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MEDIATION NEWS FOR THE 21ST CENTURY™

MEDIATION NEWS

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Arbitration News and Developments:

New rules for an appellate procedure for arbitration cases.

To address concerns with regard to the limited appealability of arbitration awards, the American Arbitration Association has developed a set of optional rules providing for appellate review.

The AAA announcement and link to the new Rules are here - http://go.adr.org/AppellateRules. The Announcement states:

The AAA's new set of Optional Appellate Arbitration Rules (effective November 1, 2013) provides parties with a streamlined, standardized, appellate arbitration procedure that allows for a high-level review of arbitral awards while remaining consistent with the objective of an expedited, cost effective and just appellate arbitral process.
Traditionally, courts use narrowly-defined statutory grounds to set aside an arbitration award. Alternatively, these new rules provide for

"Why waste our life in friction when the same effort can be turned into momentum?"
- Adapted from Frances Willard

"Your time is limited, so don't waste it living someone else's life. Don't let the noise of other's opinions drown out your own inner voice. And most important, have the courage to follow your heart and

an appeal within the arbitration process. The appellate arbitral panel applies a standard of review more expansive than that allowed by existing federal and state statutes to vacate an award. In this regard, the optional rules were developed for the types of large, complex cases where the parties think the ability to appeal is particularly important.

Quick Facts about the Optional Appellate Arbitration Rules:

- Parties may use these rules only when there is an agreement of the parties, either by contract or stipulation.
- Parties are permitted to appeal on the grounds that the underlying award is based on errors of law that are material and prejudicial and/or on determinations of fact that are clearly erroneous.
- Appeals generally will be determined upon the written documents submitted by the parties, with no oral argument.
- The Optional Appellate Arbitration Rules anticipate a process that can be completed in about three months.
- The Appellate Panel consists of former federal and state judges and neutrals with strong appellate backgrounds.
- Parties may provide for the AAA's Optional Appellate Arbitration Rules whether or not the underlying award was conducted pursuant to the AAA's or ICDR's rules.

Rule A-10 of the Rules provides that "[a] party may appeal on the grounds that the Underlying Award is based upon: (1) an error of law that is

intuition. They somehow already know what you truly want to become. Everything else is secondary."
- Steve Jobs

material and prejudicial; or (2) determinations of fact that are clearly erroneous."

Rule A-15(a) provides that the appellate process is ordinarily a documents-only procedure: "Unless otherwise directed by the appeal tribunal, all appeals will be determined upon the written documents submitted by the parties. If the appeal tribunal deems oral argument necessary, or a party requests oral argument, the appeal tribunal at its discretion may schedule same."

Rule A-4(a) specifies that the appellate tribunal is to be selected from the AAA's Appellate Panel, or, if an international dispute, from its International Appellate Panel.

Rule A-6 sets out a list procedure for use by the AAA when the parties do not agree on the identity of the members of the appellate tribunal.

Rule A-11 permits (but does not require) the appellate tribunal to assess against the Appellant/Cross-Appellant "the appeal costs, and other reasonable costs of the Appellee/Cross-Appellee, including attorneys' fees (if a statute or the parties' contract provides for an award of attorneys' fees), incurred after the commencement of the appeal if the Appellant/Cross-Appellant is not determined to be the prevailing party by the appeal tribunal."

Rule A-12(a) requires all outstanding AAA fees and costs owing by an appealing party be paid in full as a condition to initiation of the appeal or cross-appeal.
Rule A-12(b) requires the appealing party to be

responsible for the AAA's administrative fees and appeal tribunal fees and costs arising from the appeal unless there is a cross-appeal. In the latter case, the fees and costs are shared. (Source: Mark Kantor, Washington DC.)

Honolulu Labor Management Honors Legends of the Labor Management Community.

In October, 2013, local labor management organizations sponsored a workshop on improving the grievance handling process. Sponsoring organizations included the **American Arbitration Association,Hawaii IRRA (**Industrial Relations Research Association *Hawaii Chapter),* **United Public Workers** AFSCME Local 646 AFL-CIO, **Hawaii Employers Council**, **Center for Labor Education & Research** (CLEAR) and the **Hawaii State Teachers Association**.

Honored for their substantial and extensive contributions to the field of Labor/Management were Ted Tsukiyama (arbitrator and labor neutral), Claude Matsumoto (Management, Hawaii Employers Council) Randy Perreira (Labor, HGEA) and Tommy Trask (ILWU, posthumous award).

Ted Tsukiyama delivered a keynote address reflecting his five decade plus involvement in Hawaii's Labor/Management history. His thoughtful observations and recommendations appear below.

TED T. TSUKIYAMA KEYNOTE SPEECH 10/10/13

The term "reform" assumes or presupposes that

there are flaws, deficiencies and shortcomings in the arbitration process that calls for reformation and betterment. The biggest problem burdening the institution and practice of arbitration is its advancing formalism and legalism resulting from its dominance and control by the legal industry and profession.

From over 50 years ago labor arbitration was engaged in an internal struggle over its basic identity and purpose between the concept of a simple, informal, in-house "problem solving process" advocated by former War Labor Board Chair George Taylor and a more formal and structured dispute resolving process advocated by the American Arbitration Association, which was ultimately resolved in favor of the latter approach.

In the ensuing decades labor arbitration gradually evolved toward (1) an increased legalistic practice, procedure and perspective, (2) resulting in increased use of attorneys as advocates and arbitrators, (3) which was largely as a result of the parties' preference and choice motivated and fuelled by a "must win" or "win at all cost" complex, (4) prolonging and complicating the hearing time and process, and (5) producing a more competitive, adversarial process often no different than contested litigation in the courts. The net result was the loss or erosion of the basic objectives and advantages of the arbitration process of speed, informality, economy, mutual control and good will.

Labor arbitration originated as a creature of the collective bargaining contract designed to be

the terminal point of the contractual grievance procedure as a simple, informal, internal grievance resolution process within the union/management relationship. Grievance arbitration was created as a "problem-solving" process and institution to maintain labor stability and peace during the term of the contract, and it was, and still should be, an integral part of the collective bargaining process, and not as a separate system of industrial jurisprudence. Yet, the present day legalistic nature and status of labor arbitration has become a totally antithetical counterpoint to its originally intended form, purpose and operation. The almost exclusive advocacy by attorneys necessarily brings increased formalism to the entire hearing process complicating and lengthening its completion time with attendant increased costs and a more acrimonial adversarial environment which becomes wholly counterproductive to the problem-solving origins and purposes of grievance arbitration. Labor arbitration can be made better, viable and more effective only when the process can be made less formal, less technical, less adversarial and brought back to "its roots," to the shop and plant level of the parties' relationship. So how can this be done?

The Attorney Advocate.

1. It is not here being suggested, much less urged, that attorney advocates be removed or barred from the arbitration process, because an attorney who has learned to become a good, effective arbitration lawyer is a positive asset to the entire labor arbitration process. He knows that an arbitration hearing is not court

litigation and that all of the legal and technical rules of procedure and evidence are unnecessary and do not apply to the former, and he conducts himself accordingly. To be effective, he abandons his adversarial instincts and leaves behind his technical tools of trade which contribute to the growing formalism of the process but which have little or no use or relevance in arbitration.

2. Hawaii Arbitration Law (Ch. 658A-23) minimizes the technicalities and formalisms of the process by upholding and insulating an arbitrator's award against all of the usual errors of procedure or mistakes of law and specifying only 4 basic grounds* by which the award can be reversed or vacated (rendering it "more binding than a court judgment") *(1) corruption, fraud or undue means, (2) evident partiality, corruption, arbitrator misconduct, (3) substantially prejudiced rights of a party...ie, refused to consider evidence material to the controversy,(4) exceeded the arbitrator's powers. Thus, the usual lawyerly objections should not be made unless it impacts this law! Hearings will become simplified, undistracted, expedited and shortened....reduce costs.

3. The entire arbitration process has become pawns to the attorney's work schedules. Arbitration cases, especially discharge cases, should be given prioritized consideration in their work schedules. The process and its participants should no longer become captives of the legal profession.

4. Broadly speaking, attorney advocates should make themselves parties to the Contract's grievance process of resolving workplace disputes in a simple, expeditious manner and become part of the collective bargaining process. In short, they must recognize their true role in the grievance arbitration process and stop dragging it across the street to the courthouse!

The Arbitrator.

1. The Arbitrator can and must do his part. First, at the risk of incurring the wrath and displeasure of the attorneys and the parties as well as to his general acceptability, he must try to exercise tighter control over the entire hearing process and conduct of advocates, the responsibility for which is his alone.

2. The Arbitrator should assert himself more strongly to discourage and curb unnecessary formalisms and practices that emphasize form over substance and produce delays, prolonged and unfocused hearings, 'and which proliferate the total costs of the process. In short he must endeavor through every means to bring the process back to the workplace and to restore it to its intended contractual intent and purposes of functioning as the terminal point in the grievance process.

3. The Arbitrator can be innovative and flexible since the basic purpose of the grievance procedure is to resolve all disputes in the interests of industrial stability and peace not by arbitration

alone. Thus the Arbitrator can utilize appropriate situations and opportunity to approach or suggest that the parties try to settle the conflict, such as, to invoke a Step 2 ½ interlude for parties to attempt a doorstep settlement prior to proceeding with arbitration, or to even offer and get the parties consent to allow the Arbitrator to med-arb the dispute issue.

The Parties.

But real, positive and lasting success in arbitration can be assured only from the creative source of the institution and process itself….the employer and the union.

1. Every aspect of the arbitration process is the product of mutual agreement of the parties. They design, shape and control the process. They employ the advocates and the arbitrator. They are the masters, not servants, of the process.

2. They can direct and control the process through the arbitration clause in their Contract. For example, some Contracts already provide that arbitration hearings shall be informally conducted, dispensing with judicial rules of procedure and evidence.

3. Through mutual will and authority they can agree:

    a. To make better and more bona fide use of the grievance procedures (and not allow it to become just "shibai"), try to achieve good faith resolution, and thus reduce the

volume of case going to arbitration.

b. To experiment and try using informal and expedited procedures (like no attorneys, no transcripts, briefing, or full decisions), especially in simpler cases.

c. To explore and experiment in other ADR (alternative dispute resolution) forms like Step 2 ½ , med-arb, mediation and other simpler, faster, more economical alternatives or substitutes to the arbitration process.

d. To convince their advocates that for an arbitration hearing they forego or dispense with their usual litigation practices (like transcripts, briefs and full decisions), except where important or novel issues require full reasoning or analysis. Significant reduction in elapsed hearing time and great cost savings will be achieved. [The Arbitrator recalls arbitrations of 50 years ago where commonly laymen advocates represented their parties and competently presented their parties' interests nor to the process itself… it can be done.]

4. As previously asserted the arbitration process has become captives of the legal institution and professionals, the biggest victims of which are the parties themselves. The parties should give serious thought to weaning themselves away from the slavish dependence upon legal advocates. Their reliance and use of

lawyers is no guarantee of victorious arbitrated disputes nor of dominance over opposing parties.

5. The parties are urged to make serious effort to train and use their own in-house industrial relations expertise (like HR Directors and Union Business Agents) to prepare and present arbitration cases to the Arbitrator, many of whom can do as well if not better than some attorney advocates, and certainly at far less hearing time and cost.

6. Best of all, the parties can dispense with the Step 3 arbitration process and be rid of the arbitrator himself by not arbitrating at all by:

a. Greater reliance and use of t he grievance process rather than copping out for a third party resolution of a difficult conflict.

b. Improving their settlement perspectives and techniques. . . the heart and soul of collective bargaining.

c. Overall improvement of their collective bargaining relationship with opponents to diminish the quantity and frequency of grievances.

All this is based upon the truism that there is no dispute or conflict that reasonable minds on both sides of the table cannot resolve.
In sum, the parties should never forget that it is they who own, create, and control the arbitration

process and ultimately responsible for its failure or success. They are the masters of the future destiny of the process and who can bring "success" and viability back to arbitration.

Conclusion.

Ultimately and finally, it is all three participants, the advocate, the arbitrator and the parties who must work individually and together to restore arbitration to the simple, speedy and economical conflict resolution process it was intended to be and to bring back to the process to the workplace and the collective bargaining process of its origins and where it belongs.

I rest my case.

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