ADR Practice Tips and Tricks.

ADR Practice Tips & Tricks: Preparing for Mandatory Arbitration.

By Melvyn J. Simburg and R. Craig Smith

---

## 1. Explain the Process to Your Client

a. Know and review the Rules (RCW ch. 7.06, MAR & LMAR).

b. Make sure your client understands that arbitration is an abridged trial.

c. Explain the timelines.

d. Assuming cost is important to the client, discuss the trade-offs of presenting evidence live at the hearing, by video chat or phone, or by declaration.

e. Both of you must understand that there is no right of cross-examination of a witness appearing by declaration, except to the extent of an earlier deposition.

f. Explain the differences from court formality, but that rules of evidence still apply.

g. Let your client know that an arbitrator's decision is usually final, but that MAR is subject to appeal for a new trial with a judge.

h. If the arbitration outcome is less than desired, make sure you and your client understand the risks of appealing and going to trial (exceptions to the "American Rule" and disincentives to appeal).

## 2. Use MAR 5.3(d) to Admit Documents

a. Review the rules on presumed admissible evidence and make use of them, especially bills, reports, charts and visual and documentary evidence.

b. You can submit declarations of witnesses as well as expert reports.

c. Comply with the notice and form requirements to make your documents admissible and serve them timely with the Prehearing Statement at least 14 days before the hearing.

d. Make sure you also serve the context documents ("all other related documents").

**3. Take Full Advantage of Your Pretrial Statement**

a. Prepare a thorough prehearing statement. This is your first opportunity to advocate your case.

b. Not only can you submit your evidence now, but you should. It is presumed admissible if within the list and facts are more convincing than argument.

c. List all witnesses, their summary of testimony, and whether they will appear in person, by phone, deposition testimony or by declaration.

d. Submit a short brief on the law and facts. Briefs are not required by the rules, but you should submit one anyway. It should be short. It should be submitted in advance. If you have a good brief, your opening statement can be limited.

**4. Know your Arbitrator**

a. You will likely be selecting an arbitrator from a list by a positive and/or negative selection process. Understand the strategy.

b. You also have the alternative to agree with opposing counsel on selection and appointment of an arbitrator.

c. Research the arbitrators; try to understand their style, personality, reputation and experience (case-related and otherwise); ask other attorneys about the arbitrators.

**5. Know your case**

a. "What's your point?" What is the theme? How does your client's story fit your theme? And why does it matter?

b. Know your strengths and weaknesses.

c. Know, to the extent possible, the other side's strengths and weaknesses.

d. Know opposing counsel's theory and his/her strategy.

e. Does the other side's "story" conflict with your client's "story?" Which makes more common sense.

**6. Timing and Discovery**

a. Consider the shortened time to hearing of arbitration and how that affects preparation of your case.

b. Be aware of the restrictions on discovery after referral of a case to MAR, especially the absence of interrogatories, document requests and third person depositions without consent of the arbitrator.

**7. Make a strong record**

a. Cover all elements of your case: What do you have to prove to get everything you want the arbitrator to grant?

b. Prepare your client, and any witnesses you may call to testify. Then prepare good direct examination questions for them.

c. Do the required homework – know everything you can about the facts on both sides and the law supporting each side.

d. Organize your evidence well, eliminating distractors and focusing on what matters. Make sure you have all the evidence to support number 1 above.

e. Preparation is everything: Have good declarations, reports, visuals.

f. Prepare for the other side's testimony: Good, short cross-examination questions. You get two points for every question answered "yes," one point for every "no," and zero points for any answer longer than one word. This means no "open-ended" questions.

g. Remember you prove your case from your evidence and witnesses; do not rely on the other side to admit anything helpful.

**8. Keep it simple**

a. Relate the evidence to the "main message" of your case and create a case presentation that supports the main message.

b. While the arbitrator is a neutral, impressions matter.

c. Less is generally more – arbitration hearings are generally short, so don't waste time on things that are minor, even if disputed.

d. Stick to the facts – don't try to embellish or inflate.

e. Keep it civil.

**9. Opening and Closing**

a. Prepare succinct, effective opening and closing statements. If you have a lot of documents that are admitted without testimony, remember to address them.

b. In your opening, tell the arbitrator your theme and what you will prove.

c. In your closing, tell the arbitrator what you want.

d. Explain the relevance of documents to specific points. For example, if your client will need future medical treatment, identify the reports that say so and the documents that quantify those costs. Call the arbitrator's attention to the declaration supporting future damages and the page and paragraph that support the point you make in closing.

e. Tell the arbitrator what cases to review to support your legal theory. Point out the pages in your brief that have the citations and quotes you want the arbitrator to pay special attention to.

f. If you need a post-hearing brief to address something that came up in the hearing, be sure to request that opportunity before the hearing is closed.

g. Know the applicable rules regarding post-hearing submission of cost bills and attorney's fee requests. Confirm that what you expect to happen is the procedure that the arbitrator plans to follow too.