Think About a Two Person Arbitration

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I spend most of my time as a mediator. However, I also serve as a private arbitrator; typically as a solo or as the neutral on a three person panel.

When you're the sole arbitrator, you sure hope you get it right. The fact is that arbitrations are almost never reviewed or revised. On private three person panels in particular when each party picks an arbitrator and these selected arbitrators then pick a neutral, are the plaintiffs and defendants arbitrator's fair judges? My experience, including when I have been the defense or plaintiff selected arbitrator is a resounding no. As the neutral how can I take seriously the positions of arbitrators serving their respective sides?[ii]

During 2006, I was asked to be a co-arbitrator. The stakes were high. Both sides wanted a quick and quiet resolution. Apparently a prior mediation had not led to a resolution. Both counsel wanted to avoid AAA arbitration. They decided on private arbitration, but had the same reservations about solo and three person arbitrations that I have expressed. "Somehow" they agreed on a two person arbitration. As one of the two selected arbitrators, I initially thought this was a disaster waiting to happen.[iii] What happens if we cannot agree? Both counsel made it very clear that they wanted us to agree on the resolution.

The pressure on us was to work together and to fill in any facts the other might have missed. In the end, we both were able to agree and felt more confident in our mutually reached conclusion. I believe that the attorneys and hopefully their clients felt more confident that they were heard and understood.

Recently, I contacted both counsel to learn how and why they came to choose this format. Seems like they thoughtfully backed into it. They did not agree on one person, both were skeptical of a typical three person panel; so why not two?

Counsel for one of the parties wrote:

"Another unique feature of a two man panel is that such a format mandates unanimity. The arbitrators have to listen to each other and reach agreement. With a three member panel, two can reach agreement just to get rid of the case, then ignore the third panel member. There is less pressure to give the case serious thought.

I think my reasoning was as follows: One arbitrator is dangerous, because occasionally there can be a strange or totally illogical result, and there is no second arbitrator to prevent this. Two are forced to agree on something, as there will be a tie vote until they do, similar to a "hung jury." When there are three, it is true a tie vote can be avoided, but the two man majority may completely ignore serious questions or doubts raised by the third and proceed summarily to a decision without sufficient deliberation. Another advantage of two is a reduction in the cost of the arbitration. I have not heard of two arbitrators being used by anyone else, but I would not hesitate to use two again if I was still in private practice."[iv]

Counsel very thoughtfully created (perhaps backed into) a really good format for resolving this matter.

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[i] Martin Reisig is a fulltime mediator with American Settlement Centers, a frequent FINRA arbitrator, a past chair of the OCBA ADR committee, from 2004-2014 adjunct professor of mediation, named by Best Lawyers 2013 Arbitrator of the Year (metro-Detroit) and 2015 Mediator of the Year (metro-Detroit). Learn more at www.reisigmediation.com

[ii] Systems in which both parties rate from a list of arbitrators and then the three highest rated are selected do not pose the same bias problem, example FINRA (Financial Industry Regulatory Authority)

[iii] Retired Wayne County Judge Kaye Tertzag (deceased 2009) was my co-arbitrator. It was an honor to spend time with a man of such intelligence, ethics and decency.

[iv] Counsel asked that I not use his name or make any reference to the facts of the case. Counsel for the other side wrote "I would concur with (opposing counsel's)….comments and add I felt the process worked fairly."