

Chapter 4:

Trial Terminology

& Arbitration

Chapter Outline:

- ✓ § 4.1 Introduction
- ✓ § 4.2 Trial Terms
- ✓ § 4.3 Criminal Terms
- ✓ § 4.4 Motions
- ✓ § 4.5 Arbitration

§ 4.1 INTRODUCTION

When a plaintiff files a complaint with the court, he or she anticipates going to trial. In most states, however, there is an effort to encourage parties to settle their disputes without going through a full-blown trial. The most common alternative method of dispute resolution is arbitration.

Think of arbitration as a kind of informal trial. The parties still present their cases, and the arbitrator acts as a judge.

If parties are required by law to go through arbitration (as is the case in Nevada), that arbitration may be mandatory (meaning they are required to go through the arbitration process), but it cannot be binding. In other words, if either party is unhappy with the arbitration result, he or she can still demand a trial in front of a judge and jury.

If, however, a party demands a jury trial, and at trial that party loses, the court may award the opposing party attorney's fees as a penalty.

As you can see, arbitration and trial are very closely related. The terms and strategies are similar for both.

§ 4.2 TRIAL TERMS

Admissible Evidence: Relevant evidence that can be legally and properly introduced in a civil or criminal trial.

Alternate juror: a juror selected as substitute in case another juror must leave the jury panel

Charge to jury: in trial practice, an address delivered by the court to the jury at the close of the case instructing the jury as to what principles of law they are to apply in reaching a decision

Closing Argument: An oral summation of a case presented to a judge, or to a judge and jury, by the prosecution or by the defense in a criminal trial.

Concurrent Sentence: One of two or more sentences imposed at the same time, after conviction for more than one offense, and served at the same time. Also, a new sentence for a new conviction, imposed upon a person already under sentence for a previous offense, served at the same time as the previous sentence.

Cross- Examination: questioning by a party or his attorney of an adverse party or a witness called by an adverse party

Deliberation: the process by which a panel of jurors comes to a decision on a verdict

Direct Examination: the first interrogation of a witness by the party on whose behalf the witness is called

Evidence: a form of proof or probative matter legally presented at the trial of an issue by the acts of the parties and through witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or the jury

Finding: the court's or jury's decision on issues of fact

Foreperson: a member of a jury, usually the first juror called and sworn, or a juror elected by fellow jurors, who delivers the verdict to the court

Hearsay: a type of testimony given by a witness who relates not what he/she knows personally, but what others have told the witness, or what the witness has heard said by others; may be admissible or inadmissible in court depending upon rules of evidence

Hung Jury: a jury whose members cannot reconcile their differences of opinion and thus cannot reach a verdict

Impaneling: the process by which jurors are selected and sworn to their task

Jury: a prescribed number of persons selected according to law and sworn to make findings of fact

Jury Instructions: directions given by the judge to the jury

Material Witness: person whose testimony on some issue has been judicially determined as relevant and substantial

Mistrial: a trial which has been terminated and declared void prior to the reaching of verdict due to extraordinary circumstance, serious prejudicial misconduct or hung jury - it does not result in a judgment for any party but merely indicates a failure of trial

Objection: The process by which one party takes exception to some statement or procedure. An objection is wither sustained (allowed) or overruled by the judge.

Opening Statement: the first address of counsel prior to offering of evidence

Overrule: A judge's decision not to allow an objection. Also, a decision by a higher court finding that a lower court decision was in error.

Peremptory challenge: the challenge which may be used to reject a certain number of prospective jurors without assigning any reason.

Pre-Trial Hearing: a hearing held usually for the purpose of clarifying issues and determining the length of the upcoming trial- also known as the Calendar Call

Polling the Jury: a practice whereby the jurors are asked individually whether they assented, and still assent, to the verdict

Trial: the formal examination of a legal controversy in court so as to determine the issue

Trial Notebook: a collection of all the materials the attorney will need at trial. It may include some or all of the following, depending on the preference of the individual attorney:

- All pleadings filed in the case. The pleadings should be indexed, and organized numerically.
- All depositions, with any indexes or summaries
- All discovery requests by both parties, and the responses to those requests
- Any evidence the attorney will present at trial, including the opening statement and closing argument
- Any motions prepared in advance of trial which the attorney anticipates filing during the trial
- A section on witnesses including the following:
 1. a list of witnesses the attorney intends to call to the witness stand;
 2. the phone number, address, and any subpoenas served for each witness
 3. potential questions for each witness your attorney will call
 4. a list of witnesses the other side intends to call to the witness stand
 5. a short description of the nature of each witnesses' testimony
 6. potential questions for each opposing witness

Any witness or evidence list in the trial notebook should be arranged in the order in which the witness or evidence will be presented at trial. A trial notebook varies greatly in form. Some attorneys may simply want the client file, very well organized. Others utilize three-ring binders, or even expandable folders & files. Even ordinary cardboard boxes with individual files. Whichever form an attorney uses, the goal of having all relevant information at his or her fingertips will remain a constant.

Verdict: the determination of a jury on the facts

Voir Dire: a questioning of prospective jurors by the attorneys, and, on application of any party, by the judge, to see if any of them should be disqualified or removed by challenge or examination

§ 4.3 CRIMINAL TERMS

Accomplice: 1. A partner in a crime. 2. A person who knowingly and voluntarily participates with another in a criminal activity.

Acquit, Acquittal: A finding of not guilty by a judge or jury.

Arraignment: Appearance of the accused in court to enter his/her plea to the criminal charges.

Arrest: To take a person into custody, by authority of law, for the purpose of charging him/her with a criminal offense. An arrest is proper when an arresting officer has probable cause to believe the arrestee has engaged in criminal behavior; or upon an arrest warrant issued by a judge or magistrate. The judge or magistrate must find probable cause before issuance of the warrant.

Bail: the security given (or posted) to ensure the future appearance of a defendant

Bench Warrant: Process issued by the court for the attachment or arrest of a person.

Charges (multiple): A case with more than one count or offense listed on the court file.

Citation: 1) summons to appear; 2) reference to authorities in support of an argument

Consecutive Sentence: One of two or more sentences imposed at the same time, after conviction for more than one offense, and served in sequence with the other sentence. Also, a new sentence for a new conviction, imposed upon a person already under sentence for a previous offense, which is added to the previous sentence, thus increasing the maximum time the offender may be confined or under supervision.

Contempt: a willful disregard or disrespect of public authority. Contempt of court is a criminal offense.

Conviction: A judgment of guilt against a criminal defendant.

Court-Appointed Attorney: Attorney appointed by the court to represent a defendant, usually with respect to criminal charges and without the defendant having to pay for the representation.

Felony: A serious crime for which the punishment is prison for more than a year or death.

Grand Jury: A jury of inquiry of not more than 18 and not less than 15 persons, with at least 12 concurring before and indictment may be returned. The use of the grand jury varies throughout the country. In some states, it is mandatory for all felony charges. In others, there is no grand jury system at all.

Guilty Plea

A defendant's formal answer in court to the charge or charges contained in a complaint, information, or indictment, claiming that he or she did commit the offense or offenses listed.

Indictment: A formal charging document issued by a grand jury to the court, that the named person committed a specific offense.

Information/Criminal Complaint: An accusatory document filed in the court by a prosecutor, without indictment, charging a named individual with a crime. The term derives from the prosecutor's statement that he makes his charges based on his "information and belief" rather than firsthand knowledge.

Infraction: A violation of law not punishable by imprisonment. Minor traffic offenses generally are considered infractions.

Lesser included offense: Any lesser offense included in the statute under the original charge.

Misdemeanor: A class of criminal offenses which are less serious than felonies and carry less severe penalties. It is generally distinguished from a felony by the duration of the possible punishment.

No Probable Cause: Insufficient grounds for arrest.

Nolo Contendere: A person does not contest charges, thus allowing the case to close.

Own Recognizance: Sometimes called personal recognizance. A person who promises to appear in court to answer criminal charges can sometimes be released from jail without having to pay bail. This person is said to be released on his/her own recognizance.

Parole: The supervised conditional release of a prisoner before the expiration of his/her sentence. If the parolee observes the conditions, he/she need not serve the rest of his/her term.

Penalty Phase: The second part of a bifurcated trial, in which the jury hears evidence and then votes on what penalty or damages to impose.

Plea: Defendant's answer to the charge - guilty, not guilty or nolo contendere.

Plea Bargaining or Plea Negotiating: The process through which an accused person and a prosecutor negotiate a mutually satisfactory disposition of a case. Usually it is legal transaction in which a defendant pleads guilty in exchange for some form of leniency. It often involves a guilty plea to lesser charges or a guilty plea to some of the charges if other charges are dropped. Such bargains are not binding on the court.

Plea Negotiation: Negotiations arrived at by the state and the defense for a fair disposition of the case and requiring approval by the court.

Preliminary Hearing: Another term for arraignment. Legal proceeding used in some states in which a prosecutor presents evidence to a judge in an attempt to show that there is probable cause and that a person committed a crime. If the judge is convinced that probable cause exists to charge the person, then the prosecution proceeds to the next phase. If not, the charges are dropped.

Pre-sentencing Report: A report prepared by a probation department for a judge to assist in sentencing. Typically contains information about prior convictions and arrests, work history and family details.

Probable Cause: Reasonable belief that a crime was committed and that the named person committed the crime.

Probation: Suspension of sentence with or without adjudication and placing the defendant under supervision of the Department of Corrections for a specified period of time and possible conditions.

Prosecutor: A trial lawyer representing the government in a criminal case and the interests of the state in civil matters. In criminal cases, the prosecutor has the responsibility of deciding who and when to prosecute.

Quash: To nullify, void or declare invalid.

Release on own recognizance (ROR): Release of a prisoner by a judge with no bond requirement.

Restitution: Act giving the equivalent for any loss, damage or injury.

Search Warrant: A written order issued by a judge that directs a law enforcement officer to search a specific area for a specific piece of evidence.

Sentence: Punishment by a court for a defendant convicted of a crime.

Speedy Trial: A rule of law wherein the defendant must be brought to trial within 180 days (effective Jan. 1, 1994).

Victim: Someone who suffers harm or loss, or is killed by another.

Victim Witness: Someone who has suffered loss or harm and then testifies in court to that account.

Warrant: Most commonly, a court order authorizing law enforcement officers to make an arrest or conduct a search. An affidavit seeking a warrant must establish probable cause by detailing facts upon which the request is based.

§ 4.4 MOTIONS

Motion: a request that the court take some sort of action, written or oral.

Motion to Compel: A motion filed asking the court to require that the other party perform some act, such as answering discovery requests or perform some act, such as answering discovery requests or producing a witness for questioning. If the court agrees and issues an order, in the other party ignores the order, the court may find that party in contempt.

Motion for Continuance: A motion to postpone a trial or a hearing.

Motion to Dismiss: A request to a judge by the defendant, asserting the even if all the allegations are true, the plaintiff or the prosecuting body is not entitled to any legal relief and thus the case should be dismissed.

Motion to Dismiss for Lack of Prosecution: If a plaintiff takes no action on a filed matter for an extended period of time, a defendant may choose to file this motion. It is at the discretion of the court to determine how much time or delay warrants a granting of this motion.

Motion In Limine: A pre-trial motion made by counsel requesting that information that might be prejudicial not be allowed to be heard in a case.

Motion for Mistrial: An invalid trial, caused by fundamental error. When a mistrial is declared, the trial must start again from the selection of the jury.

Motion for a New Trial: Request in which a losing party asserts that a trial was unfair due to legal errors that prejudiced its case.

Motion for Protective Order: A motion filed in response to some action or conduct by the opposing party asking the court for some sort of relief. For instance, if one party feels that discovery requests are unfair, this motion may be filed.

Motion for Summary Judgment: A request made by the defendant in a civil case. Asserts that the plaintiff has raised no genuine issue to be tried and asks the judge to rule in favor of the defense. This motion is made before the trial.

A judgment given on the basis of pleadings, affidavits and exhibits presented for the record without any need for a trial. It is used when there is no dispute as to the facts of the case and one party is entitled to a judgment as a matter of law. A Motion for Summary Judgment may also be filed to try and limit the issues that will be determined at trial. Motion for Summary Judgment can be also called Motion for Judgment as a Matter of law (federal courts)

Motion for Directed Verdict: A request made by the defendant in a civil case. Asserts that the plaintiff has raised no genuine issue to be tried and asked the judge to rule in favor of the defense. Typically made after the plaintiff is done presenting his or her case.

Motion for Judgment Non Obstante Verdicto (NOV): Known also as a judgment notwithstanding the verdict. A decision by a trial judge to rule in favor of the losing party even though the jury's verdict was in favor of the other side. Usually done when the facts or law do not support a jury's verdict.

Motion to Suppress Evidence: A request to a judge to keep out evidence at a trial or hearing, often made when a party believes the evidence was unlawfully obtained.

Chapter 4: Arbitration and Trial

UNLV LEGAL SECRETARY LITIGATION WORKSHEET

CLIENT: _____ (PLAINTIFF _____ DEFENDANT _____) FILE NO: _____

PHONE NUMBER: _____ FAX NUMBER: _____

OPPOSING PARTY: _____

OPPOSING COUNSEL: _____

CASE NUMBER: _____ DOCKET NUMBER: _____ DEPT. NUMBER: _____

TRIAL/ARBITRATION DEADLINES

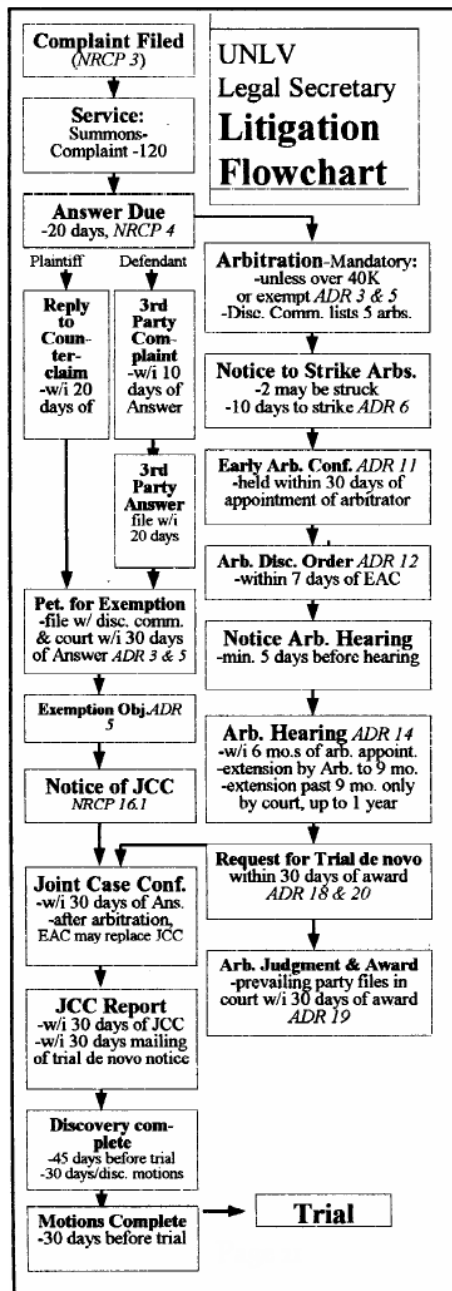
DISCOVERY CUT-OFF _____

PRE-TRIAL/ARB. MEMO DUE

PRE-TRIAL CONFERENCE _____

TRIAL/ARBITRATION

STACK: _____

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§ 4.5 ARBITRATION

THE PROCESS OF ARBITRATION

Arbitration is governed by the Nevada arbitration rules. In Nevada, it is not an option to go through the arbitration program. If your case qualifies for the program, you must participate. The arbitration program in Nevada is mandated and it is non-binding. There are other types of arbitration that may be agreed upon by all the parties and inaction, but here we will be discussing the mandated standard arbitration program for the Eighth Judicial District Court. The parties are required to pay for the services of the arbitrator in each case.

Cases in arbitration are monitored by the Discovery Commissioner and the arbitrator assigned to the case. A case in arbitration would only go before a District Court judge if there was a need for ruling on a motion. The most typical cases that go to arbitration are cases where the value of the case is estimated to be \$40,000 or less.

There are some cases that are automatically exempted from arbitration:

1. Class actions
2. Actions in equity
3. Titles to real estate
4. Declaratory relief
5. Actions seeking extraordinary relief
6. Appeal from courts of limited jurisdiction
7. Review of administrative decisions
8. Medical malpractice cases
9. Cases already arbitrated

Cases qualifying for immediate exemption must set forth on the caption of the complaint under what terms they are to be exempted.

EXEMPTION FROM ARBITRATION

If the case does not qualify to be exempted under any of the automatic exemptions listed above, but the party would like to be exempted, a Petition for Exemption may be filed. There are three reasons a case may be considered to be exempted:

- a. Involves an amount in the issue and access of \$40,000 per plaintiff, exclusive of interest and costs;
- b. Presents a significant issue of public policy;
- c. Presents unusual circumstances which constitutes good cause for removal from the program.

Why would a party **not** want to go into arbitration?

1. Non-binding
2. Litigation would be resolved in one year

Petition for Exemption

Once a party have the files a complaint, each case is placed into the arbitration program. The court now requires that all plaintiff's counsel filed a Petition for Exemption from Arbitration to be removed from the program. Thereby, all cases that qualified to be automatically exempted must have their reasons set forth within the complaint.

When do you file an exemption?

The first answering the defendant must file a request for exemption from arbitration with the Arbitration Office within 20 days after the filing of the answer.

The petition is a simple form that outlines a description of the case and the reasons for which the case should not go into arbitration. However, the drafting of this petition should be taken seriously, and exhibits establishing damages should be produced.

The defendant can file an opposition to the petition for exemption. That opposition must be filed within five days from receipt of the petition. The Discovery Commissioner will mail out his ruling on the petition. If the exemption is granted, plaintiff will proceed with a *16.1 Conference*. If the exemption is denied, the parties must continue with arbitration.

Joint Petition

The parties can also agree to file a Joint Request for Exemption from Arbitration. A Joint Petition is usually not denied by the Discovery Commissioner's office.

Objection

A party can also file an objection to the discovery commissioner's decision on exemption. The exemption must be filed with the arbitration office within five days of the decision being served.

THE ARBITRATOR

The arbitrators are employed by the discovery commissioner's office. Most arbitrators are practicing attorneys, retired and judges, or legal professors. To be considered as an arbitrator, that individual needs to submit an application for employment to the Discovery Commissioner's Office. Most arbitrators are private attorneys who are arbitrators part time.

Arbitration Selection List

Once it has been decided that a case will go to arbitration, all parties will receive an arbitration selection list. The list will have the names of five potential arbitrators for the case. All parties are requested to cross out two of the arbitrators, sign it, and file it with the discovery commissioner's office within 10 days of receipt of the list. This list is **not** sent to opposing parties.

Selection of Arbitrator

After submittal of the arbitration selection list, all parties who received a notice of the appointment of the arbitrator. Once the arbitrator is appointed, the arbitrator has 30 days to contact all parties and setup the Early Arbitration Conference (EAC). It is important for a secretary to know the arbitrators in cases with which she or he is involved.

Recusal

There are times when a selected arbitrator may not be able to serve in a particular case due to a conflict of interest or other reasons. The arbitrator should then recuse him or herself from the case, or a party to the action may request a recusal.

EARLY ARBITRATION CONFERENCE/ARBITRATION HEARING

Early Arbitration Conference

The EAC is almost like the ECC in litigation. The differences are as follows: The EAC is arranged to buy the arbitrator, it is held at the arbitrators office, when you produce your list of witnesses and documents all parties must serve the arbitrator with a copy, and most importantly the arbitrator sets forth the discovery plan that will be followed in the case. All arbitrators usually request a deposit at the EAC of \$250.00. The notice of EAC sets forth the arbitrators requirements.

Discovery Order

Instead of a JCCR, the arbitrator provides a discovery order that sets forth what was discussed at the EAC. It outlines the discovery to be completed in the case, provides the due date of the Arbitration Brief and the Arbitration Hearing is set. A copy of this order should go to the client so that arrangements can be made for the client to be present at the hearing, and for preparation of the hearing.

Arbitration Brief

The arbitration brief is very similar to a trial brief in a regular court setting. It is the most important brief created during arbitration. It consists of a factual summary of the case, case law, and exhibits to substantiate any damages alleged in the case. The brief is usually required to be filed at the arbitrator's office 10 days prior to the hearing.

Arbitration Hearing

The arbitration hearing is basically the trial. This is the most important hearing for cases in arbitration. All parties and their attorneys are present, as well as witnesses in the case. Attorneys usually meet with their clients prior to the hearing to prepare them for testimony including cross examination. This hearing is typically two or three hours long, but in some cases can last a couple of days. No decision is made at the hearing. Instead, the arbitrator sends out his or her decision in the mail.

ARBITRATION AWARD

The Award

The arbitrator mails out the decision usually within one week after the hearing. The decision can be lengthy and it usually refers to case law that shaped the final decision. The decision outlines in detail how the case was viewed and specifies the legal findings. Some arbitrators conduct their own research to confirm that no new case law affects the case. The maximum the arbitrator can award on a case is \$40,000. The arbitrator may also will award Atty. Fees and costs, but this is not typical.

Arbitrator's Bill and Costs

After the award has been rendered, the arbitrator's job is done. He or she will submit a bill for the time and costs incurred to all parties. The fees are divided up equally unless stated in the arbitration award. The attorneys, according to the Nevada Arbitration Rules (NAR), have 10 days from receipt of the bill to pay the arbitrator.

Request for Trial De Novo

Since the arbitration program is not binding, all parties have 30 days from the date of the arbitration award to file a Request for Trial De Novo. This request informs the court that the award is not being accepted and thus becomes null and void. The Request for Trial De Novo is filed with the District Court clerk and a copy is filed with the Discovery Commissioner's office. After the filing of this request, the party who filed with the request must draft a Joint Case Conference Report (JCCR) and the trial litigation begins.

Note: any party failing to pay the arbitrator as bill shall be deemed to have waived the right to Trial De Novo pursuant to NAR 18 (c).

