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Arbitration Advocacy: Its Role in Business and Legal Education, and New Options for Dispute Resolution

Stanley Sklar

SAM FAYE: Good morning, everyone. Thank you all for joining us today. On behalf of myself and the *DePaul Business and Commercial Law Journal*—students, faculty, and guest speakers, it's a pleasure to have you here. We are here today to discuss matters of commercial arbitration, which is an area of interest for the students present and an area of expertise for our speakers and practitioners in the room.

With the current state of the judicial branch in many states, particularly Illinois, courts are facing a number of budget and financing issues. At the same time, businesses often seek more expedited and cost efficient dispute resolution forums than the courts are able to offer. Arbitration has become a significantly used dispute resolution process in the business world as attorneys look for new ideas to provide efficient services in terms of time and cost-effectiveness. There have been a number of new formats and ideas regarding arbitration, one of which has become a legal battle in Delaware. Two of our guest speakers today will explain the details and potential effects the Delaware program may have if it is ruled constitutional.

I want to give special thanks to our guest speakers who are here with us today. In the booklets that are in front of you, they give a little bit of information about them. But I just want to go ahead and acknowledge each of them individually as a personal thank you for being here after months of discussion with many of them. We have Mr. Paul Lurie, who is sitting up here on the end. Mr. Lurie is a partner at Schiff Hardin here in Chicago and has been business and legal counsel for major owners, developers, and design and construction teams for over forty years. Additionally, we have Christopher Martin, who is not here at the moment. He's coming from Northwestern. He's finishing teaching a class, but he'll be here shortly. Mr. Martin has had experience in a couple of states dealing with both business litigation matters and alternative dispute resolution, and he's going to give us a few words on the cost-effectiveness of commercial arbitration and ways to keep those costs down. Additionally, joining us in a little while is the Honorable Clifford Meacham, who is a retired Cook County judge and currently serves as a neutral on behalf of JAMS. So

he will be here to give you his thoughts and opinions from a former judge's standpoint. Also joining us is Stanley Sklar, who is right up here. Mr. Sklar is an adjunct professor at DePaul and teaches a class in commercial arbitration. For the students here, I suggest you take it. I want to thank Professor Sklar particularly because I think his class and some of the things I learned in it is what led to the development of this program and the ideas that spawned. And finally we have Mr. Gregory Varallo and Mr. John Mark Zeberkiewicz, who are sitting in the back over there. I want to thank both of them particularly for coming in from Wilmington, Delaware last night. These two gentlemen are familiar with the program that was passed in Delaware and have had some practical, hands-on experience, and they're going to give you a firsthand insight into what they think about the program, why they think it's successful, and the possible effects it may have on Delaware if it moves forward, and also on other states if others outside of Delaware decide to adopt similar concepts.

So without further ado, I want to turn the floor over to Mr. Lurie and Mr. Sklar, who are going to start for us. And on that note, here is Professor Stanley Sklar.

STANLEY SKLAR: I see that I have at least one of my former students here. She'll know when to laugh at the appropriate time. I want to discuss the concept of arbitration advocacy and its role in business and legal education. One of the things that I tell my class at the very beginning is that I cannot turn them into an advocate of arbitration. I can't turn them into the kind of person who will deal with arbitration as the be-all and end-all to resolve all disputes.

It is an alternative process to the court system, and that is what we tend to forget—that there are several alternatives, which I will go into in greater detail. One of the main concepts is the push-pull that you find in industry between the lawyer and the client; lawyers are risk avoiders, okay. Why else do we have contracts that run page after page and paragraph after paragraph to explain what the word "the" means? We just don't like to take risks.

On the other hand, the client is the risk taker. It's their money, their problem. And it's up to us to say there are options out there that are available to deal with the dispute. How do you want to spend your money? And they have to make that decision. Sometimes it is as contrary to us as risk avoiders. We just don't like to take risks.

Part of the issue relates to, for example, law schools. Where do you find arbitration? Usually you go into the contracts book, your contracts textbook, and you look under contracts of adhesion or you look

under mutuality of obligation, and then there are probably one or two cases on arbitration.

It is what I call suffering from the Rodney Dangerfield syndrome, “It don’t get no respect.” Why? Because it’s not really classy enough. The number of law schools that are presenting courses in commercial arbitration are growing, including DePaul, Loyola, and Northwestern. Probably the leader is Pepperdine University in California.

When you take a look at the courses that are presented in the law school, there’s Civil Procedure 1 and 2. There’s Advanced Civil Procedure. There are civil procedure seminars, civil procedure symposia. But when you practice, how many of you will remember what *Erie Railroad Co. v. Tompkins*¹ stood for? I challenge how many will do that.

On the other hand, in contracts, how many of you will remember *Hadley v. Baxendale*?² That is a case that discusses foreseeability of damages. That’s an important case, but law schools don’t really concentrate on that case enough.

Legal writing is another area that can be improved. Does legal writing teach you how to write a contract, a real contract? I question whether it does. I question whether you can write an effective contract at the end of your first year anyway. Maybe that is for a symposium class.

The continuum of dispute resolution is not really addressed—the continuum of negotiation, mediation, litigation, arbitration, dispute review boards, and mini trials. There’s a whole litany of alternatives to litigation.

The trial courses—probably going to step on some sacred toes right now. But how effective are moot court exercises to teach you how to try a case? I don’t know the answer to that. I know I had moot court when I was in law school my first year. I don’t think it was as helpful as it could have been. But the way that you’re going to get the education and trial strategies is when you get out and you actually try cases.

The art of taking a deposition—How many take a deposition and essentially try the case in their deposition? Or they have a list of questions that they’re asking and they’re not listening to the answers. Because they’ve got their questions, and they go to the question, they ask the question and they’re looking for the next question before they listen to what the answer is. “I don’t have the right to appeal” is another mantra. At a lecture, a lawyer came up and said, “Well, you

1. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

2. *Hadley v. Baxendale*, (1854) 9 Ex. 341, 156 Eng. Rep. 145.

know, what is critical for me is that I can't appeal." And I said, "Well, in your twenty-some-odd years of practice, how many cases have you appealed?" and she said, "One." I said, "Then why is the right to appeal so important?"

But I've come around to the conclusion that if the client wants the right to appeal, you can put that into an arbitration agreement. The fact that people will say arbitration does not have the right to appeal is wrong. And where does that fault lie? The fault lies with the transactional lawyer who drafts the contract and then drafts the terms of the arbitration provision.

So, you know, here's some of the challenges that you have facing law schools and the business schools. First of all, where are the joint courses between law schools and business schools? Remember what I said earlier, the business owner is the risk taker and the lawyer is the risk avoider. What better place to teach how to have a blending of the two than in courses with law schools and business schools operating together? That is a major factor.

The discovery syndrome that drives the cost of litigation up is electronic discovery, which really increases exponentially the cost of trials. So it would really be great to see courses with the law schools and the business schools in terms of the cost-effectiveness of trials.

Where is there a course, for example, on risk analysis in litigation? You have risk analysis in all kinds of business venues, but what about risk analysis in litigation? What happens if your motion for summary judgment is denied? What happens if your key witness doesn't show up? Here is another way or another avenue for the law schools and the business schools to operate together.

What are the alternatives? I tell my class that I can't make you effective arbitrators, and I can't make you effective advocates in arbitration. But what I can do is open your minds to the alternative that is out there—an alternative that you, as counsel, would be presenting to your clients.

A client comes in and says, "I've got this problem. What do I do? How do I handle it?" Well, negotiation is the first way. Of course, negotiation also depends upon the other side being willing to sit down. And when you say negotiation, well, we have to call the other side. I'm not calling the other side because if I call the other side, it's a sign of weakness on my part.

So, therefore, you reach an impasse. You can't even get to the first step because each side is afraid to call the other side. How do you deal with it? Real simple, in terms of the dispute resolution clause. Remember, I'm not calling it an arbitration clause. I'm calling it a

dispute resolution clause in which you provide that the parties have to talk to each other at the executive level before they can get to the next step. Now it becomes a contractual obligation. Whoever calls first is meaningless because the contract says you have to engage in that discussion.

Mediation. Mediation is probably the cheapest dollars your client will ever spend to resolve a dispute. Why? It truncates the process. And so what happens? The client refuses because the other side's going to get all this free discovery.

That's an asinine response because they're going to get those documents anyway. If you go to court, they're going to be part of the court proceeding. If you go to arbitration, they can be part of the arbitration. So sooner or later, all of these documents that you're holding close to yourself and you don't want to disclose are going to be disclosed anyway.

While in private practice, I concentrated in construction law where you have disputes that are endemic. They were the leaders in resolving disputes. The American Institute of Architects (AIA) required arbitration for all disputes. The new documents now provide an alternative, but the fact is that the architecture industry recognized that it needed expertise to resolve the dispute.

My classic example is to explain to the jury the intricacies and mystique of how concrete sets. Now, for laypeople, it's how concrete hardens. Their eyes will glaze over. You will lose them. But if you have a case like that in an arbitration with skilled arbitrators experienced in construction, they will understand what's going on. So is an industry that said I want my case to be heard and decided by my peers, not by twelve neighbors who are chosen at random to sit in a jury. I want my peers to make that decision.

There are dispute review boards. Dispute review boards are set up in advance, made up of engineers and occasionally lawyers.

We have the project neutral. These are variations that can be used in any industry, okay. Let's assume we have what we call project neutrals. These are individuals who are engaged at the beginning of a project, and as and when a dispute arises, they will make a decision and keep the project going.

Well, you can take that same concept and put it into effect in an industrial process and say that if there is a problem that comes up between a supplier and a manufacturer, this project neutral, who is an expert in that particular area, will make that decision. But you keep the process going. You minimize the chance for disputes, and you keep the process going.

Why is there this inherent bias against arbitration? Maybe part of it is because what we call the vanishing trial. You know, fewer and fewer cases are tried. Most get settled. Most get settled on the courtroom steps. And why? Because of the cost involved. And clients do not want to get engaged in what I call the abyss of litigation.

How many of you are familiar with Dickens's book, *Bleak House*?³ It is about the infamous Jarndyce case that went on forever as to who was the rightful heir to the estate. And at the end, the chancellor remarked that the good news is that we have determined the true heir of Jarndyce; the bad news, however, is that there's nothing left in the estate because it's all been used up in the years and years of fighting.

If the key to your dispute is that you have to have precedential value, then arbitration's not the way to go because arbitration is confidential. Where's the precedential value of something that's confidential? This is the one area where I would opt for litigation as opposed to arbitration.

The other aspect that we have right now is that we're faced with what I call the age of the sequester. The Northern District is talking—the Northern District of Illinois courts are talking about the possibility of going to four days a week because of the impact of the sequester.

Are the Illinois courts far behind when our state is in a fiscal crunch right now? On the other hand, at arbitration, we're not faced with the sequester. We're not faced with the fiscal dilemma of the state. We set the case, have a hearing, and are ready to go.

Now put yourself in the position of counsel. You go to counsel and you say, "You know what? I've heard Sklar talk. I've heard Lurie talk. I've heard everybody talk, and I have a kinder, gentler way of resolving the dispute." And, invariably, the response from house counsel is going to be, "First, I want you to tear their heart out, and after you're done, then we'll talk about kinder and gentler." And that is, unfortunately, what happens.

The College of Commercial Arbitrators came out with the protocols for expeditious and cost-effective commercial arbitration. This was a result of a symposium that invited providers, users, counsel, and academics to talk about the arbitration process.

Am I an advocate of arbitration? You're damn right I am. Am I a critic of the current state of arbitration? You bet I am because it could be better. My quest is to get to the transactional lawyer—neither the litigators nor the trial lawyers but the transactional attorneys. Why? Because they're the ones that prepare the contracts.

3. CHARLES DICKENS, *BLEAK HOUSE* (1853).

Transactional attorneys establish the blueprint for the eventual trial, whether it is in court or is in arbitration, but too frequently the response is, “I can’t bring up dispute resolution!” Why can’t you bring up dispute resolution? “Because they’ll think that we don’t trust them. And we’re bringing up the specter of suspicion because maybe there’s going to be a dispute, and I can’t bring it up at this point. And besides that, I have to protect the deal. I have to make the deal.” That’s the mantra of the transactional attorney—protect the deal. I avoided that problem with my practice by, you know what, sending him the first draft of the construction contract so that it was there from the beginning. It was part of the negotiation from the beginning.

So the transactional attorneys have to be educated that dispute resolution, whether it is litigation, arbitration, mediation, or some other alternative, is something that has to be addressed as well as the dollars and cents of the deal, whatever that deal may be.

Trial counsel has to understand that maybe scorched earth works in front of a jury. Scorched earth will not work before a panel of arbitrators. I can tell you that it will not work. We expect professionalism. We expect courtesy. We don’t expect any disparaging comments about the parenthood of any of the parties or witnesses, and that’s one of the things that is a critical answer, a critical issue.

What works in front of a jury does not work in front of an arbitration panel. They are two different things. And I have all the respect in the world for those lawyers who engage in jury trials. They are perhaps the most difficult types of dispute resolution that you can be involved in.

The fact is that transactional lawyers and the litigators have to work together in the drafting of the contract. Everything stems from the contract. My authority as an arbitrator stems from the contract. My ability to render a decision stems from the contract. The right to appeal, if there is one, stems from the contract. If it’s not provided for in the contract, I don’t have the authority to proceed with certain areas, okay. That is a critical factor.

So the transactional lawyer and the litigator have to work together. I mean, as long as I’m knocking people, I’m going to knock the neutrals as well, okay. We like to think we’re perfect, but we’re not. We forget about the fact that we, as neutrals, are paid to manage a process, effectively manage a process, reach a decision based on the evidence that’s presented and not on what we think is fair. If you’re talking about it’s not fair, then maybe you go to a court of chancery or maybe you go to your religious leader if you’re looking for fair. What

we're talking about is a conclusion that's based on the contract and the evidence submitted.

I've taken potshots at house counsel. I've taken—excuse me, at the trial attorneys, the neutrals, and house counsel. For those of you who will become house counsel, when you have a dispute, just because your trial lawyer says “X” doesn't necessarily mean that you have to accept that. You should question counsel. When you engage outside counsel in a dispute, what is their experience level if it's a litigation matter? What's their experience level if it's an arbitration matter? You make that kind of inquiry. You engage in your due diligence when you select them.

I think that the law schools could use a little more of what they call PPS, practical problem solving. That the days of lecturing not being supplemented by problem solving is not exactly the greatest teaching technique in the world, and I've made my mistakes along the way, realizing that students want to be involved in the problem sessions. They want to be involved so that they have a sense of what it is like.

What is a default appointment? Here is where you put your license on the line. Default appointment occurs when the American Arbitration Association, for example, sends you a list of ten prospective arbitrators, and then you can't come to an agreement. Next thing is, okay, we're going to send you a list of five. Both sides still can't come to an agreement.

Then the American Arbitration Association's empowered to make a default appointment. They can pick whomever they want, and I will tell you that I believe that that is also an abdication of the responsibility of counsel on both sides. There is no reason to let a third party pick the trier of fact when you have the opportunity to make that selection yourself.

What do I do if I was looking for a neutral? Where do I get this list? Well, you know, email is wonderful. You send an email around to your partners, and you say, “I need a list of arbitrators.” They give you a list. Of course, the list can include arbitrators who've engaged in patent infringement cases, medical malpractice, but you're talking about a commercial situation. So you have to be precise in terms of what you're asking.

One of the things that I did when I practiced, I would look at the résumé of each of the proposed arbitrators. And why? I want to see if they have engaged in what I call the continuing arbitrator education. Have they participated in ACE courses? What have they done to keep themselves up-to-date on the techniques and effective management of an arbitration case?

One of the anecdotes that comes up at arbitration is that, as far as it is concerned, arbitrators split the baby. Everybody knows that arbitrators split the baby. That is something that has dogged us probably ever since arbitration started.

The American Arbitration Association has an interesting study. Its study shows that 87% of the cases resulted in one side or the other side winning or losing, okay. Only 13% resulted in a “Solomon” verdict.

The other is that cases in arbitration go to award in two years or less. What is the current wait in the Circuit Court of Cook County? When I practiced, it was about four or five years. I don’t know what it is now. But this from the day you file till the day you get the award can be less than two years. That’s like a rocket docket.

What is interesting about AIA contracts is that they require mediation as a first step before you do anything else. You have to participate in mediation, and I think that you have to participate—I like to see that you have to participate in mediation in good faith. The sad thing is, sometimes a mediation is not ripe for resolution. People don’t know enough about the case. They haven’t done anything to explore what the nature of the case is. They may not have engaged an expert.

So I think that there’s nothing wrong with saying we want to engage in mediation, but you know what? We don’t think it’s ripe yet. We have to do a little bit of homework. The Associated General Contractors (AGC)—and again, the reason I talk about the construction industry is that we were involving dispute resolution when most industries didn’t even know how to spell it, because we recognized the need for it. AGC has what are known as consensus documents, and in the consensus documents, they also have a provision dealing with dispute resolution. I talked about sitting down and deciding who your proposed neutrals may be early in the process, and that’s something that people don’t think about.

If you’re looking for studies, if you’re looking for aids in the arbitration process, I suggest you go to the International Institute for Conflict Prevention and Resolution’s (CPR) website. It’s an alternative dispute resolution think tank. It has a whole series of alternatives out there.

For example, they have what’s called the litigation prenuptial agreement. Sometimes it’s called “fire the judge.” That is an agreement where counsels get together, and they will agree on how the court proceeding is to be handled. It’s almost like pre-filing or scheduling

order. They agree that this is what we're going to do. This is how we're going to handle the case.

We're not going to go with unlimited discovery. We're going to limit the amount of depositions. We're going to limit the amount of interrogatories. Incidentally, I think the interrogatories, personal opinion, are the most useless piece of documentation you could ever have, except in one instance, and that instance is naming the individuals who have the most knowledge about the particular dispute.

I want to know who they are and where they are. Other than that, interrogatories are prepared by the attorneys, and they're answered by the attorneys. And then you take a look at the definitions that usually run more pages than the actual interrogatories. So I don't think that they're particularly useful.

But in the litigation prenuptial agreement, you take it to the judge and say, "Judge, essentially we have agreed on how we're going to handle the case." The judge can look at it and say, "Okay, it's your case. There's nothing that's out of the ordinary that offends me. I will enter it as an order of this Court."

The judge can also say, "You know what? You're not going to tell me how to run my courtroom. I don't care what you agree to. That's not the way I run my courtroom." So what do counsels do? They fire the judge. They take a dismissal, and they go into arbitration. So here is an alternative that probably still hasn't found its legs yet, but it's an alternative that's out there to consider.

Damages. CPR has a whole protocol on how you assess damages and how you allocate damages. They have disclosure. What do you have to disclose and how do you present witnesses in commercial arbitration? There is a very good tool that you can use when you practice. It's called the due diligence evaluation tool for selecting arbitrators and mediators. You go online. You go through the questions that are asked, and it helps direct you toward the type of arbitrator or mediator that you're looking for. The protocols of the college I mentioned. There is another source of arbitration information, and that is the ICC Commission on Arbitration. ICC handles international cases.

Those of us who do cases in the United States can learn a lot from the way it handles international cases. You know, for example, in an international case, How do you put on a witness? You put the witness on with a witness statement, which is the equivalent of direct examination. The arbitrators have the witness statement ahead of time, and the witness is present for cross-examination.

That can cut trial time down significantly. Try to do that in the United States, and you're looked at as though you're a little on the

loony side. What is the response? It takes me as long to prepare the witness statement as it does to prepare the witness for testimony. But the beauty of it is that the witness statement is in the hands of the panel and the opposition, and what goes on is cross-examination, redirect, and recross. And that really cuts down an enormous amount of time.

Curt von Kann participated in a seminar with DePaul, and it was published in the *Business and Commercial Law Journal* in the spring of 2009.⁴ And what he asked was—What is the report card on commercial arbitration? How are we doing? Are we better, doing worse, are we okay, not okay? So he had a series of ten categories, and he called it a report card on the process.

So category number one: choosing the decision maker, okay. Choosing the decision maker, we get an *A* because we pick who's going to hear the case. We pick who's going to hear the evidence. We pick the neutral that's going to manage.

What do you do in the circuit court? You go and you see what slip number you have, and that tells you who your judge is. And sometimes you look at it and you go, "Oh my God, with that judge, we got to settle the case." Sometimes you say that's good, sometimes bad.

But the fact is that in the arbitration, you pick the triers of fact. You may not be happy in the end with their decision, but you have the upfront opportunity to select them. So you know what? You got an *A*.

Customizing the process for each case. You have this enormous opportunity to set up the procedure in which the case is going to be held. In arbitration cases that I am the chair or sole arbitrator, I will send out what is known as a proposed scheduling order. And in that proposed scheduling order, I list all of the alternatives that you may have—for example, no depositions, several depositions, a lot of depositions, the length of time of the depositions. I send that out to the attorneys who are representing the parties before I have my first conference call. And I want them to—one of the great phrases that judges would use is, "Counsel, I want you to meet and confer, make me a happy judge," and we knew we had to meet and confer.

I suggest they meet and confer before we have the first scheduling conference so that the first scheduling conference is not a debate on

4. Hon. Curtis E. von Kann, *A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek*, 7 DEPAUL BUS. & COM. L.J. 499 (2009).

all of the issues that are going to be involved. What is left for that first conference call are those issues that could not be agreed upon.

And I often use one of the techniques that my colleague Paul Lurie suggested, and that is when you can't get to that point and one side says, "I want five depositions" and the other side says, "If they want five, I want six." "Well, if they get six, then I want seven."

Paul says you know what—and it works—why don't we start out with three. Let's see how the first three go. If you want more, we'll talk about it, and you know what, invariably, it doesn't go beyond three.

Flexibility of the process. There is no greater flexibility than in arbitration. It is far more flexible than the court process. For example, I can take witnesses out of turn. The claimant is putting on its case and the respondent says, "You know what, my key witness is going to Portugal on a trip and is going to be gone for six months." We take the witness out of turn and put him or her on. You can't do that in a courtroom. You can in arbitration.

The accessibility to the panel. We're always accessible as long as it is to all of the panel. Never ever call the judge to say, "Judge, when are you going to make the decision?" But in the scheduling order, I am bound to make a decision within a certain period of time.

Case administration. He gave accessibility an *A*. Case administration depends on the entity that you're using. American Arbitration Association, JAMS, Dispute Resolution, whatever it might be.

Fair and just results. He gave it an *A* because I suppose if you win, it was fair and just. If you lose, it wasn't as fair and just as you thought it might be.

Finality. He gave it a *B* because of this push for appeals. The question that you have to ask your client, and the client has to ask—In this dispute, are you looking for finality or are you looking for vindication? If you're looking for finality, why do you need an appeal process? You want it, it's going to cost you, and it's going to cost you significantly. So on finality, he gave us a *B*.

Less costly than litigation, regrettably arbitration got a *C* because arbitration has become—I'm going to have trouble pronouncing the word—"litigationized." The trial lawyers have discovered arbitration, and now they are making it into more of a court process. But that also depends on the quality of the neutrals that are chosen. So he gave us a *C* for that.

Privacy. Privacy depends on the transactional lawyer. What did the transactional lawyer provide in the contract? Let me go back to the construction process, okay?

Ultimately, he comes up with six *As*, three *Bs*, and a *C*, putting arbitration around a 3.5 average on a 4.0 scale, which I think would really put us on the Dean's List.

