PROGRAM MATERIALS
Program #35174
September 9, 2025

Common Mistakes Attorneys Should Avoid in Arbitration

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

COMMON MISTAKES ATTORNEYS SHOULD AVOID IN ARBITRATION

Patricia H. Thompson, FCIArb, CollArb, JAMS

September 9, 2025

A. **Introduction: How not to frustrate your arbitrator (***which is only part of this discussion)***. (***BTW; I may refer to arbitrator in the singular or the plural, it makes no difference to most of the points I will make.)*

1. Arbitration has been likened to a three-legged stool – it has three sets of partipants: parties, advocates and neutrals. And each leg of the stool has its own perspective and concerns about the process of arbitration.
    a. Parties may complain that arbitration did not live up to its hype, it was more expensive, took longer, and was too much like litigation, but with no right of appeal.
    b. Advocates for those parties miss litigation's evidentiary and civil procedure rules, they lament limitations on motion practice and discovery, and criticize what they perceive as the failure of the arbitrators to impose discipline on the process, and again, they dislike the lack of appellate relief.
    c. We members of the third leg of this stool, arbitrators like to talk with eachother about how to make the arbitration process better and how to address the concerns of the other participants in the process. Based on my conversations and reading on the subject I have learned that Many arbitrators agree with the points I will try to make today about how counsel approach, behave and present their cases in arbitration, and how their clients do themselves a grave disservice by letting their counsel make the mistakes that often end up harming their chances of success in the proceeding and creating the very problems of too much cost and delay they so dislike about litigation and are surprised to find in arbitration.
2. To state the theme of my comments more positively, we Arbitrators want counsel to do the very best for their and their clients' sakes, in every arbitration. If counsel could avoid making the following mistakes and adopt better practices in their place, clients would be better served and we arbitrators could do a better job, less expensively and more efficiently.
3. Because no two arbitrations are the same, some of the points I will make will not apply in every case, but because all arbitrations have the same three legs to the stool, there are some points that apply to almost every case.

B. Let's **begin after a dispute has arisen, but before the arbitration is filed.**

1. Arbitrators – and your clients – would like you as counsel to make sure you have joined in the arbitration all parties who are necessary to a complete resolution of all the legal ramifications of your dispute, to the extent possible**. It is a mistake to fail to think through who needs to be part of the adjudication process and how to include them**, **before your arbitration is filed. The problem is , typically, parties arbitrate because they have a predispute contract that requires them to arbitrate.** What do you do about claims for contribution, subrogation, indemnity or joining other third parties with potential liability for the issues in your case who don't appear to have the same or any contractual obligation to arbitrate with your client? It may take research, ingenuity and imagination, but at the least it takes early planning to get as many necessary parties in your case as possible.

    1. Arbitrators care about this issue, because they know that parties who wait too long to figure this out or don't know how to address it cause difficulties later in an arbitration. The other parties may object to belated efforts to add new parties, because of the resulting delay of the proceeding, the parties you want to add may object that they will be prejudiced by all the decisions and discovery that occurred before they got there. So what is an arbitrator to do with a dilemma caused by counsel's lack of planning?

    2. Shortly after I became an arbitrator a construction attorney friend at a bar assoc. luncheon told me that he seldom used arbitration because he couldn't figure out how to add third parties such as subcontractors, indemnitors, insurers. I suggested he give me a call to talk about the issue, but he never did. What would I have said? That there are several ways to include third parties in an arbitration depending on the claims and relationships involved. Let me give you a few ideas, but there are others.

        i. Such as drafting all of the contracts related to a given venture or project so they all allow for resolution of their obligations by arbitration with the others to that project. You can do this by incorporation by reference or ensuring complementary arbitration provisions in each contract.

        ii. Another option is using the doctrine of vouching in: if someone owes your client indemnity, research your jurisdiction's law about the old common law doctrine of vouching in and see if it doesn't allow you to invite them to participatevoluntarily in your arbitration, and defend their and your client's interests, or risk being bound by the results if they don't participate. This doctrine is more likely to work if you use it early in the process.

iii. Such as working with the other parties to your arbitration to file and then consolidate more than one arbitration involving common parties or common claims and issues. Then, once consolidated, seek to bifurcate the hearings so the issues are resolved in an order that makes sense to the resolution of multiple claims among multiple parties. But you will have the same discovery, preliminary rulings, and have consistency among the awards.

iv. Or Such as old-fashioned persuasion – it is not uncommon for parties to agree to be added to an arbitration to avoid inconsistent rulings in separate proceedings and to save on the cost and time otherwise incurred in separately litigating or arbitrating similar cases rather than sharing the cost of one, speedier resolution of those issues.

2. Let me turn to a second pre-filing mistake is more subtle, it does not apply to every case, but it can be important when it does. There are times when it is a mistake to fail to think through the location, venue or seat of the arbitration and hearing. It can be very important to choose the right venue and hearing location for purposes of choice of law issues, and for availability and convenience of counsel, the witnesses and parties.

    1. First, attorneys who file arbitrations in states where they are not licensed to practice law risk running afoul of the ethical rules of the venue state concerning practicing law by unlicensed foreign counsel. Arbitrators do not like having to deal with skirmishes about such ethical issues and indeed may have no authority to do anything about it. Certainly attroneys who make such a mistake does not look good in front of clients and may harm their client's interests. For example, in Florida, foreign attorneys who violate our state's rules concerning unauthorized practice of law in arbitration may not be able to recover attorney's fees for their clinet. If opposing counsel waits til the end of the case to raise that point, it could be a rude awakening to the affected client who loses its fee claim.

    2. I learned another reason why venue is important, yYears ago, when I was an advocate, I realized too late that I had failed to timely object to having an arbitration venued in the northern part of Florida, far from my office and client where there were none of my client's witnesses, and no reason to be there, except that is where the claimant's attorneys had their offices and wanted to make it difficult for my client's case.

3. But let me be clear, this issue is not just a question of convenience for counsel, it is possible that witnesses may not be available to give testimony outside of the jurisdictions where they live, the lack of their testimony may change the result of a dispute for lack of proof.

    i. Yes, there are work arounds, but choosing the right venue means your client does not have the pay the cost of having **the arbitrator** and counsel travel out of state to obtain testimony from out of state witnesses who are not willing to come to the venue of the hearing, and whom you can't compel by subpoena to attend. This testimony may not be possible virtually; Some jurisdiction will not allow witnesses to be subpoenaed for Zoom depositions or hearings.

4. A final, subtle, but important example of why venue is important are the cases I have handled as an arbitrator where one issue is what state's law shall govern a dispute that arguably arose in more than one state. In those cases, because the parties had filed their arbitration in Florida in front of a Florida neutral, I often applied the Florida choice of law case law, to decide which of the very different laws of two other states would govern the dispute before me. And in those cases, often applying Florida Choice of law case law resulted in my making important decisions about what state's substantive law governed the parties' dispute, which decisions drove the result of the case and greatly disappointed one of the parties. That result may not have been the same, if the parties filed the arbitration in the state whose law they wanted to apply.

C. I mentioned ethics a moment ago. arbitrators care greatly about whether counsel avoid sharp practices, and exhibit cooperation and professionalism. As counsel, it is your professional and ethical duty to provide competent, skilled effective representation to your client, and to know what you are doing. It does not help your credibility or the arbitrator's opinion of your case if you make it appear that this is your first arbitration rodeo or if you disrespect the arbitrator and opposing counsel by treating arbitration like the bare knuckles battlefield that litigation has become. So, what are some mistakes should you avoid?

1. Failing to Prepare for and confer with opposing counsel and your client in advance of the first scheduling conf. which is when the arbitrator and you will decide how the case will proceed. This is when the rules of your case are set.

a. Don't just show up for this conference. Think about and plan for it. One of the principles of arbitration is that **it is** the parties' dispute, So, to the extent you plan, you have more opportunity to control how the proceeding will unfold.

b. If the arbitrator has sent out an agenda of issues to be discussed and decided at the first scheduling conf., please do your homework by planning with your client how the case should proceed, conferring with opposing counsel to see where there is agreement and what will be disputed so you are ready to address those issues, and so you will be ready to assist the arbitrator in making informed decisions in your client's favor.

c. If the arbitrator has not sent out a pre-hearing agenda, look at the rules governing your case, AAA, JAMS or whatever, and you will see that there is a rule like Rule 16 of JAMS comprehensive Rules, titled Preliminary Conference which lists at least 9 things to be decided at that conference. As just one of many examples, one of the issues is the scheduling of the final, evidentiary hearing. If you fail to plan with your client about what needs to be done before the hearing, and how much time you will need, and when your client needs to have the benefit of a decision for business reasons, you may end up with a very unsatisfactory hearing date, merely for lack of preparation.

2. Next Let's talk about the mistake of Making a bad impression on and losing credibility with the panel; what does that look like:

   a. Not listening to the arbitrator as to what the arbitrator wants to hear and needs from you, during any early hearing or argument; it means following directions, complying with deadlines and orders.

   b. Being contentious, uncooperative and sandbagging your opponents

   c. engaging in verbal attacks of opposing counsel, witnesses and parties – and the arbitrator!.

   d. Overstating your case, or proof or the law wrecks your credibility

   e. Wasting time and money by

      i. filing unnecessary, unauthorized motions and unnecessary fighting over discovery and requesting overly broad discovery – doing so does not help your client's case.

ii. Failing to cooperate with or unnecessary objections to the introduction of documents into evidence at the hearing makes you ou look like you are afraid of the evidence or you don't understand what arbitration is about.

3. **I mentioned at the outset of these comments that my working title for this discussion was "how not to irritate your arbitrator". Let's pause a moment to consider why your behavior as advocate matters, and the slightly different question: Why is the arbitrator's opinion of you important?**

   a. Avoidingn the mistakes I just listed is how arbitration works best for you, your client and the process: you need cooperation, you need the other side to act in good faith; you will want the arbitrator to exercise mercy when you need it. But … if you flaunt these principles, you jeopardize your client's credibility and the persuasiveness of your arguments on close questions.

   b. Indeed, depending on the serious or repeated nature of misconduct, advocates risks their clients being sanctioned for misdeeds. JAMs rule…

   c. Finally on this point, in arbitration much deference is given to the arbitrator's discretion. Where questions of arbitrator discretion are important to your case, is it really a good idea for your client's sake for you to be the biggest jerk in the room?

D. **Now, Let's turn to one of the most important parts of an arbitration: the evidentiary hearing, and let's talk about what it looks like when counsel's failure to plan for the hearing and look at the ways in which they often fail to effectively communicate their proof at the evidentiary hearing**.:'''

   1. The first set of such mistakes we can call Timing errors.

      a. Let's begin with Failing to block out more than sufficient time for the hearing. Reserving time for a hearing at the outset of a case is like estimating the amount of attorneys' fees that case will cost. You almost always underestimate.

         i. Why? **You are going to have more time spent in evidentiary and procedural argument than you would in a trial**. Although usually the rules of evidence don't apply, it is usual that the parties will disagree and want to be heard on all kinds of foreseeable and unforeseeable evidentiary and procedural issues as they arise in the middle of the hearing: Few judges are as patient or have the time as do arbitrators in letting each side make argument on the surprise witness, the demonstrative just created, the last minute amendment to an expert report. Arbitration, because it is often less

formal tends to have a fair number of issues raised on the fly, with one side arguing fairness and the other prejudice and the Arbitrator needs time to think through, hear argument and address these issues. Indeed, if you have a panel, and these types of questions are raised, the hearing will be stopped after argument concludes, as the panel steps out and confers about what to do. All of that takes time you may not have included in your estimated time for the hearing.

ii. Another reason these hearings take more time than you think is that Your questioning of witnesses will not be as tightly planned, and targeted as in trial as you will not always have deposed them or conferred with them, prior to the hearing, and so you are feeling your way through the examination, which takes longer. Plus, in many arbitrations, the arbitrator lets the opposing party exceed the scope of the direct examination when they are on cross, thereby using your witness and "your time" to put on their case. So, your first witness, whom you planned to ask 2 hrs of questions and go on to your next witness may be on the stand for 5 hrs providing evidence for your opponent, wreaking havoc with the timing of the rest of your case and scheduling the next witness.

iii. Another cause of delay: The Panel may ask questions of witnesses – especially the experts, or the panel may slow up or interfere with the testimony about exhibits to ask questions as they are introduced, or as you to pause while they take the time to read them, and in the process, not only take up time with their questions, but raise issues that the parties then need to clean up or pursue that they had not planned on having to do.

iv. So, Unless you and opposing counsel agree that the whole case is going to take only hours to put on, you should seriously consider asking for more than a day for a one-day case, and regardless, in longer cases, always ask for several days more than you need.

   a) How does that hurt? Much better to have more than enough time reserved in one continuous chunk of time, then to come back to finish your evidence months later when all of the testimony and the nuances of the witnesses' demeanor and the details of the exhibits will be lost from the minds of the tribunal.

   b) And if the end of the hearing occurs months later, your client pays for the first part of the hearing to be transcribed, and they have to pay for

the tribunalttime o reread all of it to prepare for the second part of the hearing, only to do the same all over again months later when drafting the award.

c) The alternative which is worse, is underestimating time raised the risk the tribunal saying mid hearing: we are getting this done in the originally scheduled time, with no exceptions, so speed this up. Which means in the end, you simply wont have enough time to put your case on as effectively and thoroughly as you hoped – especially if you are putting part of your case on last.

2. **Building on the topic of timing, another common error is misusing the time , because you do not think you need to provide sufficient proof of each element of your case.**

   a. Arbitration may be less formal than litigation; and the panel may be more knowledgeable about the subject matter than a judge or jury, but arbitrators still need competent proof of each contested element of your claims or defenses.

      i. I would argue that the expertise of the panel actually increases your burden of proof and need to persuade the panel, which is knowledgeable enough about disputes like yours to be skeptical about everything your witnesses say. Don't assume you can prove a particular issue in your case by post hearing briefs that cite and try to explain the relevancy of notebooks full of documents you expect the panel to read for themselves or by trying to prove any elements of your claim solely by relying on expert summaries of the evidence.

      ~~ii. I was on a tribunal recently, where the claimant had to prove that the respondent's actions over months of work constituted breaches of contract. The claimant did not put on a competent fact witness to prove what the other side did wrong. Instead, the claimant put into evidence after the fact claim reports which purported to narrate what happened, and then had an expert testify, complete with lovely, color-coded chronologies about how these activities constituted breaches of contract. Not only did claimant's second hand evidence play into the opponent's argument that Claimant failed in its burden of proof, but mere documents created to support a claim and a hired witness who summarized what he read in those reports were not as credible on each~~

~~of the alleged breaches as the opponent's fact witnesses who explained what really happened on the project.~~

3. **Please do not dismiss my next point: Do NOT lead your witnesse**s **when they testify to the important issues**: ask non leading questions and LET THEM TESTIFY in their own words! *Their* credibility is key; you are not the witness, and the arbitrators will not be fooled into thinking that your artfully worded leading questions constitute evidence, let alone the best evidence on any important, contested issues.

4. **It is true that Chronologies, photos, demonstratives** are all very helpful. But consider how you use them. Don't just flash these up on a screen or bury them in a fat notebook of documents. Yes, use them in opening and any closing but also, give the arbitrator big paper copies on which notes can be made and then have your best, most credible witnesses - both fact witnesses and **experts**, as appropriate - explain the relevance of the information in those demonstratives or photos and their importance. And then the Arbitrators will know enough and have time be able to ask clarifying questions about these important exhibits.

5. **Speaking of experts:** The freedom of arbitration and arbitrator subject matter expertise should make for great opportunities for the parties to use experts effectively. But often they don't. that is a shame and much lamented by arbitrators as being an expensive opportunity missed.

    i. Arbitrators love to be educated by both fact and expert witnesses, but to be more effective, parties should coordinate their testimony, using both fact and expert witnesses to support and fit the testimony of one another. That type of planning requires parties to select and disclose experts early, so they have time to know the record – which greatly enhances their credibility - and to assist arbitrators on how to decide the case.

    ii. Be sure your experts follow the law governing the admissibility of their opinions and testimony. While arbitrators may not follow the rules of evidence on minor technicalities, they know them and use them to weigh evidence. And they care about the scope, competency and admissibility of expert opinions. If as has happened more than once in my cases, you have a damages expert who is testifying about lost profits, contrary to the applicable substantive law as to the measure of those damages, you have wasted your client's money, hurt your credibility, and imperiled that aspect of the award for lack of competent proof.

iii. **AVOID EXPERTS who do not appear objective or expert.** Because The arbitrators may have special subject matter expertise, they may well ask your experts questions: prepare your experts to answer honestly and not as partisan witnesses. Tell them to conceed what needs to be conceded and admit what they don't know. Panels easily detect and value credible, helpful experts and scorn those they believe are only saying what they are paid to say.

iv. As a separate issue, Failing to collaborate and coordinate the **presentation** of expert testimony **among the parties** is a lost opportunity to simplify the proof of their opinions, enhance your and the witnesses' credibility and assist the arbitrators in focusing on and deciding the weight to assign to the reasons for the expert's differences of opinions.

a) This can be done through joint reports Prepared by the experts in collaboration with eachother in advance of the hearing, which pinpoint explain areas of disagreement ;

b) And/or carefully planned hot tubbing or back-to-back presentations, or

c) ASK THE Arbitrators how they would like to have this testimony presented – preferably after filing the expert reports, and then, take their preferences seriously. Don't pretend to do what they ask you to do; that is not only a lost chance to communicate with the decision makers, but disrespectful.

6. **Arbitrators agree: One of the most important and surprising mistakes often made by counsel in arbitration is failing to effectively and fully prove damages** and the related issue of causation; that is they fail to show that the damages they claim are not only reasonable, but were actually caused by their opponent's wrong doing.

a. Repeatedly we see very experienced attorneys spend too much time proving liability, testifying to the "parade of horribles" that prove the other side is guilty of doing lots of bad things, but then they don't effectively translate that story into proving the fact and amount of damages actually caused by these horribles.

b. Arbitrators take their fact finding obligations very seriously. They hold both parties to high standards of proof when they are presented with demands and objections to claims of large sums of money. So, where it appears liability is strong, but claimant's damages proof is cursory or rushed, arbitrators wonder if that is because the damages claims are exaggerated.

i. This point cannot be emphasized too much: perhaps it helps to think of it this way: counsel need to build a bridge of evidence that supports and explains every element - every step - of their damages claim or their damages defenses, so the arbitrators can see which side has constructed a clear path across the bridge to the result they want.

ii. My message is not just for claimant's. Parties who are defending claims, especially in a strong liability case, Please think three times before you opt to rest with no damages evidence in rebuttal of the claimant's damage proof.

a) This is not a jury trial where you don't want to imply that your case on liability is weak by suggesting a counter-damages amount. Arbitrators are not likely to think of your defense that way.

b) Nor should you simply defend based on a directed verdict type of approach based on what you perceive as the fatal weakness of your opponent's damages proof.

c) PLEASE consider providing counter proof of your evaluation of your opponent's damages. That way, if the panel does not rule in your favor on liability, at least you have provided them a bridge to find in your favor if they agree that the claimant's damages proof is weak.

iii. Finally on this issue, NEVER FORGET CAUSATION. The arbitrator's need to see and be able to explain to each other and in their award, exactly how a party's wrongful acts, directly caused – or did not cause - the damages claimed. Proof of causation can be the proverbial lost horseshoe nail in the fable about how but for a lost nail, a battle was lost.

E. Last, perhaps the most common concern I have is when the parties – and counsel in an arbitration fail to consider whether to reserve the right of appeal.

1. Rember at the outset of my comments, one of the common criticisms of arbitration is no right of appeal. However, I contend this concern is mistaken. By "right of appeal" , I mean the parties' absolute right, by **agreement** to reserve to themselves the right to appeal the final award, "on the merits", to a panel of seasoned and knowledgeable appellate arbitrators.[1]

[1] One such survey was conducted of corporate counsel, advocates, arbitrators and academics by Bryan Cave Leighton Paisner LLP, in 2020 ("BCLP Survey"), concerning arbitration appeals. *See* https://www.bclplaw.com/images/content/2/8v2/186066/Bclp-Annual-Arbitration-Survey=2020.pdf. The

a. It is really easy to do. AAA, CPR and JAMS all have special rules for private appeals of arbitration awards, and have panels of neutrals whose expertise, often either years on the appellate bench or as appellate lawyers, equip them to handle the review of awards on the merits, expertly.

b. All the parties have to do, is agree in writing – at any time – that the administering organizations appellate procedures or rules will apply to their case. For example, JAMS Comprehensive rules provides just that: "The parties may agree at any time to the JAMS optional Arbitration Appeal Procedure"

    i. Increasingly, I am seeing language in standard arbitration agreements that reserves the right to such appeals.
    ii. I also remind the parties in the agenda for each initial scheduling conference of their right to agree to optional appellate relief at any time during that proceeding.

c. Why is it a good idea to preserve the right of a private appeal, aside from the fact that lack of an appeal this is always listed as one of the reasons why arbitration is not better than litigation?

    i. Studies show that when decision makers know their decisions will be reviewed, they take more care when making them. How is that not such a good thing in arbitration?

    ii. Even the most well intentioned and experienced arbitrators make mistakes and if the case is important enough, don't you want to have the right to cure that mistake?

    iii. Finally, the existence of the right of appeal might be the best way to remedy prejudice caused by unethical behavior by a party.

d. A few years ago, I interviewed all of JAMS appellate neutrals who have sat on arbitration appeals, for an article I wrote on the subject, and they agreed that JAMS appellate arbitration rules provide a fast, fair, final and cost-effective dispute resolution option for parties who want the reassurance of knowing they may, if they wish, have "another set of eyes and ears" review their arbitration award.

---

survey participants admitted they were concerned about the risk of erroneous arbitration awards, but they also believed that appellate relief was either unavailable or would impair finality and increase delay or cost of arbitration. They also raised concerns about the fairness of possible review processes.

e. There is much more to say about private arbitration appeals and how they work, but I will end with this, **it is a mistake to fail** to confer with your client about whether to agree to one of the most important tools provided by JAMS arbitration rules. Your client may well decide that arbitration of a given dispute would be too risky to undertake without such an option.