

Top Ten Mistakes Litigators Make in Arbitration

By Charlotte E. Thomas

Arbitration is different from litigation in many respects. First, there is no judge in arbitration; rather, the parties select an arbitrator or a panel of arbitrators to resolve disputes. Second, arbitration is usually more flexible than litigation; it is designed to accommodate the specific needs of parties to disputes. For these reasons and to save money, many parties choose arbitration over litigation. But for arbitration to translate into lower legal fees, the parties need to cooperate to reduce the scope of discovery and motion practice. Litigators who are accustomed to navigating courtrooms can overlook the emphasis on cooperation in arbitration.

1. Attempting to “game” the system to achieve the upper hand. There is no doubt that it is possible to “game” civil practice rules for tactical advantage in litigation; for example, a party with greater financial resources may try to conduct more discovery or motion practice than needed to gain the upper hand over a party with lesser financial means. In arbitration, parties are not supposed to use the relatively flexible rules of arbitration to increase costs or to “game” the system. One arbitrator we surveyed complained about counsel trying to establish a record for one of the limited reasons that could justify an appeal (e.g., a conflict of interest). Another arbitrator we surveyed stressed the importance of lawyers avoiding frivolous arguments or positions and conducting themselves in an intellectually credible and respectful fashion.

2. Excessive document requests and resisting reasonable document requests. Generally, requesting an excessive amount of documents is only costly to the party responding to the discovery request. But, when one side seeks broad-ranging document discovery, usually the other side responds in kind. Arbitration aims to reduce legal expense by containing discovery costs, including all parties limiting document production to only necessary documents. Some arbitrators we surveyed complained about lawyers using the same excessive and unnecessary document requests as are used for tactical purposes in litigation. Others complained of parties that resist reasonable document requests; such resistance, according to the arbitrators, causes parties to incur additional expenses for motion practice, attorney time, and arbitrator fees.

3. Failure to cooperate with opposing counsel. Litigators may forget that a high level of cooperation with opposing counsel is expected in arbitration. For example, parties in arbitration cooperate to reach agreement on how certain evidentiary rules should be applied and how to dispense with a form of discovery, such as depositions. Failure to cooperate in arbitration can lead to additional prehearing meetings or telephone calls, which can result in more hours worked by arbitrators and higher bills for the parties.

4. Delay tactics. Some delays in arbitration are unavoidable, such as when a business is unable to commit the resources to a discovery request. But, experienced arbitrators can see through the smoke screen of strategic delays. Arbitrators we surveyed said they often see delay tactics used by respondents. Engaging in such delay tactics may taint the arbitrator’s perception of the delaying side or result in the arbitrator setting aggressive schedules to overcompensate for the delay.

5. Delays due to lack of preparation. Some of the arbitrators we surveyed said that they have encountered counsel and witnesses who were not ready to proceed at the arbitration hearing. They pointed to the informal nature of arbitration, as compared with litigation, as a common reason for the lack of preparation.

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6. Delinquent submissions. Arbitrators we surveyed found fault with counsel whose written submissions are delinquent. Delinquency is unnecessary in arbitration because many deadlines are agreed upon by the parties. Even though consequences of delinquent submissions in arbitration tend to be less draconic than in litigation, such late submissions should be avoided.

7. Overestimating the time needed to resolve the dispute. Another mistake made by litigators in arbitrations, according to the arbitrators we surveyed, is asking and using more hearing days than needed to resolve disputes. With sophisticated arbitrators, arbitration hearings probably can be resolved in less time than a jury trial and possibly even less time than a nonjury trial.

8. Redundant testimony. Some of the arbitrators we surveyed said that testimony can be too repetitive when litigators worry that their presentations are not “getting through” to arbitrators. The adverse impact of redundancy can be more pronounced in arbitration than in a jury trial where lay persons are the finders of fact. One arbitrator we surveyed underscored that arbitrators typically are sophisticated, experienced lawyers or industry professionals and want to be treated in an honest and direct manner. If arbitrators learn the positions of the parties in prehearing conferences or submissions, they are likely to be familiar with the issues and repetitive testimony and evidence can seem even more redundant. Many arbitration rules, such as American Arbitration Association Commercial Rule 30, authorize arbitrators to expedite hearings, including by focusing the testimony and presentation of the parties.

9. Making jury speeches. Our survey respondents find that long-winded and redundant jury speeches are unnecessary and possibly counter-productive in arbitration. Usually it takes arbitrators less time to understand disputes than for juries of peers, as arbitrators will read the statements of claim, position papers, and any filed motions. In addition, arbitrators may be industry specialists.

10. Arguing after the ruling. Some arbitrators we surveyed complained that litigators sometimes continue to argue the merits of rulings even though rulings in arbitration are unlikely to change. Typically, this happens in prehearing motion decisions, as arbitration awards often are sent to the parties after conclusion of the hearing. This type of conduct not only irritates arbitrators but adds to the time and expense of the proceedings.

In litigation, a judge can control inappropriate conduct of counsel or a party through dismissal, prohibitions on the admission of evidence, and even contempt of court. In arbitration, the rules are not designed to control inappropriate conduct, although in theory an arbitrator can exert control through the ultimate award given or an award of costs.

The “Top Ten Mistakes Litigators Make in Arbitration” were assembled by canvassing the following lawyer arbitrators: Louis Coffey of Coffey Consulting Co., William G. Frey of Gibbons P.C., Jerome J. Shestack of Schnader Harrison Segal & Lewis LLP, James Greenberg of Duane Morris LLP, and Bernard Chanin.

Charlotte E. Thomas, a partner at Duane Morris LLP in Philadelphia, can be contacted at cthomas@duanemorris.com.
