsel at the end of the hearing questions along the following lines: Have you had an opportunity to offer whatever proof you feel you're entitled to offer and to say whatever you feel you need to say? Do you feel you've had a full and fair hearing? Is there anything further you need in order to feel that you have a full and fair hearing?
- While this may seem like looking for trouble, it can save a lot of time in the long-run.

Non-Party Subpoenas

by Charles J. Moxley, Jr.

Significance of the Issue

- Importance of Non-Party Subpoenas: In many cases, non-parties are key witnesses and hold key documents.
- Concerns: Arbitration is a creature of contract. Non-parties should not be required to be involved absent a real need.

Overriding Practicalities as to Subpoenas

- Likely compliance by non-party witnesses: Anecdotally, it appears that non-party witnesses accept subpoenas in many instances, rather than disputing them, and then often negotiate convenient times for compliance.
- Reasons for acceptance of subpoenas: This may be because such witnesses want to come forward because they are aligned with a party, because they respect the process and feel a responsibility as a witness to cooperate, because they want to schedule their appearance to suit their own convenience, or because they want to avoid the time and expense of opposing the subpoena.

Considerations Applicable to What Subpoenas Arbitrators Should Sign

- Case specific considerations—Threshold Questions: Is this witness or are these documents reasonably necessary for the case? Is the other party objecting?
- Legal considerations: What law, federal or state, applies? What does that law provide?

Evolutionary Nature of Applicable Law

- Arbitration subpoenas as limited to "hearings": The Second and Third Circuits have held that FAA Section 7 only permits subpoenas to be returnable at hearings, albeit with "hearings" including pre-merits hearings – *see generally* The New York City Bar report at http://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf
- Possibility of deposition subpoenas under other law: Some federal courts and the arbitration law of numerous states (including, it appears, New York), however, permit pre-hearing non-party depositions and/or pre-hearing discovery of documents from non-parties under some circumstances, as does Section 17 of the Revised Uniform Arbitration Act (RUAA), as promulgated by the National Conference of Commissioners of Uniform State Laws.
- Scope of subpoenas: There are also various approaches by different jurisdictions, federal and state, throughout the United States, as to the range of subpoenas, potentially raising issues as to whether a particular subpoena will enforceable, depending on where it was issued or where a party may try to enforce it. Some jurisdictions permit the process whereby commissions may be issued by a court at the site of the arbitration requesting that a subpoena be issued by a court in the jurisdiction where the witness or documents in question are located.
- The roving arbitrator alternative: There is the possibility under the law of some jurisdictions that an arbitrator (including possibly one member of a panel of arbitrators)

might "rove" from the seat of the arbitration to the location of the witness or documents at issue, sitting there, so as to conduct a hearing session or the like there, in some instances potentially making it possible for the parties to obtain testimony or documents they might not otherwise have been able to obtain.

- Choice of law questions: Accordingly, in any case where subpoenas are presented to arbitrators for signature, there may be a myriad of choice of law issues as to what jurisdiction's law is applicable, and whether the federal or state law of that jurisdiction is applicable.

Ethical and Practical Significance of the Uncertainty of the Law in this Area

- Unenforceable subpoenas: Many would argue that it is inappropriate for an arbitrator to sign a subpoena which she knows is unenforceable.
- Colorable subpoena: But what about a subpoena whose enforceability is at least colorable? May an arbitrator sign such a subpoena?

Some Standards for Consideration (If Only by Analogy)

- Canon I.F of the Code of Ethics for Arbitrators in Commercial Disputes: "An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision.
- Canon IV: "AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY."
- Canon IV.B: "The arbitrator should allow each party a fair opportunity to present its evidence and arguments."
- Rule 4.1 of the New York Rules of Professional Conduct for Attorneys: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person."
- Rule 3.1(a): "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."
- Rule 3.1(b): A claim or defense is frivolous "that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;"
- Rule 4.4(a): "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person."
- Rule 8.4(c): A lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Some Tentative Conclusions

- Arbitrator's right and duty to help the parties obtain non-party testimony and documents where not inappropriate: Desiring to accord the parties a fair and efficient resolution of their issues and a fair opportunity to present their evidence and arguments, the Muscular Arbitrator will generally want to help the parties obtain necessary non-party testimony and documents where not inappropriate.
- Overriding responsibility for subpoenas: It is the right and obligation of the parties, when they disagree as to the matter, to argue the law and facts as to subpoenas issues in an arbitration. As a general proposition, arbitrators are not required independently to

research such matters, but rather to decide issues presented based on the law and facts argued to them by counsel. However, this will often be an area where the arbitrators possess specialized knowledge not familiar to the parties or even their counsel.

- No signing of subpoenas known to be unenforceable: It would appear to be inappropriate for an arbitrator to sign a subpoena that she *knows* to be unenforceable under any circumstances, since that subpoena could be misleading to the non-party recipient.
- Appropriateness of signing subpoenas that are colorably enforceable: Although there are differing views on this, many arbitrators believe it is reasonable for arbitrators to sign subpoenas that are colorably enforceable, subject to resolving issues as to enforceability in the ordinary course when presented by the parties or by non-party recipients of subpoenas who bring the matter to the arbitrators.

Back-up Alternative Approach

- Inappropriateness of subpoenas in some instances: There will be instances where the arbitrators will decide to decline to sign subpoenas.
- The information request alternatives: In such instances, a non-binding information request may still be helpful in assisting the parties in obtaining the desired testimony or documents.

Summary

- Scheduling order: Provide for the consideration of subpoenas in the scheduling order, leaving sufficient time for possible court challenges or enforcement proceedings.
- Appropriateness for the case: Get comments from all parties. The arbitrator should always make the threshold determination as to whether the requested witnesses or documents sought by a subpoena are reasonably necessary for the case.
- Legal considerations: Assuming they are, the Muscular Arbitrator will generally want to cooperate with counsel in signing subpoenas when requested, unless it would be inappropriate to do so.
- Hearing argument from the parties: Arbitrators should hear argument from the parties if there is a dispute about signing the subpoenas and from the non-party recipients of subpoenas if they are willing to address their objections with the arbitrators.
- Requiring colorability: Arbitrators should not sign subpoenas unless they are at least colorably enforceable.
- The non-subpoena alternative: The Muscular Arbitrator, when she is unwilling to sign a non-party subpoena, may suggest to the Parties a non-binding "subpoena"—an information or document request that requests that the witness testify or the documents be produced, rather than directing that that happen.