

Douglas County Bar Association
April 20, 2023

FAMILY LAW
ARBITRATION

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AN OVERVIEW OF ARBITRATION

Arbitration, like litigation, is an adversarial proceeding in which competing parties make arguments under oath and present evidence before a neutral arbitrator. After the conclusion of the hearing, the arbitrator will issue a decision (Award).

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AN OVERVIEW OF ARBITRATION

Unlike litigation, arbitration is fundamentally a creature of a written contract. Parties appear in binding arbitration because at some point, they have contracted to go into arbitration.

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AN OVERVIEW OF ARBITRATION

Arbitration may be preferred because:

- The arbitration agreement limits the issues to be decided.
- It is generally a confidential process.
- Disputes may be resolved relatively quickly.
- Witness testimony is taken under oath.
- Disputes are resolved by "experts".
- There is finality.

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AN OVERVIEW OF ARBITRATION

What can be arbitrated?

Practically anything. Nonetheless, there are immense variations among arbitration processes, depending upon the subject matter of the dispute.

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AN OVERVIEW OF ARBITRATION

The Arbitration Agreement

The Arbitration Agreement provides in writing that the parties agree that an existing dispute, or a future dispute, shall be submitted to arbitration.

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AN OVERVIEW OF ARBITRATION

The Arbitration Agreement

The agreement generally contains simple, straightforward, standard language providing for the resolution of specific disputes through arbitration.

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AN OVERVIEW OF ARBITRATION

The Arbitration Agreement

Practically anyone can be selected as an arbitrator, but most parties want an arbitrator who has had specific training or expertise.

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Uniform Law Commission

The Uniform Law Commission (ULC) is a not-for-profit organization formed in 1892 to create non-partisan state legislation.

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Uniform Law Commission

The ULC promulgated the Uniform Family Law Arbitration Act (UFLAA) in 2016.

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Uniform Law Commission

The ULC's Revised Uniform Arbitration Act was passed by the Kansas legislature in 2018.

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Kansas Bar Association's Support of the UFLAA

In February 2023, following unanimous approval by the Kansas House Committee on the Judiciary, the full house approved passage of the UFLAA by a vote of 122 to 0. See HB 2017.

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OVERVIEW OF THE UFLAA

The UFLAA is different from a commercial arbitration in the following respects:

- Premarital agreements regarding arbitration of child-related disputes must be reaffirmed at the time of the conflict.
- Protections are provided for victims of domestic violence.
- Judicial review is required for child-related issues.
- Recording or transcripts of child-related testimony is required.

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OVERVIEW OF THE UFLAA

Important UFLAA provisions include:

- The selection of the neutral arbitration will be based upon reputation, experience and expertise.
- The parties shall choose the issues to be determined by the arbitrator.
- The parties determine the timing and location of the hearing.

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OVERVIEW OF THE UFLAA

Important UFLAA provisions include (cont.):

- The parties determine the evidentiary and discovery processes to be utilized.
- The parties decide the level of confidentiality of the proceeding; and,
- The parties decide the form of the written award.

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OVERVIEW OF THE UFLAA

Family law disputes authorized by the Act, include:

- Contested issues arising under the state's family law statutes;
- All property and debt issues;
- Spousal support, alimony, maintenance;
- Parenting time, custody, visitation, residency;

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OVERVIEW OF THE UFLAA

Family law disputes authorized by the Act, include (continued):

- Child support;
- Interpretation and enforcement agreements;
- Allocation of attorneys' fees, costs;
- Interpretation and enforcement of premarital, cohabitation and separation agreements.

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SECTION 3 - SCOPE

Under the Act, an Arbitrator may not:

- Grant a divorce, annulment or separate maintenance;
- Terminate parental rights;
- Grant an adoption or guardianship of a child or incapacitated person;
- Determine the existence or nonexistence of the parent and child relationship; or
- Determine the status of a child-in-need-of-care.

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SECTION 4 - APPLICABLE LAW

- The law applicable to arbitration is the state's statutes and procedural rules governing contractual arbitration;
- The arbitrator shall apply the law of Kansas, including its choice of law rules.

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SECTION 5 - ARBITRATION AGREEMENT

The arbitration agreement must:

- Be on a record signed by the parties;
- Identify the arbitrator and arbitral organization, or method of selecting an arbitrator; and,
- Identify the family law dispute the parties intend to arbitrate.

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SECTION 5 - ARBITRATION AGREEMENT

If an agreement to arbitrate a child-related dispute arises at a time after the arbitration agreement is made, the parties must:

- Affirm the agreement in a record after the dispute arises; or
- The agreement was entered during a family law proceeding and the court approved or incorporated the agreement in an order issued in the proceeding.

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SECTION 5 - ARBITRATION AGREEMENT

If a party objects to arbitration on the grounds that the arbitration agreement is unenforceable or the agreement does not include a family law dispute, the court shall decide whether the agreement is enforceable or includes a family law dispute.

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SECTION 6 - NOTICE OF ARBITRATION

A party may initiate arbitration by giving notice to arbitrate to the other party in the manner specified in the arbitration agreement.

Should the notice not be specified in the arbitration agreement, the law and procedural rules of the state will govern contractual arbitration.

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**SECTION 7
MOTION FOR JUDICIAL RELIEF**

Section 7 continued

(a) A motion for judicial relief must be made to the court in which a proceeding is pending involving a family law dispute or, if no proceeding is pending, a court with jurisdiction over the parties and the subject matter.

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**SECTION 7
MOTION FOR JUDICIAL RELIEF**

Section 7 continued

(c) On motion of a party, the court may terminate arbitration if it determines that:

- (1) The agreement to arbitrate is unenforceable;
- (2) The family law dispute is not subject to arbitration; or
- (3) Under Section 12 the arbitration should not proceed.

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**SECTION 8
QUALIFICATION & SELECTION OF ARBITRATOR**

(a) ...unless waived in a record by the parties, the arbitrator must be:

- (1) An attorney in good standing admitted to practice or on inactive status, or a judge on retired status in the state; and
- (2) Trained in identifying domestic violence and child abuse.

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SECTION 8
QUALIFICATION & SELECTION OF ARBITRATOR

(b) The identification in the arbitration agreement of an arbitrator, arbitration organization, or method of selection of the arbitrator controls.

(c) If an arbitrator is unable or unwilling to act or if the agreed-on method of selecting an arbitrator fails, on motion of a party, the court shall select an arbitrator.

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SECTION 9
DISCLOSURE BY ARBITRATOR; DISQUALIFICATION

(a) Before agreeing to serve as an arbitrator, an individual, after making reasonable inquiry, shall disclose to all parties any known fact a reasonable person would believe is likely to affect:

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SECTION 9
DISCLOSURE BY ARBITRATOR; DISQUALIFICATION

Continued:

(1) The impartiality of the arbitrator in the arbitration, including bias, a financial or personal interest in the outcome of the arbitration, or an existing or past relationship with a party, attorney representing the party or witness; or

(2) the arbitrator's ability to make a timely award.

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SECTION 9
DISCLOSURE BY ARBITRATOR; DISQUALIFICATION

Continued:

(b) An arbitrator, the parties, and the attorneys representing the parties have a continuing obligation to disclose to all parties any known fact a reasonable person would believe is likely to affect the impartiality of the arbitrator or the arbitrator's ability to make a timely award.

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SECTION 9
DISCLOSURE BY ARBITRATOR; DISQUALIFICATION

Continued:

(c) an objection to the selection or continued service of an arbitrator and a motion for a stay of arbitration and disqualification of the arbitrator must be made under the law and procedural rules of this state.

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SECTION 9
DISCLOSURE BY ARBITRATOR; DISQUALIFICATION

Continued:

(d) if a disclosure...is not made, the court may:

(1) On a motion of a party within 30 days after the failure to disclose is known, or by the exercise of reasonable care should have been known to the party, suspend the arbitration.

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**SECTION 10
PARTY PARTICIPATION**

(a) A party may:

- (1) Be represented in an arbitration by an attorney;
- (2) be accompanied by an individual who will not be called as a witness or act as an advocate; and
- (3) participate in the arbitration to the full extent permitted by law and procedural rules of Kansas.

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**SECTION 10
PARTY PARTICIPATION**

(b) a party or representative of a party may not communicate *ex parte* with the arbitrator except to the extent allowed in a family law proceeding for communication with the judge.

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**SECTION 11
TEMPORARY ORDER OR AWARD**

(a) Before an arbitrator is selected and able to act on a motion of a party, the court may enter a temporary order.

(b) After the arbitrator is selected:

- (1)The arbitrator may make a temporary award;
- (2)if the matter is urgent and the arbitrator is not able to act in a timely manner or provide an adequate remedy, on motion of a party, the court may enter a temporary order.

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**SECTION 11
TEMPORARY ORDER OR AWARD**

(c) on motion of a party, before the court confirms a final award, the court...may confirm, correct, vacate or amend a temporary award.

(d) On motion of a party the court may enforce a subpoena or interim award issued by an arbitrator.

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**SECTION 12
PROTECTION OF PARTY OR CHILD**

(a) The term "protection order" means an injunction or other order, issued under domestic-violence, family-violence or stalking laws.

(b) If a party is subject to a protection order or the arbitrator determines there is a reasonable basis to believe a party's safety or ability to participate effectively in arbitration is at risk, the arbitrator shall stay the arbitration and refer the parties to court. The arbitration may not proceed unless the party at risk affirms the arbitration in a record and the court determines:

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**SECTION 12
PROTECTION OF PARTY OR CHILD**

(continued)

(1)The affirmation is informed and voluntary;

(2) the arbitration is not inconsistent with the protection order; and

(3) reasonable procedures are in place to protect the party from risk of harm, harassment or intimidation.

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**SECTION 12
PROTECTION OF PARTY OR CHILD**

(continued)

(c) If an arbitrator determines there is a reasonable basis to believe a child who is the subject of a child-related dispute is abused or neglected, the arbitrator shall terminate the arbitration of the child-related dispute and report the abuse or neglect to state authorities.

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**SECTION 12
PROTECTION OF PARTY OR CHILD**

(continued)

(d) An arbitrator may make a temporary award to protect a party or child from harm, harassment or intimidation.

(e) On motion of a party the court may stay arbitration and review a determination or temporary award under this section.

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**SECTION 13
POWERS AND DUTIES OF THE ARBITRATOR**

(a) An arbitrator shall conduct an arbitration in a manner the arbitrator deems appropriate for a fair and expeditious disposition of the dispute.

(b) An arbitrator shall provide each party a right to be heard, to present evidence material to the family law dispute and to cross-examine witnesses.

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**SECTION 13
POWERS AND DUTIES OF THE ARBITRATOR**

(continued)

(c) Unless the parties otherwise agree in a record, the arbitrator's powers include the power to:

- (1) Select the rules for conducting the arbitration;
- (2) hold conferences with the parties before a hearing;
- (3) determine the date, time and place of a hearing;

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**SECTION 13
POWERS AND DUTIES OF THE ARBITRATOR**

(continued)

(4) require a party to provide:

- (A) A copy of a relevant court order;
- (B) information required to be disclosed in a family law proceeding;
- (C) A proposed award that addresses each issue in arbitration.

(5) meet with or interview the child who is the subject of a child-related dispute;

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**SECTION 13
POWERS AND DUTIES OF THE ARBITRATOR**

(continued)

(6) appoint a private expert at the expense of the parties;

(7) administer an oath or affirmation and issue a subpoena for the attendance of a witness or the production of documents and other evidence.

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**SECTION 13
POWERS AND DUTIES OF THE ARBITRATOR**

(continued)

(8) compel discovery concerning the family law dispute and determine the date, time and place of discovery;

(9) Determine the admissibility and weight of evidence;

(10) Permit deposition of a witness for use as evidence at a hearing;

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**SECTION 13
POWERS AND DUTIES OF THE ARBITRATOR**

(continued)

(11) for good cause, prohibit a party from disclosing information;

(12) appoint an attorney, guardian ad litem or other representative for a child at the expense of the parties;

(13) Impose a procedure to protect a party or child from risk of harm, harassment or intimidation;

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**SECTION 13
POWERS AND DUTIES OF THE ARBITRATOR**

(continued)

(14) Allocate arbitration fees, attorney's fees, expert-witness fees and other costs to the parties; and

(15) Impose a sanction on a party for bad faith or misconduct during the arbitration according to standards governing imposition of a sanction for litigant misconduct in a family law proceeding

(d) An arbitrator may not allow *ex parte* communication except to the extent allowed in a family law proceeding for communication with a judge.

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**SECTION 14
RECORDING OF A HEARING**

- (a) Except as otherwise provided in subsection (b)...an arbitration hearing need not be recorded unless required by the arbitrator, provided by the arbitration agreement or requested by a party.
- (b) An arbitrator shall request a verbatim recording be made of any part of an arbitration hearing concerning a child-related dispute.

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SECTION 15 - AWARD

- (a) An arbitrator shall make an award in a record (writing), dated and signed by the arbitrator. The arbitrator shall give notice of the award to each party...;
- (b) Except as otherwise provided in subsection (c), the award must state the reasons on which it is based unless otherwise agreed by the parties.

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SECTION 15 - AWARD

- (c) An award determining a child-related dispute must state the reasons on which it is based as required law...;
- (d) An award is not enforceable as a judgment until confirmed under section 16.

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**SECTION 16
CONFIRMATION OF AN AWARD**

(a) After an arbitrator gives notice under section 15(a), [a child-related dispute] of an award...a party may move the court for an order confirming the award.

(b) Except as otherwise provided in subsection (c), the court shall confirm an award if:

- (1) The parties agree in a record (writing) to confirmation; or
- (2) The time is expired for making a motion, and no motion is pending, under section 18 or 19.

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**SECTION 16
CONFIRMATION OF AN AWARD**

(c) If an award determines a child-related dispute, the court shall confirm the award under subsection (b) if the court finds, after a review of the record, if necessary, that the award on its face:

- (1) Complies with (Award) and law of this state...
- (2) Is in the best interests of the child.

(d) On confirmation, the award is enforceable as a judgment.

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**SECTION 17
CORRECTION BY AN ARBITRATOR OF
UNCONFIRMED AWARD**

(a) On motion of a party within 30 days after an arbitrator gives notice of award under section 15(a), the arbitrator may correct the award:

- (1) If the award has an evident mathematical miscalculation or evident mistake...;
- (2) if the award is imperfect in the manner of form not affecting the merits of the issues submitted;
- (3) to clarify the award.

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SECTION 18
CORRECTION BY COURT OF UNCONFIRMED AWARD

(a) On motion of a party made not later than 30 days after an arbitrator gives notice under section 15(a) of the award...the court shall correct the award if:

- (1) The award has an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property;
- (2) the award is imperfect in a matter of form not affecting the merits of the issues submitted; or
- (3) the arbitrator made an award in a dispute not submitted to the arbitrator and the award may be corrected without affecting the merits of the issues submitted.

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SECTION 18
CORRECTION BY COURT OF UNCONFIRMED AWARD

(b) A motion to correct an award may be joined with a motion to vacate or amend the award under section 19.

(c) Unless a motion under section 19 is pending, the court may confirm a corrected award under section 16.

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SECTION 19
VACATION OR AMENDMENT BY COURT OF UNCONFIRMED AWARD

(a) On motion of a party, the court shall vacate an unconfirmed award if the moving party establishes that:

- (1) The award was procured by corruption, fraud, or other undue means;
- (2) There was:
 - (A) Evident partiality by the arbitrator;
 - (B) Corruption by the arbitrator; or
 - (C) Misconduct by the arbitrator substantially prejudicing the rights of a party.

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SECTION 19
VACATION OR AMENDMENT BY COURT OF UNCONFIRMED AWARD

(3) The arbitrator refused to postpone a hearing on showing of sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise conducted the hearing contrary to section 13, so as to prejudice substantially the rights of a party;

(4) The arbitrator exceeded the arbitrator's power;

(5) No arbitration agreement exists, unless the moving party participated in the arbitration without making a motion under section 7 not later than the beginning of the first arbitration hearing;

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SECTION 19
VACATION OR AMENDMENT BY COURT OF UNCONFIRMED AWARD

(6) The arbitration was conducted without proper notice under section 6 of the initiation of arbitration, so as to prejudice substantially the rights of a party;

(7) A ground exists for vacating the award under the law of the state.

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SECTION 19
VACATION OR AMENDMENT BY COURT OF UNCONFIRMED AWARD

(b) Except as otherwise provided in subsection (c), on motion of a party, the court shall vacate an unconfirmed award that determines a child-related dispute if the moving party establishes that:

(1) The award does not comply with section 15 or the law of this state...or is contrary to the best interest of the child;

(2) The record of the hearing or the statement of reasons in the award is in adequate for the court to review the award; or

(3) A ground for vacating the award under subsection (a) exists.

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SECTION 21
JUDGMENT ON AWARD

(a) On granting an order confirming, vacating without directing a rehearing or amending an award...the court shall enter judgment in conformity with the order.

(b) On motion of a party, the court may order that a document or part of the arbitration record be sealed or redacted to prevent public disclosure of all or part of the record or award to the extent permitted under law of the state.

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SECTION 23
ENFORCEMENT OF CONFIRMED AWARD

(a) The court shall enforce an award confirmed under section 16, including a temporary award, in the same manner and to the same extent as any other order or judgment of a court.

(b) The court shall enforce an arbitration award in a family law dispute confirmed by a court in another state in the same manner and to the same extent as any other order or judgment from another state.

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SECTION 24
APPEAL

(a) An appeal may be taken...from:

- (1) An order denying a motion to compel arbitration;
- (2) An order granting a motion to stay arbitration
- (3) An order confirming or denying confirmation of an award;
- (4) An order correcting an award;
- (5) An order vacating an award without directing a rehearing; or
- (6) A final judgment.

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SECTION 24
APPEAL

continued

(b) An appeal...may be taken as from an order or a judgment in a civil action.

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SECTION 25
IMMUNITY OF ARBITRATOR

- (a) An arbitrator or arbitration organization acting in that capacity in a family law dispute is immune from civil liability to the same extent as a judge of a court of this state, acting in a judicial capacity;
- (b) The immunity provided by this section supplements any immunity under the other laws of this state.

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SECTION 25
IMMUNITY OF ARBITRATOR

Continued

- (c) An arbitrator's failure to make a disclosure required by section 9 does not cause the arbitrator to lose immunity under this section.
- (d) An arbitrator is not competent to testify, and may not be required to produce records in a judicial, administrative or similar proceeding about a statement, conduct, decision or ruling occurring during an arbitration, to the same extent as a judge of a court of this state acting in a judicial capacity. This subsection does not apply to:

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SECTION 25
IMMUNITY OF ARBITRATOR

Continued

(1) The extent disclosure is necessary to determine a claim by the arbitrator or arbitration organization against a party to the arbitration; or

(2) A hearing on a motion under section 19(a)(1) or (a)(2), to vacate an award, if there is prima facie evidence that a ground for vacating the award exists.

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SECTION 25
IMMUNITY OF ARBITRATOR

Continued

(e) If a person commences a civil action against an arbitrator arising from the services of the arbitrator or seeks to compel the arbitrator to testify or produce records in violation of subsection (d) and the court determines that the arbitrator is immune from civil liability or is not competent to testify or required to produce the records, the court shall award the arbitrator reasonable attorney fees, costs and reasonable expenses of litigation.

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