

# Effective Advocacy In Arbitration

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Arbitration will be arise normally in three ways for a practicing attorney. The first will be when drafting a contract for a client or reviewing a proposed contract prepared by the other party. The second will be when presented with an existing contract and determining that an arbitration clause is contained in it. The third will be evaluating whether arbitration is an appropriate alternative to court litigation for a dispute that exists, but one that is not compelled to be arbitrated.

***Considerations for Inclusion of an Arbitration Clause in a Contract:*** As with anything, there are pros and cons to arbitration. These will be examined briefly.

*Pros:* Arbitration offers advantages over court litigation that should be discussed with a client who has requested preparation or review of a contract. Arbitration generally allows for quicker resolution of a dispute than court litigation. An arbitration can be resolved in one-half the time it would take for litigation.

Depending upon the construction of the arbitration clause, arbitration can be less expensive than court litigation. Pre-hearing discovery is limited in Colorado under the RUAA. Under the UAA, there is no provision for pre-hearing discovery. Under the RUAA, discovery can be limited by the arbitration clause or agreement, thus saving litigation costs.

Arbitration is private. Though an arbitration award can be confirmed and made a judgment in a district court, the arbitration hearing is not open to the public. Indeed, the parties can agree that all proceedings shall remain confidential.

Arbitration can be less stressful than a court proceeding, particularly when a jury is involved in resolving the dispute. Arbitration hearings can and should be less formal for the benefit of both sides.

Both sides have a say in selecting the arbitrator/s. You have some control over the person or persons making the final decision in the case.

*Cons:* For all practical purposes, consenting to arbitration means giving up the right to appeal. Vacating an award is not impossible, but very close. It must be accepted that the arbitration award will end the dispute.

Arbitration is not free. There is cost involved in paying an arbitrator. That cost can be substantial, as contrasted to a court filing fee.

***Considerations for Selection of an Arbitrator:*** The parties can agree in the initial contract to the selection of an arbitrator or the process for such selection. As an example, a contract having a short term may include a specifically named arbitrator. The contract could provide for a process of selection. For example, an alternative dispute resolution group could be named and directed to provide an arbitrator.

The parties to a contract may want to have some input into selection of a mutually agreed upon arbitrator or neutral in a three-person panel. Selection should be made on the basis of neutrality and integrity. Agreeing to appointment of a neutral, objective arbitrator ought to be a goal for both sides.

Occasionally, it is important to consider special training or experience. A dispute over technical issues in a oil and gas contract may warrant the selection of an arbitrator who has expertise in the area. That needed expertise may mean selection of a non-lawyer to act as the arbitrator. The goal should be to select and agree upon a neutral and objective person to act as arbitrator.

Make sure the client has input into selection of the arbitrator. The client has to believe that the process is fair and that the arbitrator will be impartial. As an example, a female client may wish to have a female arbitrator if the dispute involves gender discrimination.

***What do arbitrators look for in a case?*** An arbitrator should see his or her job as one of fairly and neutrally evaluating what will be presented by the parties. The process should be simplified as much as possible without doing injustice to the case.

Depending upon the contractual agreement of the parties, an arbitrator has latitude that a district judge would not. The parties can request that the arbitrator fashion a just result, and that would allow the arbitrator to not be bound by case precedent. In that situation, the arbitrator will look for evidence as to what equitably should be done to resolve the dispute.

Arbitrators will evaluate witnesses and exhibits in the same fashion as a district judge. If a case hinges on credibility, then the arbitrator will look to exhibits and testimony from other witnesses in order to determine whether to believe a witness.

Arbitrators will look to counsel to prepare and present a case that is complete, but not overwhelmed with exhibits and witnesses. Trust that the arbitrator knows what he or she is doing.

***How do you simplify the case?*** Since an arbitration is supposed to be less formal than a court trial, try to simplify claims and evidence as much as possible for the arbitrator.

There are several ways to attempt to do this.

First, provide prior to the arbitration hearing exhibits that will be admitted by agreement. Let the arbitrator review these prior to the hearing. An example would be the medical records of a claimant in a personal injury case.

Second, depositions that will be admitted should be provided prior to the hearing. The same is true as to videotaped depositions that could be watched prior to the arbitration hearing. Remember that you want to present evidence covering all claims, but it is not crucial that it be in a certain order as would be the case with a jury.

Third, try to stipulate to facts that are not in dispute. Though an arbitrator may be paid by the hour, his or her time should not be wasted. A good arbitrator selected by the parties will have other work to do, and the parties should not have to pay for something that can be resolved by stipulation. As an example, the uninsured status of a driver can be handled normally by stipulation, rather than formal proof being required in an uninsured motorist arbitration.

Fourth, provide legal precedent before the hearing if that is something you will rely upon. Remember that arbitrators have great latitude. If you believe that the dispute should be resolved on the basis of a statute or case law, then it should be provided to the arbitrator before or at the commencement of the hearing.

***What are common mistakes and errors?*** There are a number of things that can be done that will not be helpful to the arbitration process. A short discussion should be undertaken as to some of those.

1. Do not ask the arbitrator to do something that he or she has no power to do. The arbitration agreement provides the sole basis for jurisdiction of the arbitrator. If the agreement provides no basis for what is requested, then any action by the arbitrator is a nullity and will be set aside. *C.R.S. § 13-2-223(l)(d)*.
2. Remember you are not in a court trial. It may be habit to say "may it please the court" and "your honor," but those phrases do not help in an arbitration.
3. A colorful, passionate closing argument fit for a jury is not fit for an arbitration. If you wanted to have a jury, then the arbitration clause should not have been agreed to by your client.
4. Do not overreach. Asking an arbitrator to award a million dollars on a twenty thousand dollar case is insulting to the arbitrator. If you need to make such a request, then state it as "my client believes that he is entitled to one million dollars."
5. Do not insult the intelligence of the arbitrator.
6. Do not bore the arbitrator.
7. Make sure that the arbitrator knows what the parties want in the award. A multi-page award may be helpful in understanding how a decision was made, but you will have to pay for the time to prepare it. On the other hand, a one paragraph award is not helpful and has no chance of being set aside by a district court.

***What should be done after the award is entered?*** Go over the award with the client. If there is some concern about the award, discuss the legal remedies that exist to set aside the award. If a mistake has been made as to calculations, then file a request that the award be modified.

If you seek to set aside an award, be sure to file within the time limit provided by statute. The time limit in Colorado under the UAA is thirty days. *C.R.S. § 13-22-214(2)*. Under the RUAA, the time limit for filing an action to set aside the award is ninety days. *C.R.S. §13-22-223(2)*. Be sure to set forth as much documentation as possible to support the motion to vacate. *McNaughton and Rogers v. Besser, supra*.