

# The Shaffer Law Firm, PLLC

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Dear Friend,

For me, the most appealing aspect of practicing law is meeting people and resolving their business and litigation issues. Recently, a good friend inspired an epiphany, though not one of biblical proportions. I am going to start writing letters. This is the first of what I anticipate will be monthly communications intended to stimulate thought and maybe even dialogue. If you find them sufficiently helpful and/or entertaining, I look forward to your call to schedule lunch or a drink.

My current pet peeve is arbitration. Recently, I have represented a number of arbitration litigants. The process offers hope of efficiency, but this can be illusory. While the process can produce good results, it is plagued with flaws that are better addressed by the court system. When putting a deal together, clients can be averse to facing the negative possibility that things may “go south.” I come to commercial work with a background in litigation. I encourage clients to draft more flexible agreements with a view towards the dark side when the parties are trying to close a deal.

Yes, most litigators are biased against arbitration. You may attribute this to their fee expectations; however, this is not the foundation of my concern. Work is work. In my view, the process is potentially ineffective in addressing the client’s needs. See, litigators have hearts. We care. I have a number of additional concerns about arbitration.

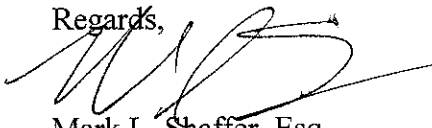
1. While arbitration is touted as a faster alternative, speed, while desirable, is not always in the client’s best interest. The client’s claims and defenses may require time to develop, fix – bridging over problems, or identify and exploit the opposition’s weakness. Remember the “Greatest Generation’s” expression, “Haste makes waste?”
2. While advocates argue that it is expeditious, arbitration can be slower than court litigation. “Who’d a thunk it.” The voluntary nature of arbitration gives the parties the ability to obstruct the process. Discovery is a particularly vexing problem. Many arbitrators are not comfortable managing discovery. In my experience, arbitrator discovery orders can be imprecise and ineffective. Arbitrators sometimes abstain when a party does not comply with a discovery request. Arbitrators hesitate to punish non-compliance, hiding behind the voluntary nature of the process. And, did I mention that arbitration awards can be appealed?
3. Arbitration is largely a voluntary process. Parties can obstruct arbitrations in ways that would cause them to be “nuked” by a real judge. When the arbitrator declines to manage the discovery

process, parties wind up taking their disputes to the courthouse for resolution by a real judge, but in the form of a low priority “miscellaneous action.” After all, why would a court address case management problems in an arbitration proceeding before it addresses the similar problems in its own cases? Arbitrators do not have subpoena power. Therefore, witnesses don’t always show up for the hearing. A witness’ absence can shoot a hole in either the attorney’s witness sequencing or the arbitration award process. And, did I tell you that arbitrators cannot enforce their own awards? Successful arbitration litigants must go to court and ask a real judge to do that.

4. Conventional wisdom notwithstanding, arbitration is not cheap. Arbitration litigants pay their lawyer’s fees, their expert witness’ fees, half of the arbitrator’s fees, half of the arbitrator’s appointed expert’s fees, and, oh yes, the arbitration organization’s fees for “managing” the process. The arbitration outfit makes great money for clerical work. The organization charges a percentage of the claim to, you guessed it, open the file and provide you with a list of arbitrators, all of whom want the work. Some arbitration outfits then charge you for maintaining their own files. Lastly, some charge you to mail out a letter reminding you to attend the hearing date that you already agreed to in your last telephone conference and pay the arbitrator’s trial retainer a month before the hearing.

Buying into arbitration can be the proverbial purchase of a “pig in a poke.” The promise of reduced costs and expedited results can be deceptive. If your expectations are not met, you’ll be unhappy. If you’re unhappy, your lawyer will be unhappy, and, while some of you may disagree, an unhappy lawyer is a terrible thing. Be careful before agreeing to arbitration language in a contract. Before signing up for arbitration, call your litigation crisis intervention expert and talk it through.

Regards,

A handwritten signature in black ink, appearing to read 'Mark L. Shaffer', with a long, sweeping horizontal line extending to the right.

Mark L. Shaffer, Esq.