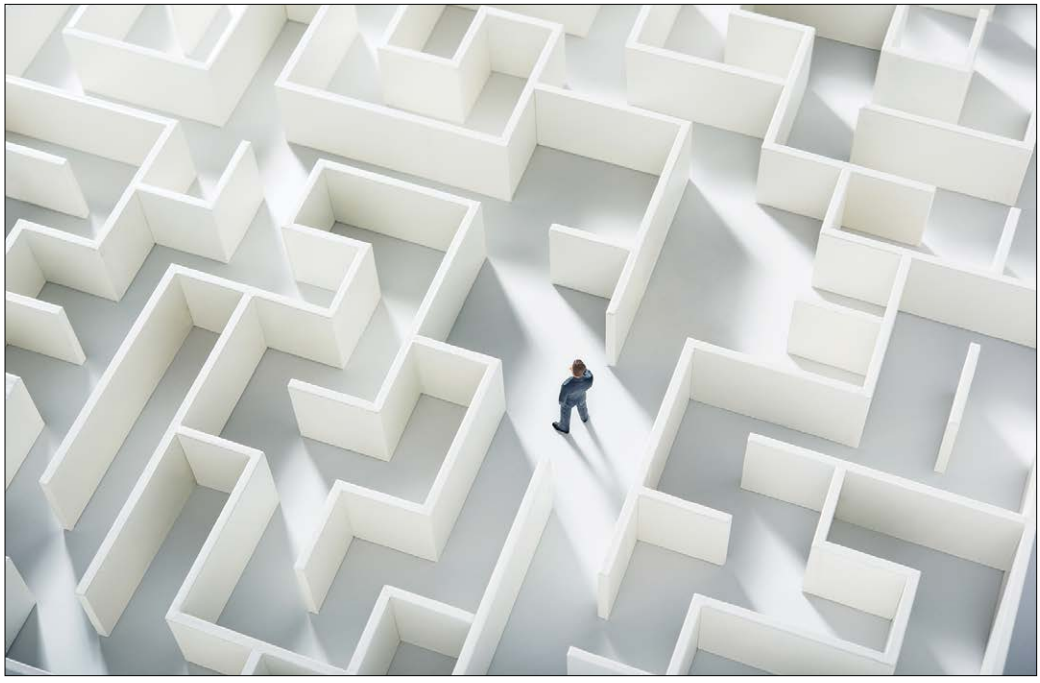
Navigating Your Client through Arbitration

by Juanita F. Ferguson



In the construction industry, the terms "conflict" and "dispute" are synonymous with project delays and cost overruns. For that reason, alternative dispute resolution, in particular arbitration, has been a long favored means of resolving disputes and avoiding expensive and protracted litigation. Long regarded as a swift, efficient, and cost effective process, arbitration necessitates that parties agree to submit a dispute to a neutral third party and to be bound by whatever decision that the neutral renders in the matter. The arbitrator is customarily a retired judge or a practicing attorney who specializes in the area of law that the dispute entails. In the commonwealth, the law governing the arbitration process is the Uniform Arbitration Act, Virginia Code § 8.01-581.01 *et seq*. The attraction of arbitration is due, in part, to the fact that litigants avoid congested dockets, lengthy discovery periods, and the sometimes vexatious motions practice associated with litigating a dispute in the court system.

There is an increasing need for attorneys to actively prepare clients for arbitration long before the need arises. It actually begins when drafting agreements. Otherwise, depending on the level of understanding of a client as to how arbitration works, the benefits of arbitration can seemingly dissipate. First, when advising clients during the drafting or reviewing of a proposed contract, consider that it may not be prudent to draft an arbitration provision where the dollar amount in controversy does not warrant the costs associated with arbitration. Second, if arbitration is a recommended option for dispute resolution, give careful consideration to the venue for the proposed arbitration. For example, a client whose place of business and primary contacts are in Mathews County would be reluctant to agree to arbitration in Washington County. Third, if the provision is inconsistent with other contractual terms, it could threaten a party's ability to enforce arbitration. Fourth, give careful consideration to the selection of an arbitration service. The fees can vary from one service to another. If a client is unprepared for the filing fees and periodic payments, even the most comprehensive arbitration clause will

not be utilized.

When recommending arbitration, remember its appeal for clients – that it is swift, effective and is not supposed to resemble the formality of litigating a matter in court. We know that isn't always the case, and your clients should know this too. When advising your client, keep in mind the various scenarios. For example, if an arbitrator is selected who may not operate as quickly as your client would like, then it may not be a good fit for an effective arbitration. Additionally, depending upon the arbitrator, "pre-arbitration proceedings" such as discovery and the filing of motions can resemble the various events included in a Uniform Pretrial Scheduling Order. Also, while document requests and depositions are not uncommon in arbitration, be attuned to an arbitrator's recommendations, or even requirements, for the use of court reporters — especially if the parties request the arbitrator to write an award that explains the arbitrator's reasoning. The more discovery allowed during arbitration means the greater likelihood of discovery disputes arising between the parties. And unlike a judge, the more an arbitrator is called upon to resolve disputes between the parties, the more expensive it is to arbitrate the matter — at least until or unless the arbitrator awards costs and attorney fees to a prevailing party in the litigation.

It may seem like a given, but it is a good practice to routinely remind a client that the arbitrator is paid on an hourly basis, which is often the case. Because the parties pay for the services of an arbitrator, sometimes there is a risk that they consider the arbitrator their private judge and therefore on call to address whatever concerns arise during the process. The more the arbitrator is entrenched in working through the issues with parties, the more the services cost, and no amount of encouragement from an arbitrator can eliminate the level of animosity that may exist between parties. If the process becomes cost prohibitive, it can result in one or more parties simply opting out of the process by failing to fulfill financial obligations to the arbitration service, thereby threatening an arbitration hearing for all of the parties involved. Of course, a nondefaulting party could agree to assume the defaulting party's costs and seek recovery as part of an arbitration award.

Before following a client's instructions to file suit, ensure that the client is aware if an arbitration provision is a term of their agreement. It is derelict to file suit knowing that a client will be faced with a legitimate procedural challenge, and it costs a client unnecessary resources to defend against a motion to compel arbitration or to stay a matter pending arbitration. A well-drafted arbitration provision will more than likely be upheld in the courts. A simple remedy is to seek the opposing party's agreement to waive the arbitration provision prior to filing suit. That way, if there is not agreement, your client can demand arbitration immediately and begin the process of dispute resolution.

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Making it a priority to ensure your clients understand the risks and rewards of the process helps them make educated and mindful decisions through the process. It will also establish you as a knowledgeable and conscientious attorney, no matter what the outcome.

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