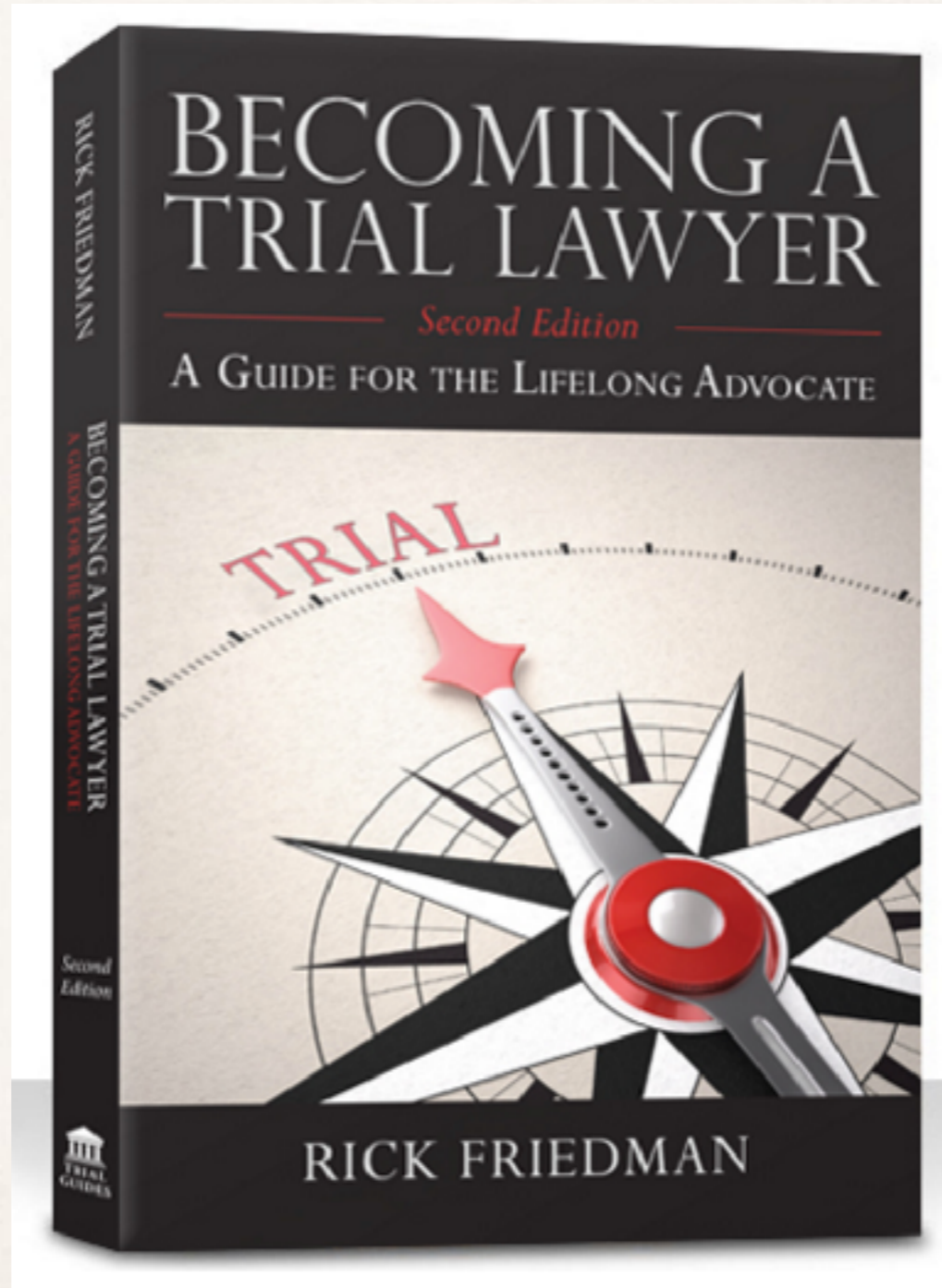


Welcome to Consumer Law

Syllabus and Required Text



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Three Step Approach

- ❖ Why should you care about this issue?
- ❖ How will this make my life better?
- ❖ What do I need to do accomplish my goals?

Arbitration

What is Arbitration

- ❖ A written agreement to resolve disputes in a private court (the arbitration forum)
- ❖ Private courthouse and private judge (paid for by corporate defendant)
- ❖ No jury, no judge, and no courtroom
- ❖ Arbitrator decides all issues of law and all issues of fact
- ❖ Supposed to streamline cases

How Do You Get Into Arbitration

- ❖ Arbitration Clauses are everywhere
- ❖ Now part of nearly every written contract
- ❖ Blow-in agreements
- ❖ Terms and conditions
- ❖ Blow-in changes in terms
- ❖ Computer kiosks
- ❖ Point of Sale Signage
- ❖ Receipt Language
- ❖ Labeling Language
- ❖ Website terms of use

How To Get Out Of Arbitration

- ❖ In short, you don't get out of arbitration...
- ❖ Very tough standard to meet
- ❖ You have to essentially attack existence and / or enforceability of the underlying contract that contains the arbitration clause
- ❖ Contract Formation Defenses: Fraud, duress, unconscionability, frustration of purpose, etc.
- ❖ Federal Arbitration Act enforced 99% of the time

Motion to Stay for Arbitration

- ❖ Either party to a contract who has sued or been sued can invoke an arbitration clause
- ❖ Motion made to the court along with a copy of the arbitration clause as an exhibit
- ❖ Court decides arbitrability of a matter unless clause specifics that an arbitrator must decide
- ❖ “Any and all disputes between the parties” is broad language that inevitably pulls you into arbitration

Major Arbitration Players

- ❖ AAA - American Arbitration Association
- ❖ JAMS - Judicial Arbitration and Mediation Services
- ❖ NCDS - National Center for Dispute Services
- ❖ Now Defunct NAF - National Arbitration Forum

Costs of Arbitration

- ❖ **AAA Consumer**: Filing Fee—\$200
- ❖ **AAA Business**: Filing Fee—\$2,200 Hearing Fee—\$500 Arbitrator Compensation—\$1,500 per hearing day per arbitrator
- ❖ **JAMS Consumer**: Filing Fee—\$250
- ❖ **JAMS Business**: Filing fee—\$1,500 per party. Arbitrator Compensation—\$850 /hour plus (12%) surcharge of all compensation.

Benefits of Arbitration

- ❖ Somewhat cheaper if you're a consumer plaintiff
- ❖ Supposedly quicker resolution
- ❖ No courtroom, just a private conference room or teleconference so less pressure
- ❖ Relaxed rules of evidence

Downsides of Arbitration

- ❖ Expensive if you're a corporate defendant
- ❖ No right of appeal except for "abuse of discretion" by arbitrator
- ❖ Difficult to know what discovery will be allowed
- ❖ Difficult to know what rules will be followed (Fed.R.Civ.Pro or arbitration rules)
- ❖ Loser may be ordered to pay arbitration costs

Legal Impacts of Arbitration

- ❖ No written record of hearings, unless you pay for it
- ❖ No precedential value to your cases (more or less)
- ❖ Arbitration award still has to be enforced in Court
- ❖ Lax enforcement of rules of evidence
- ❖ Lacks the impact of a courtroom and judge
- ❖ May not get a “real judge”

What's Different In Arbitration

- ❖ Much more informal in terms of hearings—almost always telephonic
- ❖ You should still call arbitrator “Your Honor”
- ❖ Less motion practice and quicker decisions
- ❖ Faster case pacing and less time to correct strategic errors
- ❖ Final hearing rather than a jury trial
- ❖ Less stressful than a full courtroom presentation

Consumer Use of Arbitration

- ❖ Invoke arbitration clause in defending lawsuits against a consumer for underlying debts, breach of contract, etc.
- ❖ Makes it very expensive to pursue small balance claims for corporate defendants
- ❖ Useful for auto loans, landlord tenant actions, etc.
- ❖ Arbitration actions are expensive for corporations

What is a Class Action Waiver

- ❖ An additional contractual clause that bans class actions
- ❖ May or may not be a part of an arbitration clause
- ❖ Class action killer
- ❖ Prevents joinder of multiple parties or mass actions

Takeaways on Arbitration

- ❖ It's here to stay
- ❖ Make the best of it
- ❖ Understand the drawbacks and the benefits of arbitration
- ❖ Consider invoking arbitration clauses proactively to avoid wasting time getting removed from federal court into arbitration

Developing Great Consumer Cases

Step 1: The Phone Screening

Always Start With The Basics

- ❖ Consumer
- ❖ Consumer Transaction
- ❖ Covered Entity / Person
- ❖ Violation of the Law

Identify Conduct That Violates

- ❖ Unfair conduct
- ❖ Untrue conduct
- ❖ Specific regulated conduct
- ❖ Disclosure requirements
- ❖ Licensing requirements

Set Intake Appointment

- ❖ Assign “homework” to client
- ❖ Have client write out chronology
- ❖ Tell them to bring documents, letters, tapes, etc.
- ❖ Remind them to be on time and to call if going to miss appointment

Step 2: The Intake Meeting

Analyze the Case

- ❖ Give them a card
- ❖ Make them feel at ease / water / coffee
- ❖ Listen to their story, quietly
- ❖ Start shaping possible claims
- ❖ Identify all possible Plaintiffs, including spouses, neighbors, etc.

Assess Your Client

- ❖ Presentability
- ❖ Credibility
- ❖ Reliability
- ❖ Stability

Assess The Defendant

- ❖ Location
- ❖ Licensing
- ❖ Insurance
- ❖ Prior Lawsuits
- ❖ Relative Size of Defendants

Gather Your Evidence

- ❖ Get client chronology of events or write one
- ❖ Get copies of all documents
- ❖ Arrange to tape record voicemails, emails, etc.
- ❖ Identify witnesses and arrange to get affidavits
- ❖ Prevent spoliation

Complete Intake and Retainer

- ❖ Do a complete intake form with all your client details
- ❖ Ask about prior lawsuits, criminal history, etc.
- ❖ Have them review and sign your retainer
- ❖ Don't date your retainers unless required to do so

Educate Your Client

- ❖ About the law to which their claims relate
- ❖ About federal court vs. state court
- ❖ About what to expect
- ❖ About timelines for case
- ❖ About your fee agreement--how do you get paid?

Send Them Home

- ❖ Always follow the Two-Visit Rule
- ❖ A prospect comes once, but a client visits often
- ❖ Give them a job to do
- ❖ Set your next appointment
- ❖ Be careful not to overwhelm clients in first face-to-face

Step 3: The Drafting Meeting

Draft Complaint

- ❖ Comfortable office
- ❖ Water, soda
- ❖ Magazine
- ❖ Chance to take a break
- ❖ You listen to client and write

Complaint Contents

- ❖ Facts, facts, facts
- ❖ No puffery or exaggeration
- ❖ Warn client of need for absolute accuracy
- ❖ When in doubt, leave it out

Make Your Claims

- ❖ Separate fact section for each bad act
- ❖ Specify each and every provision of the law violated
- ❖ Don't recite the text of the statute--it's a waste of paper
- ❖ Example: "Conduct XX on this occasion was an act done in violation of numerous and multiple provisions of the XX law, including but not limited to 15 U.S.C. §§ 1681b and 1681m amongst others."

Edit, Polish and Verify

- ❖ Print, edit and review three paper drafts
- ❖ Save paper drafts to substantiate work done on complaint
- ❖ Draw a Red X on them to avoid confusion later
- ❖ Have client carefully read and sign Verification page once complete

Question and Answer

