

Testing Your Arbitration Dispute in a Mock Arbitration

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March 15, 2024

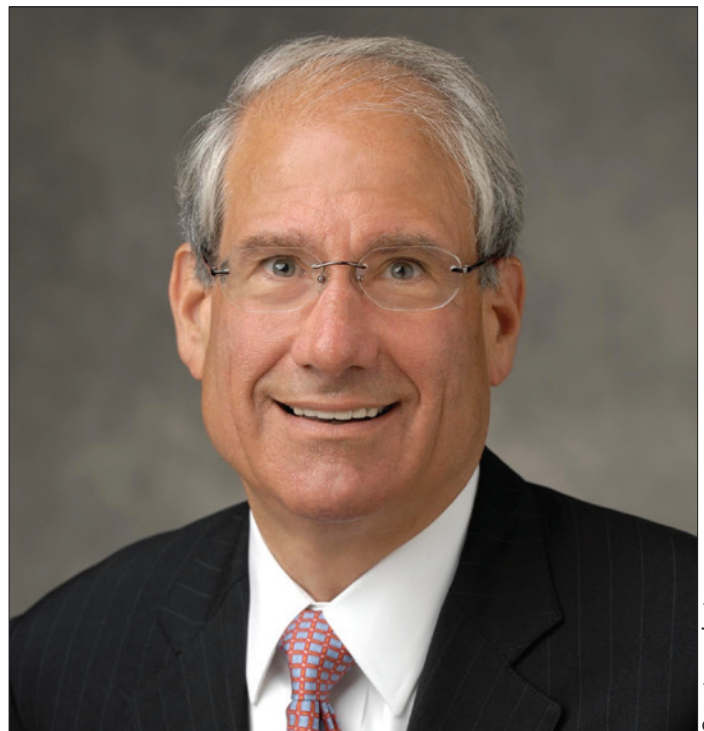
A valuable preparation option for any high-stakes arbitration is the mock arbitration, which serves many of the same purposes as mock trials and jury research for court cases. Mock arbitrations serve to:

- Identify strengths and weaknesses in a party's case and arguments;
- Show where and how case presentation and cross examination can be improved;
- Help counsel and client better evaluate their case based on arbitrator feedback; and
- Help the client and counsel evaluate settlement options.

When done well, the reason a mock arbitration works is that counsel (and client) receives neutral mock arbitrator feedback on every issue that counsel seeks to test.

Who Oversees the Mock Arbitration?

Although variations on a mock arbitration might be organized internally by a law firm



David Ichel of FedArb.

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representing a party, with its own partners or others recruited as mock arbitrators, this process as a testing mechanism is best professionally handled by experienced professionals, such as a trusted jury research firm with experience in running mock arbitrations. They are experienced in breaking down the

process into steps in which mock arbitrator feedback is obtained at each stage.

How Are the Mock Arbitrators Selected?

Mock arbitrators are typically selected in an effort to match characteristics and/or backgrounds of each arbitrator on the arbitration tribunal. If the arbitration has only a single arbitrator, the mock arbitration might use only one or two mock arbitrators. For three-arbitrator panels, which are more common in larger-stakes arbitrations, the mock arbitration will most often consist of at least three matching arbitrators, and sometimes six to comprise two separate panels for ultimate deliberation. Particular effort should be made to match an arbitrator predicted as potentially disposed against the side of the party conducting the mock arbitration in order to be sure to receive adverse feedback on key issues and see whether steps can be taken to overcome adverse inclinations.

Some of the major jury research firms have their own database of potential mock arbitrators. Law firms themselves are familiar with many arbitrators. Some of the ADR organizations can provide lists of potential mock arbitrators or even administer a mock arbitration.

Conflicts checks and confidentiality agreements must be secured, and optimally the mock arbitrators will not know on which side's behalf the arbitration is being conducted, although sometimes that is practically impossible because the lawyers involved are so well known.

How Is the Process Run?

Advance Written Material. In advance of the main mock arbitration session, the mock arbitrators are provided with a packet of material developed by counsel intended to mirror the written submissions in the arbitration, which, depending on the stage of the arbitration, could consist of actual submissions, mock submissions or hybrids for both sides, along with the applicable contract(s) and other key documents. An initial questionnaire will be answered intended to gather the mock arbitrator's views on strengths, weaknesses, open questions, further information desired and how the arbitrator leans (if at all) after reading the material.

Who Represents the Other Side? Just as in jury research mock trials, it is critical that excellent counsel represent and prepare the case for the "other side." Often, it is the best counsel who presents the other side's case. That may be easy when two law firms represent the party conducting the mock arbitration, but I have seen the division among counsel very effectively handled by a single law firm as well. Just make sure that at least as effective counsel is representing the other side and presenting its evidence and arguments in the most effective way.

Main Session Segments. The main mock arbitration sessions often involve each side delivering (1) opening statements, (2) multiple merits-issues evidentiary sessions devoted to the main case issues and (3) evidence and argument on damages and (4) closings. Questionnaires are completed by the mock arbitrators after each session, providing feed-

back as to their reactions, views, questions and leanings at that moment.

Sometimes a separate session is held for mock arbitrator questions to both sides.

Mock Arbitrator Oral Interviews. Mock arbitrators may each be orally interviewed as well.

Deliberation. Often mock arbitration panels are asked to deliberate to reach an Award, with the session being both observed and recorded.

Final "Ask the Arbitrators" Session: Often, counsel will wish to ask the mock arbitrators questions about their views in a final session.

Client Participation. One benefit of a professionally organized and administered mock arbitration is that the client can either participate directly by watching through one-way windows or by watching video of certain segments and receiving a written report that includes video highlights. This can also assist clients in evaluating settlement options.

Utilizing a mock arbitration in the right case helps achieve a number of important

objectives: testing and refining your case, getting real arbitrator feedback as to what does and does not work and what else might make a difference, and, just as crucially, providing invaluable insights for your client in evaluating settlement.

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