DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

ARBITRATION TRAINING AND CERTIFICATION 2022

DSBA WEBINAR VIA ZOOM

SPONSORED BY THE DELAWARE STATE BAR ASSOCIATION

THURSDAY, FEBRUARY 10, 2022 | 9:00 A.M. TO 12:15 P.M.

1.0 Hour CLE credit in Enhanced Ethics for Delaware and Pennsylvania Attorneys

CLE SCHEDULE

9:00 a.m. – 10:00 a.m.

Arbitration Ethics

David A. White, Esquire

Office of Disciplinary Counsel of the State of Delaware

10:00 a.m. – 10:15 a.m. | Break

10:15 a.m. – 12:15 p.m.*

Nuts and Bolts of Arbitration from Planning, Hearing the Case and Writing the Report

Bernard G. Conaway, Esquire

Conaway-Legal, LLC

** Ethics credits available*

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ABOUT THE PROGRAM

Back by popular demand, DSBA offers members an opportunity to be Certified as a Trained Arbitrator in one of 4 legal practices: Family Law; Commercial Law; Personal Injury Law; and Labor & Employment Law. To be certified, a member must take this course and at least ONE OTHER practice area course.

This course will feature the nuts and bolts of any arbitration, stepping attendees through the process of scheduling and conducting the arbitration and in preparing the arbitration order. Additionally, there will be one hour of ethics related to arbitration hearings.

Subject matter courses are being planned and not yet available for registration; however, dates for these courses will be made available shortly.

By taking this course and one subject matter course, the attorney may display the DSBA arbitration certification logo on the attorney's website. Certification will remain in effect for 7 years, to be renewed at that time.

Visit www.dsba.org/event/arbitration-training-and-certification-2022/ for all the DSBA CLE seminar policies.

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

Arbitration Ethics

David A. White, Esquire
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Nuts and Bolts of Arbitration from Planning, Hearing the Case and Writing the Report

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ARBITRATION TRAINING AND CERTIFICATION 2022

Nuts and Bolts of Arbitration from planning, hearing the case and writing the report.

~ Presented By ~

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WHY ARBITRATION?

Arbitration has been around for a thousand years.[1] That survival and duration owes its existence to several perceived benefits:

1. Timeliness
2. Competence
3. Cost
4. Confidentiality
5. Informality

Notwithstanding arbitration's long history, understanding and appreciating the benefits offered are critical to your success as an arbitrator.

Situation: An arbitrator is selected to decide a time sensitive commercial matter involving a shipment of produce arriving from South America. The arbitrator promptly schedules the hearing. What can go wrong here?

The sky is the limit. Taking too long to render a decision, imposing unnecessary procedural hurdles upon the parties, relying upon inefficient methods for evidence gathering, hearing presentation, ignoring cost considerations by allowing unlimited discovery, or, one of the most common mistakes of either too much or not enough formality.

The point here is that a good arbitrator appreciates the benefits of arbitration and balances those benefits against the demand of the case.

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[1] *See generally*, Frank D. Emerson, *History of Arbitration Practice and Law*, 19 CLEVELAND STATE L. REV. 155 (1970). Available on online at: https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2726&context=clevstlrev

Professor Emerson details examples of arbitrations that occurred eons ago, including examples from the Old Testament (involving King Solomon), from Greek mythology, and an arbitration panel occurring around 600 B.C. to decide possession of the island of Salamis.

TYPES OF ARBITRATION

Much like a bag of mixed vegetables, arbitration can proceed in any number of formats. Below is a list of the most encountered formats:

Type	Example
Binding or Non-Binding	*Binding* – contractual (employment, warranty), or statutory *Non-binding* – think RULE 16.1, or as agreed by the parties
Mandatory or Voluntary	*Mandatory* – Again, Rule 16.1, or other court-annexed arbitration programs. *Voluntary* – Any situation where the parties agree, either in advance of the dispute or after a dispute arises, to submit the matter to arbitration.
Contractual or Statutory	*Contractual* – labor agreement, consumer warranty, internet services, financial services) *Statutory* – can be US law (NAFTA, NLRB, certain labor type disputes, etc.), or based upon treaty (The New York Convention, 9 U.S.C. § 201–08, or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)), International Atomic Energy Association (IAEA); or foreign body such as the International Court of Arbitration (ICC), or the United Nations Convention on the Law of the Sea, or international institutions such as the Permanent Court of Arbitration at the Hague.
Administered or Non-Administered	*Administered* – typically involves a third-party organization such as the American Arbitration Association ("AAA"), JAMS, etc. Arbitrations under these organizations involve an administrative process intended to focus and organize the process. The AAA has administrative guidelines covering costs, hearings and decisions. In addition, the AAA offers procedural rules governing different subject matter, i.e., construction, employment, commercial. *Non-Administered* – Usually the arbitrator is solely responsible for the administrative framework of a non-administered arbitration. That framework can, and often is, developed in conjunction with the arbitrating parties. Third-party agencies have established rule and procedures for arbitration. They do not, however, administer the arbitration process. See, for example, *International Institute for Conflict Prevention and Resolution ("CPR") Rules for Non-Administered Arbitration*

KINDS OF ARBITRATION

Aside from the format, arbitration can be structured in any number of ways. The list below reflects frequently used formats. This list is, however, by no means exhaustive.

Format	Description
Single arbitrator	One arbitrator undertakes every aspect of the arbitration process.
Panel arbitration	Multiple arbitrators are involved in the process. Typically, one of the arbitrators is designated as the lead or chair.
Party selected panel	Very similar to a Panel arbitration except that the arbitrating parties select all of some of the arbitrators. Often the parties will select an arbitrator and then, collectively, those arbitrators will select another arbitrator to serve as the chair. One unique use of Party selected arbitration is that the arbitrator selected by a party is expected to advocate for the party selecting them.
High/Low arbitration	Prior to the arbitration, the parties agree to limit the parameters of the arbitrator's award. For example, the parties may agree that any arbitration must fall within a discrete money range, i.e., 50 to 100K. Frequently, the arbitrator is unaware of the high/low parameters.
Baseball arbitration	In this setting, each party provides the arbitrator with their position on the outcome. For example, going into a baseball arbitration the arbitrator(s) would know that one side believes the case to be valued at 1000K and the opposing party values the case at 150K. The important limitation here is that the arbitrator(s) must select one parties valuation as the arbitration award.
Arbitration/Mediation	In this setting, the parties select and arbitrator. That person also serves as a mediator. The case is first arbitrated with each side presenting the entirety of their case. Upon conclusion of the arbitration, the arbitrator's award is issued but placed in a sealed envelope. Thereafter the arbitrator transitions to a mediator. If the mediation is successful, the arbitration award in inconsequential. If the mediation is unsuccessful, then the parties are bound by the arbitration award.

There are significant benefits and risks associated with each form of arbitration.

ARBITRATION BASICS – IT'S A CONTRACT

Arbitration agreements/clauses are contracts. *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248 1253, 103 L.Ed.2d 488 (1989); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204 1207, 163 L.Ed.2d 1038 (2006); 9 USC § 2; 10 DEL. C. § 5701. As such they are subject to the same rules of construction, the same defenses and overarching public policy considerations.

The arbitration agreement is the roadmap of an arbitrator's authority. Never, ever lose sight of this. When in doubt about your authority ask the parties to confirm, or not, that authority.

Always ask if there is an arbitration agreement. If there is, ask to see it. If they parties will not, or cannot allow you to see it, ask what you, as the arbitrator, must know about the arbitration agreement.

A. Writing Required to Enforce but not to Proceed

To be enforceable, an arbitration agreement must be in writing. 9 USC § 2 ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid, irrevocable, and enforceable."); New York Arbitration Convention[2] at ART. II, part 2 ("The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."); 10 DEL. C. § 5701 ("A written agreement to submit to arbitration . . . ")

Despite the writing requirement, US courts will interpret this requirement in a commercially practical manner. In some cases, courts have enforced arbitration agreements where, for example, the final contract was unsigned or where the agreement to arbitrate was entered into via email or in circumstances discussed in answer. *TMG Health, Inc. v. Unitedhealth Grp., Inc.*, 2007 U.S. Dist. LEXIS 31423, *6-7 (E.D. Pa. Apr. 26, 2007); *Raynor v. Verizon Wireless (VAW), LLC*, 2016 U.S. Dist. LEXIS 54678, *2 (D.N.J. Apr. 25, 2016) (both agreements unsigned – held enforceable nonetheless)

As an aside, personal injury arbitrations in Delaware often proceed without a written agreement. This likely flows from the fact that court rules essentially supplement the perceived need for a writing. In the complex personal injury cases, an unwritten arbitration agreement can leave too much to chance, *i.e.*, how liens might be handled, who handles them, dealing with disability insurance or government programs, allocations, release issues,

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[2] The New York Arbitration Convention is formally known as the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award*s (New York, 10 June 1958). 9 USC § 202, *et. seq.* (adopting Convention). https://www.newyorkconvention.org/new+york+convention+texts. The Convention requires signatory States to recognize arbitration awards rendered outside their borders.

will a release be given.

B. A Sliver of What Was Not Discussed Today

One issue that often arises in arbitration is: who decides what? For example, does the arbitrator have the authority decide the scope of their authority? How about their jurisdiction over a specific matter? When must a court decide certain issues? The literature and case law on this subject, substantive arbitrability, is plentiful, deep, often conflicting between jurisdictions.

In general, most of these the answers to these disputes turn on the language of the arbitration agreement.

Example: In Delaware, "where the arbitration clause provides that the arbitration will be conducted in accordance with the rules of the American Arbitration Association (AAA), that statement constitutes clear and unmistakable evidence of the parties' intent to have an arbitrator determine substantive arbitrability. *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 78 (Del. 2006).

In a recent 2nd Circuit case, the court confirmed a district court order denying substantive arbitrability. *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, 6 F.4th 308 (2nd Cir 2021). The decision was based, in part of that court's conclusion that the following arbitration clause language did not reflect the "parties' clear and unmistakable intent to delegate questions of arbitrability to the arbitrator."

> (b) Arbitration. The parties unconditionally and irrevocably agree that, with the exception of injunctive relief as provided herein, and except as provided in Section 16(c), all Disputed Matters that are not resolved pursuant to the mediation process provided in Section 16(a) **may be submitted by either Member to binding arbitration administered by the American Arbitration Association ("AAA") for resolution in accordance with the Commercial Arbitration Rules and Mediation Procedures of the AAA then in effect**, and accordingly they hereby consent to personal jurisdiction over them and venue in New York, New York. The demand for arbitration shall be made within a reasonable time after the conclusion of the mediation process by delivery of a written notice (an "Arbitration Notice") by the electing Member to the other, and in no event shall it be made after two years from the conclusion of the mediation process. . ..

Id. at 312-13.

The district court rejected Williams-Sonoma's assertion that incorporation of the AAA Commercial Rules alone was sufficient to evince the parties' clear and unmistakable intent to delegate questions of arbitrability to the arbitrator. On appeal, the 2nd Circuit affirmed.

An overview of process/substantive arbitration issues not addressed today.

Arbitration Issue Matrix		
Process/Substantive Issues *See below*		
	Procedural Considerations	Substantive Considerations
Who	Who selects arbitrator? Will arbitrator be appointed or selected? Who can serve as arbitrator? How many arbitrators? Minimum arbitrator qualifications/certification/license Must certain parties attend an arbitration?	Who decides arbitrability? Do you really want an unknown entity/person serving as arbitrator? Do you want the arbitrator to have authority to decide all arbitration related issues, or not? Who decides whether an enforceable arbitration agreement exists? Who is covered by the arbitration agreement? Who is not covered by the agreement?
What	What disputes will be arbitrated? What will not be arbitrated?	Distinguishing relief requested expedited, irreparable harm, or injunctive matters. Distinguishing the relief requested from the subject matter of the arbitration
Where	Where will the arbitration physically take place? What about virtual arbitration?	What law will control the arbitration process and substantive law questions?
Why	Under what circumstances will arbitration be mandatory? Will arbitration be limited to certain, defined circumstances? What are they?	Is the imprimatur of a judicial necessary or preferred for enforcement of an issue? Outside the Delaware Court of Chancery, can the client tolerate an arbitration process that requires additional post award/decision steps to implement enforcement? Is the power of judicial enforcement likely to be necessary to adequately protect the client's interests?

When	Will the arbitration be subject to a pre-determined timeline? Is the arbitrator required to render a decision within a specific time frame? Is a combination mediation and arbitration agreement appropriate?	Is there a contractual statute of limitations? Some agreements require a claim to be asserted within 30 days of the alleged breach. Does the issue(s) addressed by arbitration require expedited handling such that an arbitration administrator may take too long?
Money	How much and who pays the arbitrator? When must the arbitrator, or arbitration administer be paid?	What can the arbitrator award/not award, i.e., no punitive damages, non-economic damages. Can the arbitrator award fees to a prevailing party absent a contractual fee shifting provision? Can the arbitrator impose sanctions?
Substance	There are few areas that the law prohibits the use of arbitration. The area of law/subject matter of the arbitration will often impose other considerations on the arbitration. For example, some matters cannot be arbitrated such as interstate family law/right disputes. State law may impose other limitations or restraints – consumer/warranty class actions. Federal law may likewise impose similar limitations.	

C. The Winds of Change

Pending federal and state legislation may have a dramatic impact of the type of matters subject to arbitration. Mandatory arbitration in employment, class actions or internet service agreements are but a few areas under review. Keep informed.

KEYS TO SUCCESS AS AN ARBITRATOR[3]

Every single rule is born out of experience – some bad, some good.

1. *A Deep Abiding Appreciation of Due Process and what it Means, i.e., Being Fair, Balanced, Knowledgeable, Informed, and Impartial.*

Can't over emphasize enough the need to be independent/impartial and perceived that way. Every step you take will be judged, at a minimum, in retrospect. Be self-aware of how your actions could be viewed.

> Independence and impartiality are generally considered to be two different concepts: independence is the objective absence of any substantial link to any of the parties as that may alter the freedom of judgment of the arbitrator; impartiality is the subjective will not to favor any of the parties.
>
> Due process contemplates more than independence and impartiality.

Understanding how to conduct yourself in a manner conveys both qualities. Understand how to handle a hearing. How to establish pre-hearing processes that comport with the benefits and purpose of arbitration. Lastly, remember that as the arbitrator, you are generally in charge of process and procedure – comport yourself accordingly.

2. *Always ask for the Arbitration Agreement, if one exists*.

Distinguish this from high/low or other types of agreements. Some terms of an arbitration agreement the parties may not want you to know. Some agreements are very basic. Some very complicated. For example, you should understand what your final decision should look like – a reasoned decision of nothing more than a conclusory award.

A reasoned decision is professionally and personally rewarding but it also the serves as the perfect foundation for overturning the award. Be very careful when writing a decision. Flip remarks, bad math, over/hyper critical focus on a single fact/circumstance set the foundation for a reversal argument. A powerful reasoned decision identifies those facts, that testimony, and credibility that reinforce the outcome

3. *When in Doubt, Confirm Your Authority to Act with the Parties*.

Keep in mind that the arbitration agreement is the source of your authority. It is always the best source your authority If you are unsure that you have certain authority as an arbitrator, then ask the parties to confirm that you do.

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[3] These Rules should serve only as a guide and should not to be thought of as an edict. Moreover, the discussion here is very limited and only intended to serve as an introduction.

A simple question often adds needed clarity.

4. *Respond Promptly and Completely*.

Remember that arbitration is selected because it is quicker and less expensive. Taking too long to respond undermines that objective.

5. *Understand the Allegations – Ask as Many Questions as it takes.*

The single best way to lose credibility is to fail to grasp the issues. It's far better to make the "wrong decision" because you disagreed with a party's position, then to make the wrong decision because you didn't understand the facts, legal issues, or arguments.

6. *Be Overly Inclusive Regarding Your Conflict Check*.

Likewise, your disclosure to the parties should be broad. Example: indicating that you've served as an arbitrator involving an insurance carrier or this attorney, or that others in your firm may have/had some relationship with one of the litigants. I use the following disclosure for every arbitration.

> Subject to the general disclosure that, over the course of my career, I have litigated, arbitrated and/or mediated cases with all counsel and/or with other members of their respective firms, and, just as likely socialized professionally with the same, the conflict check revealed two issues. I have arbitrated/mediated countless cases wherein either [redacted] Insurance Co. and/or [redacted] Indemnity Co were the underlying insurers or parties. In none of those instances did an attorney/client relationship exist.
>
> I do not believe that these prior interactions constitute a prohibited conflict of interest but will, of course, defer to counsel.

Keep in mind that conflicts of interest and the resulting appearance of impartiality is one of the primary reasons why arbitration awards are reversed.

7. *Marketing Yourself.*

Two kinds of arbitrations: (i) those disputes involving a matter that is largely local in nature, and (ii) those disputes involving a matter that is not entirely local. Personal relationships largely drive the selection of the arbitrator in the former. Competency is a criterion but secondary. When disputes are not local competency usually drives the selection of the arbitrator. Personal relationships are a secondary consideration. Know what you want to focus on and direct your marketing efforts accordingly.

8. *Understand that Everyone is Trying to Manipulate You*.

Thus, it is vitally important to know yourself. For example, are you conceptual, open-minded, equity-oriented person or a rule-oriented, no-nonsense, by- the-numbers strict constructionist? To be successful you need to understand your own psychology and understand how your mindset might be influenced by counsel. Know that the lawyers selected you and already have their own insight into your psychology. Example: strict construction of the contract and related documents, while the other argues the parties' intent and the equities of the case.

9. *Humiliate No One Especially the Referring Attorneys.*

This ought to be obvious.

10. *Know the Rules and Law for Which You Are Accountable.*

Ask the parties especially if there is no written arbitration agreement. An important corollary to this rule is knowing the Federal Arbitration Act and the Delaware Arbitration Act, especially the provisions relating to vacating and modifying awards. The DRAA imposes other time and process obligations upon the arbitrator.

Federal Arbitration Act	**Delaware Uniform Arbitration Act**
9 U.S.C.A. § 10 [*Award of arbitrators; confirmation; jurisdiction; procedure]; vacation; grounds; rehearing*. (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration— where the award was procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrators, or either of	**10 Del C. § 5714** *Vacating an award.* Upon complaint or application of a party in an existing case, the Court shall vacate an award where: The award was procured by corruption, fraud or other undue means; There was evident partiality by an arbitrator appointed as a neutral except where the award was by confession, or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; The arbitrators exceeded their

	powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made;

them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.	The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, or refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 5706 of this title, or failed to follow the procedures set forth in this chapter, so as to prejudice substantially the rights of a party, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection; or There was no valid arbitration agreement, or the agreement to arbitrate had not been complied with, or the arbitrated claim was barred by limitation and the party applying to vacate the award did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known. In vacating the award on grounds other than stated in paragraph (a)(5) of this section, the Court may order a rehearing and determination of all or any of the issues, before new

	arbitrators chosen as provided in the agreement, or in the absence thereof, by the Court in accordance with § 5704 of this title, or, if the award is vacated on grounds set forth in paragraphs (a)(3) and (4) of this section, the Court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with § 5704 of this title. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order. (d) If the application to vacate is denied and no motion to modify or correct the award is pending, the Court shall confirm the award.

9 U.S.C.A. § 11 *Same; modification or correction; grounds; order* In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration— (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. (c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.	**10 Del C. §** 5715 *Modification or correction of award by Court.* Upon complaint or on application in an existing case made within 90 days after delivery of a copy of the award to the applicant, the Court shall modify or correct the award where: There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or, The award is imperfect in a matter of form, not affecting the merits of the controversy. If the application is granted, the Court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the Court shall confirm the award as made. An application to modify or correct an award may be joined in the alternative with an application to vacate the award.