The Lean Arbitration: Providing a Truly Efficient and Effective Process for Parties

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Florida Dispute Resolution Center Conference 2014
Lean Arbitration

Agenda

1. What is Lean?
2. Clause Drafting
3. Prehearing Stage
4. Evidentiary Hearing Stage
5. Award preparation and Writing Stage
6. Post Award Stage
What is Lean?
Lean Arbitration

1. Focus on client value

2. Understand the value stream and eliminate waste

1. Enhance flow

2. Continual process improvement
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Value-Add:

- Customer is willing to pay for it
- Done correctly the first time
- Party gets exactly what was expected, when they expected it

Non-Value Add Tasks and Processes:

- wastes resources without creating value for the customer (often CYA)
- Requires extra time, effort, or resources
- Creates frustration
How can Lean Principles save parties time and money?

- The Lean ADR clause
- The Lean Administrator
  - Arbitrator Selection
  - Exchange
- The Lean Scheduling Order
- Limiting motions practice
- Maintaining the flow of the case
  - Stipulated agreements
  - Momentum
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Lean Tools

● Really understanding what the client/customer values (Surveys and Analysis)

● Understanding and challenging the current way of doing things (A3, Mapping, PDCA)

● Seeking best practices elsewhere and everywhere (Benchmarking, Education, and Training)

On average, **84%** of arbitration costs are generated by a party’s attorney which dwarfs the 13% associated with the arbitrator and 3% for AAA fees.
Clause Drafting
Selections Include:

- Number of Arbitrators
- Method of Arbitration Selection
- Arbitrator Qualifications
- Locale Provisions
- Governing law
- Discovery
- Documents Only Hearing
- Duration
- Remedies
- Assessment of Forum and Attorney's fees
- And more.....
Conflict Management Tools

Mediation NEWS

American Arbitration Association® launches Mediation.org to promote and enhance mediation education, practice and growth.

Introducing: ADRCommunity
A Social Network for Alternative Dispute Resolution Interests
Visit community.adr.org to join today!
Arbitrator / Mediator Select Platform

Conflict Management Tools

Arbitrator Search

For AAA cases

You have been invited to use the AAA Arbitrator Search Tool, which is designed to assist the parties in their selection of an arbitrator or arbitrators. The Tool is only to be used for arbitrations that are currently being administered by the AAA that are in the arbitrator selection phase. It is expressly not to be used in cases not yet filed with the AAA, or on cases that are not administered by the AAA. There is no fee for the use of the tool apart from the administrative fees that have been paid to the AAA. Your access code will expire on February 4, 2014, but you will be able to renew it with your AAA contact if needed.

Read more...

Search By:

- **KEYWORD**
  - Any
  - All
  - Exact
  - Large & Complex Cases
  - Judge
    - Appellate
    - State
    - Federal
- **PRACTICE AREA**
  - Accounting
  - Banking & Financial Services
  - Construction
  - Employment
  - Energy
  - Executive Employment
  - Healthcare
  - Intellectual Property
  - Real Estate
- **GEOGRAPHIC SEARCH**
  - US
  - International
  - State:
  - City:
  - ZIP Code:

- **Hourly Rate**
- **Languages**

SEARCH
Prehearing Stage
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Challenges Posed by the “Litigation Mindset”
Lean Arbitration

Challenges Posed by the “Litigation Mindset”

Proposition #1

Party autonomy/party choice is fundamental to the principle of arbitration.

Proposition #2

While respecting the principle of party autonomy, attorneys should encourage “managerial” arbitrators to intercede whenever proposed changes in rules or procedures threaten to prevent an efficient and economical process.
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Challenges Posed by the “Litigation Mindset”

Proposition #3

Parties’ attorneys are frequently more familiar and sometimes more comfortable with the “rules” of litigation than with arbitration. They, therefore, sometimes try to rely on litigation procedures to provide a framework for arbitration. Yet, paradoxically, when parties agree to arbitrate they indicate their intention to bypass the complexities of litigation.

Proposition #4

Attorneys should recognize that one of arbitration’s strongest points is its’ flexibility, and that the application of procedures designed for the courtroom may impede efficiency and economy in arbitration.
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Challenges Posed by the “Litigation Mindset”

Proposition #5
Too often attorneys prepare for arbitration as if they were presenting their case in litigation to a judge or lay jury.

Proposition #6
Attorneys should recognize that the arbitrator often brings substantive expertise and significant experience to the adjudicative process, thus allowing attorneys to make more streamlined case presentations. Attorneys should seek the arbitrator’s guidance to help them focus on key areas in dispute.
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Challenges Posed by the “Litigation Mindset”

**Learning Points**

1. Attorneys should proactively collaborate with arbitrators to promote process choices that lead to efficient and economical arbitration proceedings.
Challenges Posed by the “Litigation Mindset”

Learning Points

2. Attorneys should ask the arbitrator to intercede whenever proposed changes to rules or procedures threaten the efficiency and economy of an arbitration proceeding.
3. Attorneys should not rely on litigation procedures to form a framework for arbitration but rather capitalize on arbitration’s flexibility to bypass such procedures and ensure an efficient and economical proceeding for their clients.
4. Attorneys should actively seek the arbitrator’s guidance regarding their case presentations for ways to make the process more efficient and economical when compared to litigation.
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Seeking Efficiency & Economy at the Preliminary Hearing

- AAA P-2 Checklist (Handout)
- Draft Scheduling Order (Handout)
Motion Practice
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Discovery

Production of Documents
Interrogatories
Request for Admissions
Depositions
eDiscovery
Establishing an Efficient Schedule

Before the American Arbitration Association

In the Matter Between:
Arbor Pointe Construction, Inc.
-and-
Eagle Ridge, LLC

Preliminary Hearing Scheduling Order
Evidentiary Hearing Stage
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Start of the Hearing

● Begin with administrative issues or opening statements

● Initial Procedures
  ▪ Start on time
  ▪ Set forth the schedule
  ▪ Cell phones and distractions
  ▪ Courtesy and Professionalism
  ▪ Protocol for use of court reporter
Opening Statements

- Arbitrator questions
- PowerPoint
- Limit time period?
- Rebuttal time?
- Interruptions
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Paper Exhibits

- Smaller binders – ease of use
- Two-sided copies – saves trees
- Organization, chronology
- Advance Bates stamping the individual pages of all exhibits consecutively before copies are made
- Helping the arbitrator with set-up of exhibits, shipping and/or storage
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The Electronic Hearing

- Lean Arbitrators will increasingly be ready for a fully electronic hearing
- Thumb drive or the like containing all pleadings, witness statements, Experts’ Reports, briefs, etc..
- Hyperlink briefs to exhibits and cases
- Potential mark up of important parts of the exhibits or cases
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Direct Testimony

- General statement regarding objections
- Testimony by video or telephone
- Objections
  - Hearsay
  - Leading
  - Cumulative
  - Speaking objections: Should the witness leave the room?
  - Argument of objections
- “Take it for What it is Worth”
- Consultation among arbitrators
- Hearsay
- Chess Clock
Expert Testimony

- Having expert witnesses on a particular topic testify at the same time, with all such witnesses being present when each testifies
Cross Examination

- Limited to direct examination?
- “Pad” method
- Argumentative
- “The witness has the right to finish his or her answer.”
- Documents not on exhibit list or not produced in discovery
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Closing the Hearing

- Making Rule 35 inquiry
- Designating review of transcript
- Closing briefs?
- Closing argument?
- Draft awards?
- Costs and attorneys’ fees
Award preparation and Writing Stage
Nature of the Award

- Findings of fact and conclusions of law
- Reasoned
- Bare
- Which do you want?
- Why?
Post Award Stage
AAA Educational Services

www.aaau.org

Welcome Visitors

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From in-person education and training events to an ever-expanding array of online offerings – including webinars and more – to our expansive collection of printed materials, AAA offers a wide variety of resources designed to help attorneys, the business community and the general public better understand the uses and implementation of alternative disputes resolution.

Courses 》
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Organizational Conflict Management Systems

Final Questions
Thank you!

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