

HOW TO CHOOSE AN ARBITRATOR

One of the great advantages of arbitration is that the parties get to choose the arbitrator who will be deciding the case. In the judicial setting, the parties are at the “whim” of “the wheel,” that is, the judge is selected randomly. In stark contrast, however, arbitration provides a unique ability to select the individual and the qualifications of the individual who will decide the case. This is especially important in arbitration as there is limited court review of the arbitrator’s decision.

There are several ways and times that the parties’ choice can be made or views can influence who the arbitrator will be. For example:

- in the arbitration clause in the parties’ contract, the parties can:
 - name the arbitration provider (that is the forum, such as AAA, JAMS, NAM)
 - in the arbitration clause name the specific arbitrator (that is, actually agree in advance on who the arbitrator will be if there is a dispute)
 - list specific qualifications for the neutral (such as “a former judge” or “a former or current managing attorney of a law firm of over 400 lawyers” or “a CPA”)
- in the arbitration demand that is filed with the arbitration provider, the claimant can set forth the qualifications of the arbitrator by stating, for example:
 - “an attorney with experience in trade secrets” or “intellectual property” cases or “experience with non-competition covenants in high tech industries” or “experience in the apparel industry”
- ask the provider to have the potential arbitrators list experience as an advocate or as an arbitrator in a particular type of case, such as “shareholder disputes”
- speak with the case manager or other administrator at the arbitration provider about the specific qualifications you are seeking or in a particular industry (such as “jewelry design” or “intellectual property disputes”)

The arbitration provider will be sending you various resumes (or “profiles”) from which you be selecting the arbitrator. The resumes most likely will include background, ADR training, education, experience in litigation and arbitration, speaking engagements, articles, prior work history, and rates. Once you have this information in hand, you can begin your due diligence. Litigation counsel are literally trying to “read the tea leaves” when reviewing the resume. Was the arbitrator associated with management or employee-representing law firms? Does the arbitrator have prior experience in ADR?

Among the things you can do to learn more about the prospective arbitrators are the following:

- Ask colleagues at your firm, bar associations, or other groups (such attorney list-servs) about the candidates and experience with them either as a neutral or as counsel
- Look for on-line sources of information about the candidate, including:

- current or prior firm website and other biographical information
- cases in which the arbitrator appeared on behalf of a client (as an advocate); decisions rendered by the arbitrator or as a judge
- articles authored by the candidate and presentations given
- research the industries, clients, trade associations s/he has been involved with (or of his/her firm)

Another important source of information can be other arbitrators. For example, an arbitrator may have served on a panel with the candidate and have information about the person, such as, is s/he efficient or laborious? How does the arbitrator treat evidence, discovery or motions? Another arbitrator may have valuable insight into not only how that candidate thinks, but may be able to suggest what qualifications you should be considering, as well as what type of arbitrator may be best for the particular case. Similarly, ask lawyers who have experience appearing before the arbitrator candidates about that experience, the arbitrator's demeanor and how he or she handled the hearings, adjournments, dispositive motions, and witnesses.

Finally, consider hiring a consultant (who is experienced in arbitration) to help counsel and client choose the arbitrator and to be available to consult throughout the process. It may well be that an experienced, courtroom litigator may not be familiar with the arbitration process and its nuances. The experienced arbitrator may prove to be an invaluable resource to help the litigator prepare for the arbitration, including the hearing itself.