I AM YOUR ARBITRATOR. HERE IS WHAT TO EXPECT FROM ME . . . AND WHAT I EXPECT FROM YOU.

By Phil Cutler[1]

© Philip E. Cutler 2012

I have been a trial lawyer for almost 40 years. Over the last 25 years, service as an arbitrator, special master and *pro tem* judge has become an increasingly important and significant part of my practice. My experience as a lawyer and arbitrator has taught me much, most especially that:

- parties to a dispute choose arbitration for the advantages it has over traditional civil litigation, particularly (1) an early opportunity to present their evidence and get a resolution and (2) a process that minimizes the most expensive phase of litigation – discovery,

- parties to a dispute, and their lawyers, need and want information about how the decision-maker manages cases and conducts the dispute resolution process, and

- the decision-maker is best able to carry out his or her role – and the parties and their counsel are most comfortable with the fundamental fairness and integrity of the process – if the decision-maker manages the process fairly and efficiently.

With these principles in mind, and mindful that information about how individual arbitrators conduct proceedings is hard to come by – and in any event generally anecdotal – in the late 1990s I set about to summarize my arbitration philosophy and the principles which govern my management of cases. So that the parties to cases in which I serve as arbitrator are aware of how

---

[1] Phil Cutler is a lawyer-arbitrator with Cutler Nylander & Hayton PS in Seattle, Washington. Arbitration and mediation – as a neutral – comprise about half of his practice. The balance of his practice includes trial and appellate work and advice and counsel to clients in complex commercial and business matters covering a wide variety of substantive law areas. He has taught the AAA's Arbitrator I and II training programs and the AAA's annual ACE updates and presented at AAA Neutrals Conferences. He is a member of the AAA's National Commercial and Large Complex Case arbitration panels and a Fellow of the College of Commercial Arbitrators. He can be reached at philcutler@cnhlaw.com. Additional information is available from www.cnhlaw.com.

I conduct arbitrations, I distribute this article to them shortly after I accept an appointment, or summarize the essential points in a letter shortly before our initial pre-hearing conference.

I follow these policies in arbitrations where I am the sole arbitrator and, with the consent of other members of the Arbitration Panel, in cases where I am the Chair of a 3-arbitrator Panel. While I am flexible and will tailor both pre-hearing and hearing procedures to suit the needs of a particular case, my written policies give the parties a fair idea of my philosophy toward arbitration and case management. They are designed to ensure that parties obtain the benefits they have bargained for by choosing arbitration over traditional litigation: confidentiality; reduced legal expenses; an early opportunity to present evidence; an expeditious decision; finality.[2] Of course, if the parties' arbitration agreement (or court or other rules) specifies particular rules or addresses one or more of the subjects discussed below, those rules or their agreement will govern to the extent they are inconsistent with my policies. I encourage the lawyers in a case to share my policies with their clients.

Here they are.

THE ARBITRATION PROCESS

The purpose of **arbitration** is to resolve a dispute privately using the services of an independent, neutral decision-maker...the *Arbitrator*. Although the **arbitrator** is not a judge, he or she functions in much the same manner as does a judge and **determines whether or not a claim should be allowed and, if so, in what amount or under what circumstances**. The arbitrator's award is most often final and binding. An arbitration award may generally be filed in court and, once approved by the court, becomes a judgment with the same force and effect as a judgment which results from a trial.

Although the arbitration process is similar to a court proceeding – and the Hearing similar to a trial – there are several key differences. First, the time from case filing to entry of the arbitration award is generally faster than in court proceedings. Second, the sort of broad, wide-ranging "discovery" common in court proceedings is generally not available unless the parties agree or the arbitrator permits it. Third, the rules of evidence that govern court trials are generally not followed in arbitration hearings: evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs will ordinarily

---

[2] Over the last 10 years, arbitration has taken on more and more of the hallmarks of litigation, with parties saddled with the sort of wide-ranging discovery and motions practice common in traditional litigation. The reasons are many and varied, and lawyers, their clients, provider-organizations and arbitrators all bear responsibility for the change. In response to growing complaints from arbitrators, lawyers and corporate counsel that commercial arbitration has become as slow and costly as litigation, the College of Commercial Arbitrators (a by-invitation only association of leading arbitrators), in conjunction with the major arbitration provider-organizations, convened a national summit of lawyers, commercial users of arbitration, and arbitrators. The result of the summit was the development and publication of Protocols for Expeditious, Cost Effective Commercial Arbitration (downloadable from www.thecca.net). I encourage you and your clients to review them. The protocols echo any of the points made here.

be received, regardless of its admissibility in a court proceeding. Finally, there is, as a practical matter, no appeal from an arbitration award; the grounds for vacation of an arbitration award are generally very limited.

My job as arbitrator is to hear your "proofs"...the evidence you present, both by way of testimony and by way of documents...and to decide the case. The "award" which I will make after hearing your case is my decision.

DIRECT CONTACTS WITH ME

Following confirmation of my appointment as arbitrator, direct contacts with me concerning any matter involved in your arbitration are not permitted, other than in a hearing or conference call at which all parties are present or represented. *See* Rule R-18, AAA Commercial Arbitration Rules.[3] As a general rule, as long as all parties are represented by counsel, you may correspond directly with me (or provide me directly with a copy of briefs and other case papers) only if all other participants in the case are copied – at the same time and by the same method of communication – on your correspondence.[4] We will discuss this in more detail at our initial preliminary hearing. However, in the absence of a contrary provision in my first pre-hearing order, all contact should be with the Case Manager assigned to your case; he or she functions , in essence as my "bailiff" or "clerk" and will contact me, if appropriate. In private (*i.e.*, un-administered) arbitrations – and in appropriate cases in administered arbitrations – my office staff fills that role and contact regarding administrative matters should be with them: Amylyn Riedling (amylyn@cnhlaw.com). She may be reached by telephone at my main office phone number: 206-340-4600.

DISCLOSURES

The integrity of the arbitration process depends in large part on the faith of the parties and counsel in the impartiality of the arbitrator. I take my disclosure obligations seriously (*see* Revised Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA, March 1, 2004) and the Revised Uniform Arbitration Act, Section 12, codified in Washington as RCW 7.04A.120) and make a good faith effort to make all appropriate disclosures in a timely fashion. Counsel are asked to share my disclosures with their client representatives and to bring to the attention of the

---

[3] Unless otherwise noted, all references to the AAA's Commercial Rules are to the June 1, 2009 edition of "Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)." All of the AAA's current rules are available on-line at the AAA's website – www.adr.org.

[4] In FINRA-administered securities cases where all parties are represented by counsel, I encourage the parties to stipulate to "direct communication" (see FINRA Rule 12211 (customer cases) and 13211 (industry cases)) as that eliminates the delay inherent in forwarding papers (in multiple sets) to FINRA for distribution to the arbitrator. All FINRA rules are available on-line at FINRA's website – www.finra.org.

Case Manager any concerns they might have with any disclosures I make.[5] ***Do not copy me on any disclosure-related communications you may have with your Case Manager or your administering organization.***

LIST OF RELATED ENTITIES AND CONFLICT LISTS

Many arbitration-administering organizations require that the parties submit a list of related entities and key potential witnesses in order to assist the arbitrator in disclosing potential conflicts and appearance of fairness issues. Even if submission of such a list is not required, it is good practice to do so. Your lists should be seasonably supplemented as necessary. It is important that I know, at the earliest possible time, whether any additional disclosures need to be made.

PRE-HEARING CONFERENCES

In General

A telephone (or in-person) conference to discuss some variation of these policies, or to bring some special circumstance to my attention, may be arranged at any time. Simply call (or e-mail) your Case Manager (or, in unadministered, private arbitrations, my office staff), who will contact me. You may assume that I will have read any papers submitted in connection with such a conference and be prepared to address the issues you have identified. ***I expect proper decorum to be followed in all pre-hearing conferences:*** address yourself to me or to the Arbitration Panel, not to your opposition; avoid personalizing your comments; one person speaks at a time.

Mid-Case and Final Pre-Hearing Conferences

In complex cases, or cases where the Hearing is some ways off, I usually schedule a conference with counsel or the parties (normally by telephone conference call) mid-way through the case to make certain that the case is on-track for the Hearing. I always schedule a final pre-hearing conference a couple of weeks before the Hearing to discuss final arrangements and logistics for the Hearing. Dates and times for these conferences will be set at our initial preliminary hearing, discussed immediately below.

INITIAL PRELIMINARY HEARING/SCHEDULING CONFERENCE

I hold a preliminary scheduling conference in almost every case. Most preliminary hearings are satisfactorily handled by telephone conference call; in an appropriate case, an in-person hearing will be arranged. ***I encourage your client/client representative to attend the initial preliminary hearing.***

You may expect that in our initial preliminary hearing I will

---

[5] In private arbitrations, my private arbitration agreement sets forth a procedure to be followed in the event of disclosure concerns that arise after my appointment has been confirmed. Please read and follow it.

- ask the parties to confirm that all conditions precedent to arbitration have been waived or satisfied, the parties' statements of their claims and defenses are sufficient to enable them to prepare for the hearing on the merits and the claims asserted in the arbitration are arbitrable and

- cover many of the matters addressed in these policies, including setting a schedule for exchange of documents and lists of witnesses and exhibits, and, if one has not already been set, a date for the Arbitration Hearing.

I expect that ***prior to the date of our preliminary hearing***, you will have discussed with the other parties:

- the adequacy of the operative pleadings (demand/complaint, answer) to prepare a discovery plan and otherwise prepare for the hearing-on-the-merits,

- the parties' need for discovery (types of discovery and the time necessary to complete such discovery) [***please see the below discussion of "discovery"***],

- whether any party foresees any dispositive motions or other requests for interim relief, and

- the anticipated length of the hearing-on-the-merits and a time-frame when the parties, their counsel, and their witnesses will be available for that hearing.

We will discuss each of the foregoing matters at the initial preliminary hearing, as well as other matters on an agenda that I will distribute in advance. I will enter a Scheduling Order following our initial preliminary hearing a hearing. It will usually be labeled Pre-Hearing Order No. 1 and will govern further management of your case.

MOTIONS – IN GENERAL AND FOR INTERIM RELIEF

Most arbitration-administering organization rules (and arbitration agreements) do not expressly provide for the type of broad motions practice common in judicial proceedings. Nonetheless, I recognize that in appropriate cases one or more parties may have matters they desire to raise by motion. The parties should be prepared at the preliminary hearing to advise me what (if any) motions, dispositive or otherwise, a party anticipates making and whether a party anticipates seeking any interim relief (*see, e.g.,* Rule R-34, AAA Commercial Rules).

Although I have the authority to permit the filing of – and to decide – dispositive motions (*see, e.g.,* Section 15 of the RUAA, RCW 7.04A.150(2) and AAA Rules R-30 and R-34), I exercise that authority with caution. If any party indicates at the preliminary hearing or thereafter that it may wish to file such a motion, we will discuss the protocol to be followed.

I expect that before filing any sort of "motion" – except in an emergency – you will discuss with the other party (1) the motion you intend to file and (2) a briefing schedule for that motion. If you are unable to agree on a briefing schedule, I will set one.

AMENDMENT OF A CLAIM

Ordinarily, once the arbitrator has been appointed, any party wishing to amend its claim to state another or different claim may do so only with the consent of the arbitrator. *See, e.g.,* Rule R-6, AAA Commercial Rules; Rules 12209 and 13309, FINRA rules. I will generally set a date by which any such motion must be filed. If you desire to amend your claim (or counterclaim) to assert another or different claim, please do so by motion served on all other parties and filed with the sponsoring organization. Your motion should set forth the nature of the new claim you wish to present and, if appropriate, state why the claim was not put forward in your demand for arbitration or response to the demand. Any such motion, if made, will be heard by me (or the Arbitration Panel), after all other parties have been given an opportunity to comment and reply. Monetary claims should be quantified at the earliest practicable time; once a claim has been quantified, payment of the appropriate filing fee or administrative charge for that level of claim may be required in order for that party's claim – to the extent it exceeds the amount of the claim originally quantified – to be heard in the arbitration.

DISCOVERY

If an initial preliminary hearing is held, I will expect you and the other parties to have conferred about discovery prior to that hearing.

One of the most attractive features of arbitration as a method of dispute resolution is its general economy as compared to traditional civil litigation. Experience has shown that discovery is ordinarily the single most expensive aspect of litigation. While a limited amount of discovery is generally appropriate in arbitrations (unless the parties have expressly restricted discovery by contractual agreement), the amount and nature of appropriate discovery is dependent upon many factors, including the amount in controversy and the issues and claims presented. I encourage all parties to mutually develop a discovery plan appropriate to the case and to cooperate in its implementation. In private or AAA-administered cases you may also wish to stipulate with the other parties to your case that the AAA's "Procedures for Large, Complex Commercial Disputes" (particularly Rules L-3 and L-4) will apply to your case.

Please note: *No party in an arbitration has a* ***right*** *to discovery* ***unless*** *(1) all parties agree to the discovery, (2) the arbitration agreement, applicable law or applicable rules (see, e.g.,* Rule R-21, AAA Commercial Rules; FINRA rules 12505-12511 and 13505-13511) *provide such a right, or (3) I enter an order expressly approving or directing discovery. This includes testimony of a witness "perpetuated" by deposition for later presentation at the arbitration hearing.*

The following policies will be followed in the absence of an agreement or applicable law or rule concerning discovery. I will not tolerate discovery abuse of any kind.

Documents

I encourage timely mutual exchange of relevant documents, particularly documents upon which a party relies. I encourage you to agree as soon as possible on what types of documents are relevant and will be provided, as well as a schedule for exchanging such documents. Pre-Hearing Order No. 1 will ordinarily set a date for an exchange of reliance documents. I discourage Requests for Production of "all documents referring or relating to" a subject matter; document requests should be narrowly tailored to what is reasonably necessary for the case and to limit the burden on the producing party. In private and AAA-administered cases I commonly require the parties to exchange, a month or two after our initial conference, all documents on which they rely or which a reasonable person looking at the case objectively would deem relevant or material to the claims.

E-Discovery

Because so much correspondence is by email, and documents are routinely created, modified and amended by computer, e-discovery is now commonplace. Unfortunately, searching for and producing relevant electronic documents can be inordinately expensive. If you foresee the need for e-discovery, please discuss it with the other party. Ordinarily, I will impose limits on e-discovery along the following lines:

- Production of electronic documents will be limited to sources used in the ordinary course of business. Absent a showing of compelling need, no "documents" are required to be produced from back-up servers, tapes or other media.

- The fact that a "document" was originally created electronically does not, in the absence of a showing of compelling need, require production of the document in electronic form.

- Absent a showing of compelling need for another format, production of electronic documents will normally be made on the basis of generally available technology in searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party.

- Absent a showing of compelling need for metadata, metadata need not be produced with the exception of header fields for email correspondence.

- Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the relevance (or potential relevance) of the materials requested, I will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production, subject to further allocation of costs in the Final Award.

Interrogatories

Lengthy and detailed interrogatories – on any subject, but particularly about "facts" or "contentions" – are generally inappropriate in arbitration and I discourage them. To the extent

you wish to use interrogatories as a discovery device, please discuss the issue with the other parties to your case. I encourage you to limit interrogatories to inquiries regarding the existence and whereabouts of documents, and witnesses with knowledge or information, relevant to issues in the case. In FINRA-administered cases, interrogatories are ordinarily not permitted, though "requests for information" are permitted. *See, e.g.,* FINRA rules 12507 and 13507.

Identification of Potential Fact Witnesses

I encourage you to exchange pertinent identifying information (name, address, telephone number or other contact information) about persons with knowledge or information concerning issues in this case and to agree on a time for delivery of this information. I expect you to seasonably supplement your submissions in the event you acquire knowledge or information about other witnesses. The purpose for your disclosure of potential fact witnesses is to enable the other parties to your case to evaluate the need for formal or informal discovery concerning these people, including the potential need to take their deposition. Thus, it is important that your disclosures be as complete as possible and that they take place sufficiently in advance of the discovery cut-off to enable other parties to prepare. *See* my comments below concerning late-identified witnesses and exhibits. It is also important that you notify me of additional potential witnesses so that I may timely make any additional disclosures that may be required.

Expert Witnesses

Expert witnesses are not required in every case. Where you anticipate presenting expert testimony at the arbitration hearing, I expect you to notify all other parties of the name, address and qualifications of your expert promptly after you have determined that you will present expert testimony – and in any event sufficiently in advance of the discovery cut-off to allow any appropriate expert discovery. I also expect that you will promptly provide all other parties with:

- a copy of your expert's report or analysis and
- a narrative statement of
    - the subject matter on which your expert is expected to testify,
    - the substance of the facts and opinions to which the expert is expected to testify, and
    - a summary of the grounds for each opinion.

I encourage you to mutually agree on a date by which this information will be provided and whether it will be simultaneous or staged; please discuss this subject with the other party prior to the initial preliminary hearing and be prepared to advise me of what you have agreed to. If a deposition of an expert is to be taken, and the expert has prepared a report for the party retaining him or her, I normally require that a copy of the expert's report be furnished to all other parties *at least* one week prior to the deposition. As with other witnesses, it is important that you notify me of anticipated experts so that I may timely make whatever disclosures are indicated.

Depositions

Numerous and/or lengthy depositions are inappropriate in most arbitrations. I encourage you to realistically evaluate both your deposition needs and those of the other parties to this dispute and to work cooperatively to (1) agree on a deposition schedule and (2) utilize less formal – and less expensive – witness interviews when appropriate. For third-parties who are to be deposed, and for which you require a subpoena, please see the discussion below concerning Witnesses/Exhibits and Subpoenas. Depositions are rarely permitted in FINRA-administered cases. *See* FINRA rules 12510 and 13510.

Protective Order

Documents produced for this arbitration and the testimony of witnesses should be used only for purposes of this case. If you feel that a protective order is necessary or desirable, please confer with the other parties and propose one. If you are unable to agree, either that a protective order is appropriate or that the form proposed is acceptable, please call your Case Manager; he or she will contact me and arrange a hearing on the matter.

Discovery Disputes

Judges – and arbitrators – dislike discovery disputes. However, if you and the other parties are unable to agree on a discovery plan, the appropriateness of particular discovery devices, or particular discovery requests or responses to same, please contact your Case Manager to schedule a telephone conference call (or, in an appropriate case, an in-person) hearing with me. When you are unable to resolve a discovery dispute, I ask that the party seeking relief provide me with a letter or brief succinctly demonstrating the necessity of the discovery requested (or, in the case of an objector, the reasons why the requested discovery should not be granted). If particular discovery requests (or responses to same) are at issue, you should provide me with a copy of same so that I may place the dispute in context. Where numerous discovery requests are at issue, I will advise you of how your briefing should be structured so as to make my consideration of such matters most efficient. I will rule promptly on any discovery disputes brought to me for resolution.

WITNESSES AND EXHIBITS

In General

A reasonable time prior to the arbitration hearing, I expect you to exchange lists of witnesses who are expected to or will testify at the hearing and lists (and a copy) of all documents which will be offered or are expected to be offered at the hearing. Pre-Hearing Order No. 1 will set a date for both the initial (generally several weeks prior to the Hearing) and final (normally 7-10 days prior to the Hearing, what I call a Joint Statement of the Evidence) exchanges. Witnesses disclosed *for the first time* on the date set for exchange of preliminary or final witness lists will ordinarily not be permitted to testify over the objection of an opposing party, although I will evaluate prejudice and make my decision on a case-by-case basis. The

same is true of exhibits (except for demonstrative or rebuttal exhibits and, in some cases, exhibits prepared especially for the Hearing).

Witnesses

Each party's witness list should identify the witnesses (name, address, phone number) that party expects to testify at the hearing, identify the general nature of their testimony, and indicate how the witness will testify at the hearing (in-person, by telephone, by video deposition, by deposition (if a deposition has been permitted) or by affidavit or declaration). If the witness is expected to testify by affidavit or declaration, a copy of the affidavit or declaration should be delivered to all other parties at least one week before the Hearing, unless a different date is established by my scheduling order. A copy of your witness list should be delivered to me and to your Case Manager at the same time as you deliver it to the other parties. In complex cases and cases where the parties expect the Hearing to last several days, I may require that party-controlled witnesses' direct testimony be presented in writing; in that event, the offering party will be given an opportunity to conduct reasonable oral direct examination to "introduce" the witness to me and highlight the essence of the witness's testimony. *See* my comments below concerning hearing management procedures.

Although in many cases a witness's testimony may be presented by declaration or affidavit (*see, e.g.,* Rule R-32(a), AAA Commercial Rules), I ***strongly*** encourage the offeror to have the witness available by telephone for cross-examination, as his or her availability for cross-examination may affect the witness's credibility and the weight I accord his or her evidence. If you wish to utilize all or a portion of a deposition transcript as substantive evidence (*i.e.,* in addition to or in lieu of a witness testifying in-person or by telephone), I will expect you to provide all other parties with a copy of the transcript, highlighting those portions you intend to offer, at least a week prior to the Hearing so that your opponent may designate other portions of the transcript or identify any objections he or she may have to the portions you intend to use.

Exhibits

Each party's exhibit list should identify all documents the party expects to offer at the hearing; a form of exhibit list that I find most useful is attached to this article. Unless the document has already been provided, a legible copy of each exhibit must be provided to all other parties along with the list; if it has already been provided, a reference to the production number or a description of the document will normally suffice. Please confer with your opponent regarding the number and numbering of exhibits; *use this opportunity to eliminate duplicate exhibits.* Exhibits should be pre-marked to the extent possible and should be numbered sequentially. *Avoid letter or party designations* (*e.g.,* A-1, P-33 (or Plaintiff's 33)); *instead, assign number ranges for parties' exhibits* (*e.g.,* claimant: 1-100; respondent: 200-300). *See also* the discussion below concerning exhibits and use of exhibits. Because I am expected to decide your case, please highlight relevant portions of your exhibits in my exhibit book. To the extent you want me to read and understand an exhibit, be sure to have a witness testify about it – otherwise, the document will have little meaning when I review it.

Supplementation

I recognize that even the most skilled and diligent among us cannot anticipate every eventuality and that supplementation of witness or exhibit lists may be necessary and appropriate. I expect, however, that you will make a good faith effort to timely identify witnesses and exhibits so as to minimize any prejudice to the opposition generated by late disclosure. I will consider foreseeability and prejudice in deciding whether to allow a late-designated witness or exhibit.

Subpoenas

If you desire me to issue a subpoena to any person to attend the Hearing, or for a deposition (or pre-hearing production of documents),[6] please first discuss the matter with the other parties to the case and provide other parties with a draft of the subpoena you desire me to issue. For subpoenas to third-parties, I expect that you will also – before asking me to issue a subpoena – have contacted the third-party to discuss the scope of the subpoena (if for documents) and the timing of the third-party's appearance. I will only issue a subpoena if I conclude, after hearing from the other parties to the case, that such action is appropriate. A subpoena to a third-party will specifically advise the third-party that it may seek a hearing before me as to any concerns it has regarding the subpoena. Remember that enforcement of subpoenas to non-parties is generally for the appropriate court.

CLAIMS AND CONTENTIONS; NARROWING THE ISSUES

I generally find it helpful if the parties provide me (and the other parties) – fairly early in the arbitration process – with a short "plain English" (3-7pp) outline of the principal claims (or defenses) and issues involved in the arbitration, a statement of their respective contentions and a plain statement of the relief sought. We will discuss whether such a claims statement should be submitted – and, if so, when – at our initial preliminary hearing and scheduling conference.

I also find it helpful if the parties furnish me with a pre-hearing statement (preferably a joint statement) setting forth those facts which are agreed or stipulated to and summarizing each side's disputed factual contentions and each side's legal contentions. While I do not require a such a pre-hearing statement in every case, I would appreciate it if you would consider preparing such a document and furnishing it to me with your arbitration briefs (discussed below). In any event, I encourage all parties to stipulate to matters or claims not in controversy so that we may make the most of the time set aside for the Hearing.

ARBITRATION BRIEFS

No party is required to submit an arbitration brief, although I encourage the submission of *succinct* briefs addressing relevant issues (legal and factual) in the case. Briefs which apply

---

[6] Please bear in mind that in a case subject only to the Federal Arbitration Act there is currently a split of authority among the circuits concerning the authority of the arbitrator to issue subpoenas for discovery depositions or document production.

the law to critical factual issues are particularly helpful. Pre-Hearing Order No. 1 will set a date by which arbitration briefs are due. ***Arbitration briefs should not exceed 30 pages.***

String citations to authority (case or otherwise) are discouraged. ***Please include with your brief a copy of any key decisional or other authority on which you rely.*** You will aid my understanding of your position and the relevance of the authority to it if you highlight pertinent portions.

I will presume that the law of my home state governs with respect to all aspects of the case unless you advise me differently. If you contend that the law of another jurisdiction applies to any aspect of this case, kindly point that out (and cite to authority) in your arbitration brief.

ARBITRATION HEARING

Hearing Date; Continuances; Cancellation Fee

The date for the hearing-on-the-merits will almost always be set at our initial preliminary hearing, after consultation with the parties. It will ordinarily be changed only for good cause shown or if all parties agree to a continuance. *See,e.g.,* Rule R-28, AAA Commercial Rules. Prior to our initial preliminary hearing, please confer with the other parties and be prepared to discuss (1) when this case will be ready for hearing, (2) the number of days reasonably anticipated to be necessary for the hearing (including opening statement and closing argument), and (3) your availability for a hearing during the 30 day period surrounding the time when this case is anticipated to be ready for hearing. Counsel should have their calendars readily available at the preliminary hearing. Be sure to check with your key witnesses to ensure their availability during the time period in which the Hearing may be set.

Please be aware that AAA may impose a fee for postponing and rescheduling a Hearing. When I set your arbitration hearing date, I block out that date (or dates) on my calendar and schedule other matters around it, at times turning down other legal work or arbitration or mediation assignments. As a consequence, I also impose a fee for postponing or rescheduling a hearing (up to one-half of my estimated hearing compensation), but only if the request for cancellation or postponement is made on short notice (fewer than 30 days notice for multi-day hearings, fewer than 14 days notice for hearings of 1 day or less). As a courtesy to me and your opponent, if you foresee a need for a continuance, please notify the other party and me or your Case Manager as soon as the need becomes apparent.

Decorum and Facilities

I generally hold arbitration hearings in private cases at my office. In AAA-administered cases, we will discuss potential suitable locations; FINRA arranges the hearing location in cases it administers. While the setting is less formal than a courtroom, I expect that counsel, parties, and witnesses will observe proper decorum. Direct your objections and argument to me or to the arbitration panel, not to opposing counsel. Do not use purple prose or engage in *ad hominem* attacks on opposing parties or their counsel; you will not advance your cause by doing so. Cell phones must be turned off (or the no-ring option selected) when in the hearing room. Please

discuss any special hearing needs (*e.g.*, white board, easel and flip chart, overhead projector, video deposition equipment, power point projector, etc.) with your Case Manager (or, for private arbitrations, with my assistant) as soon as possible so that appropriate arrangements can be made. We will discuss other logistics at our final pre-hearing conference.

The Arbitration "Day"

The Notice of Arbitration Hearing Date will identify the starting time for the arbitration. I expect everyone to be ready to begin at the appointed time. That means arriving *before* the time set for us to begin. Morning "starts" will ordinarily begin at 9 or 9:30 am; afternoon "starts" will ordinarily begin at 1:30 pm. The arbitration day will ordinarily conclude between 4:30 and 5 pm. We will take reasonable breaks throughout the day. The lunch recess will normally be from 12 noon until 1 or 1:30 pm in order to allow the parties and counsel sufficient time not only to eat, but also to return telephone calls and prepare for the afternoon session. I expect counsel and witnesses to return to the hearing room from breaks promptly and be ready to proceed at the appointed time. With the agreement of all parties (and assuming the hearing facilities are available), I am ordinarily prepared to continue the Hearing through the lunch recess and/or for a limited time beyond 5 pm.

Stenographic Record

If any party desires that a stenographic record be made of the arbitration hearing, that party must make the arrangements for same – and notify the Case Manager and the opposing party. *See, e.g.,* Rule R-26, AAA Commercial Rules. The reporter's attendance fee will be the responsibility of the party arranging for same. If any party obtains a transcript that it will reference directly or quote from in examining witnesses or in argument, that party will be expected to provide me and the opposing party with a copy at no cost.

Exhibits and Use of Exhibits

Please bring with you to the arbitration hearing a full set of your exhibits, appropriately marked, along with a current exhibit "list", for my use during the hearing. *Please use the form attached to these policies to list your exhibits so you, your opponent, and I can annotate it easily to record the status of exhibits* as offered, admitted, rejected, or withdrawn. You should also have a full set of your exhibits for use by witnesses and another full set for yourself. You will, of course, already have provided opposing counsel/all other parties with a full set of your exhibits. Please use a tabbed 3-ring binder for exhibits; include a few extra number tabs at the end of the binder to accommodate the inevitable "additional" exhibits. I prefer a consolidated, consecutively numbered set of all (*i.e.,* all parties') exhibits. If, as inevitably happens, additional exhibits are offered at the hearing, be sure they are side-hole-punched for the exhibit books. You are encouraged to highlight the relevant portions of documents in my (or the Panel's) set of exhibits; exhibits in the witness's set should ***not*** be highlighted. I encourage the parties to agree on the admissibility of as many exhibits as possible. Once an exhibit has been admitted, there is no need for authentication or foundation testimony; however, you will want to make sure I understand that a witness has some connection with or understanding of an exhibit (or that he or

she has none). As noted above, an exhibit that has not been the subject of any testimony during the Hearing will be of scant use to me in considering the case.

Opening Statement

Counsel, or a party which is unrepresented, may give a brief opening statement if desired; the opening statement will ordinarily be given immediately after the opening of the Hearing and will, except in unusual circumstances or complex cases, be limited to 15-20 minutes. Your opening statement should be non-argumentative and should focus on (1) the issues, (2) the proof you anticipate will be presented, and (3) the specific relief you seek.

Presentation of Evidence

You should come to the arbitration hearing fully prepared to put on all of your evidence. I encourage you to stipulate to matters or claims not in controversy so that we may make the most of the time available. *See* Narrowing the Issues, above. The claimant will put on his or her case first, followed by the respondent. Evidence concerning counterclaims or cross-claims (offensive or defensive) will ordinarily be put on as part of the party's case. You are encouraged to focus your questions, and witnesses are encouraged to focus their answers, on substantive matters and to dispense with lengthy preliminaries; rambling witness narratives are not helpful. Cross-examination and reasonable re-direct and re-cross examination will be permitted. Non-cumulative rebuttal evidence specifically directed to evidence in the opposing party's case-in-chief may be permitted, but ordinarily only on good cause shown.

Hearing Management Procedures

In cases where the parties anticipate the hearing will take several days, I encourage the parties to consider the use of hearing management procedures designed to streamline the hearing process. Some options are:

- Use of a "chess clock" to allocate the parties' time fairly, and/or separate time limits on discrete portions of the hearing (*e.g.*, openings, closings, etc.); and/or

- A requirement that the direct testimony of all party-controlled witnesses, or perhaps only the expert witnesses, be submitted in writing (and exchanged in advance of the hearing). Where this option is adopted, the party "presenting" the witness will be given an opportunity to "introduce" the witness by a short (*e.g.*, 30 minutes) live direct examination to "introduce" the witness and highlight portions of the witness's written narrative. Normal cross- and redirect examination then follows.

I generally raise this subject in our initial preliminary hearing only to highlight its potential usefulness in streamlining the Hearing. We will revisit this subject at other pre-hearing conferences that precede the Hearing. While I encourage the parties themselves to agree upon the hearing management procedures they believe are best suited to their case, I retain the discretion to require the parties to follow such procedures as I believe are appropriate in the case.

Regardless of whether any of the above hearing management procedures are utilized in your case, I expect counsel to be organized and fully prepared for the Hearing: a command of all the exhibits is critically important so that exhibits are presented to witnesses (and identified to me) expeditiously; questions, whether on direct or cross, are crisp and understandable; witnesses are present and available on short notice; repetitive questions and testimony are avoided, as is time spent on inconsequential matters.

Order of Witnesses

On occasion a witness's availability is limited to certain times or dates. Requests for an accommodation in this regard will be handled on a case-by-case basis but will ordinarily be granted absent a showing of some prejudice. I encourage you to cooperate and agree on such requests. In cases where multiple hearing days are scheduled, I normally require that the "presenting" party notify me and all opposing parties, the day before, of the order in which the next day's witnesses are expected to testify.

Rules of Evidence

Unless your arbitration agreement requires application of state or federal rules of evidence, strict adherence to those rules will ***not*** ordinarily be required, although I generally use the rules of evidence as a guide in determining admissibility of exhibits and the appropriateness of questions and testimony. While the rules governing admission of evidence at the arbitration hearing (*see* Rule R-31, AAA Commercial Rules; FINRA rules 12604 and 13604) will be more relaxed than in a court proceeding, counsel will be expected to lay an appropriate foundation and to observe normal witness interrogation rules regarding the form of questions (leading one's own witness on substantive matters, for example, will not ordinarily be permitted – and doing so impacts my assessment of the witness's credibility). Hearsay evidence will normally be admitted if it is of the sort that business people and others commonly regard as trustworthy and rely on. Double- and triple-hearsay will not normally be admitted. Counsel are encouraged to bring anticipated evidentiary problems to my attention *prior* to the arbitration Hearing so that they may be resolved with minimal interruption to the proceeding. Motions *in limine* are disfavored and should be resorted to only in the rarest of circumstances. If you feel compelled to object to a question at the Hearing, please make your point succinctly. Direct any response to an objection to me. You may impeach a witness who departs materially from his or her deposition testimony, but use the process sparingly and only with respect to material departures; do not waste your time niggling over minor, non-substantive variations.

Cumulative Evidence

A parade of witnesses who all say the same thing is a waste of time – mine, yours, your clients' and that of the other parties and lawyers. This is not to say that corroborating evidence will be excluded, however. If a witness will corroborate evidence given by others, establish that fact quickly and move on.

Use of Depositions

It is the responsibility of the party desiring to offer deposition testimony to provide other parties with a copy of the transcript marking/highlighting those portions the party desires to offer. Other parties may then mark/highlight the portions of the deposition they wish to offer. You may simply submit the marked/highlighted transcript to me; I will read it after the hearing day. If the deposition is lengthy, I may ask counsel to give me an oral summary of the key points for which the witness's deposition is being offered.

Use of Technology in the Presentation of Evidence

I prefer that counsel use power-point presentations, videos and overhead projectors ***sparingly***, if at all. I (and the witness) will have a copy of all exhibits before us and can easily read what you direct us to. If you do use technology, be sure you know how to use it efficiently and effectively; transitions should be pre-cued and seamless.

The Arbitration Hearing is a "Closed" Proceeding

The arbitration Hearing is not open to the public and will not be opened to the public, unless required by applicable law, except (1) on stipulation of all parties and (2) with my permission. *See, e.g.,* Rule R-23, AAA Commercial Rules. Ordinarily, the only persons permitted in the arbitration hearing room will be counsel, a designated representative of each party (who may also be a witness at the hearing), and the witness testifying. I will generally permit future witnesses (except the parties' designated representatives and expert witnesses) to sit-in on the arbitration hearing only if the opposition has no objection.

Closing Argument

You may expect that a reasonable amount of time will be afforded you for closing argument. Closing argument will ordinarily take place immediately following the close of the presentation of evidence. If necessary, we will take a short recess following the close of the evidence in order to permit counsel to organize themselves for closing argument. I encourage you to focus your argument on the evidentiary support for your case and the legal principles you believe apply. I expect you to precisely identify the relief you seek. On occasion, I permit "argument" to be presented in writing, within a week or two following close of the presentation of evidence. I encourage you to discuss this subject with all other parties and agree in advance on the type of argument desired (oral or written). I much prefer oral argument held immediately following the hearing on the merits.

"Close" of the Arbitration Hearing

Ordinarily, I will "close" the arbitration Hearing upon completion of the parties' closing argument. *See* Rule R-35, AAA Commercial Rules. This formal "closure" begins the time within which I may make my award. Hearing closure in FINRA-administered cases is governed by Rules 12608 and 13608. Once closed, the hearing will be reopened only upon good cause

shown and in accordance with applicable law and/or the rules and policies of the arbitration service provider. *See* Rule R-36, AAA Commercial Rules; FINRA rules 12609 and 13609.

Hearing Record

I will ***not*** normally prepare a separate Hearing Record (describing pre-hearing proceedings and listing witnesses who testified and exhibits) following close of the Hearing. If a formal hearing record is desired, any party may request a stenographic record, which will ordinarily be the official record of the proceedings. *See* Rule R-26, AAA Commercial Rules. I will in my Award summarize pre-hearing proceedings and describe the Hearing generally.

AWARD

Statement of Relief Requested

As an aid to preparation of the award in your case, I will require that each party provide me, generally on the first day of Hearing but in any event prior to closing argument, with a ***statement of relief requested*** – the substance of the award (claim-by-claim) the party proposes that I enter. It is important that in your proposed award you tell me exactly how you want me to rule on all claims made in the arbitration – yours and your opponent's. If, for example, you have a claim for pre-award interest, I need you to tell me exactly how I should deal with it, including the applicable interest rate, the principal amount to which the rate is supposed to apply, and the starting/ending date for interest accrual. Unless the other party can show substantial prejudice, I will ordinarily permit a party to amend its statement of relief requested immediately prior to closing argument.

Procedure in Most Cases

Unless your arbitration agreement provides for a different time, I will make my written award within the time permitted by the arbitration rules applicable to your case – 30 days following the "close" of the arbitration hearing for cases conducted pursuant to the AAA Commercial Arbitration Rules (*see* Rule R-41); 14 days for cases conducted pursuant to the AAA's "Expedited Rules" (*see* Rule E-9, Expedited Procedures under AAA Commercial Rules).

Also, unless your arbitration agreement requires otherwise or all parties have timely requested a "reasoned award" (*see* Rule R-42, AAA Commercial Rules, requiring that such request be made prior to appointment of the arbitrator; FINRA rules 12514 and 13514, requiring that such a request be made no later than 20 days prior to the Hearing), my award will be very short and simply make an "award" based on the evidence presented; *I will not make formal findings of fact or conclusions of law, nor will I ordinarily give you reasons for my award.* If your arbitration agreement requires entry of findings of fact and conclusions of law, I will expect each party to provide me with their form of proposed findings and conclusions prior to conclusion of the Hearing. Unnecessarily detailed findings and conclusions will be rejected; findings and conclusions should be *ultimate*, not predicate, findings and conclusions.

If a "reasoned award" has not been timely requested by all parties, but all parties nonetheless agree that my award should be in that form, I will generally do so. If the parties disagree as to the form of award, I will provide them with an award in the form I deem most appropriate.

Unless I agree to provide the parties with a draft award, I will simply make and enter my award and serve the parties with a copy. Therefore, my award (whether a Partial or Interim Award (below) or a Final Award) is ***final*** as to all matters addressed therein. Transmittal of an award is not an invitation to any party to re-argue the merits of the award made or to seek reconsideration.

Cases in Which a Party May be Entitled to Attorneys' Fees

In cases where a party may be entitled to an award of attorneys' fees, I will ordinarily close the hearing as to the merits of the dispute and make a ***partial or interim award*** reflecting my decision on the merits of the dispute before me, handling issues concerning attorneys' fees after the partial award has been made.

If there is a contractual or statutory basis for awarding attorneys' fees, I will ask ***all parties*** to give me, and exchange with each other (generally within a week or two after the conclusion of the Hearing), very basic information concerning the amount of attorney/paralegal time (and the book value of same) incurred through the last day of the Hearing. For example:

Time-keeper	Hours	Rate	Book Value
Richard Roe	125 hrs	$200/hr	$25,000
Jane Doe	200 hrs	$250/hr	$50,000
Totals	325 hrs		$75,000

A schedule for submitting a formal fee application and papers in opposition will be established at the close of the Hearing or after I have made a decision on the merits. Your formal attorneys' fee submission should give me sufficient information to evaluate the reasonableness of the attorneys' fees requested. The opposing party will be afforded an opportunity to comment on any request for attorneys' fees.

I ordinarily handle attorneys' fee issues by affidavit or declaration; if you desire to present oral testimony, I will expect you to show me why oral testimony is necessary. Regardless of the form of the "hearing" on attorneys' fees, you will have an opportunity to argue your views.

Following the hearing on attorneys' fee issues, I will ordinarily enter a written order dealing with the matter. In any event, my decision on attorneys' fees will be incorporated in the ***final award*** entered in the case.

POST-AWARD PROCEEDINGS

Delivery of my Final Award ordinarily terminates the arbitration and my authority to act. Grounds for an arbitrator to modify or correct an award, once made, are set out in the Federal Arbitration Act (9 U.S.C.) and its state law equivalent. *See also* Rule R-46, AAA Commercial Rules.

MISCELLANEOUS

Settlement/Mediation

I encourage all parties to attempt to resolve the dispute by settlement – either through direct party-to-party (or lawyer-to-lawyer) negotiation or with the assistance of a neutral third-party mediator. I will not, however, be involved in any aspect of your settlement negotiations and ask that you not even advise me of them, except insofar as they may potentially impact the schedule of case events established. Your Case Manager can supply you with information about mediation services and mediators. Obviously, if your case is resolved by settlement prior to the arbitration hearing, you should promptly call your Case Manager so that I can be advised and take the hearing date(s) off my calendar.

Service by Fax

In the absence of an objection by a party, I generally allow documents required to be served or filed (except original process) to be sent by confirmed fax transmission, provided that the number of pages to be faxed is ***15 pages or less***; I generally permit lengthier documents to be served by fax only with the prior consent of the recipient.

Service by email

In the absence of an objection by a party or a contrary rule or policy, I generally allow documents required to be served or filed (except original process) to be sent by email. Any such documents should be sent in PDF format. Please confirm with your opposition and with your Case Manager that they have the capability of opening any documents you send. ***Attachments (such as briefs, declarations, exhibits) may be sent to me by email only if the attachments do not exceed (in the aggregate) 2MB of data.*** Lengthier or larger attachments should be sent in hard-copy form only – by mail, messenger or other form of expedited delivery. Regardless of whether attachments are sent to me by email, I ask that you send me a hard-copy by mail or messenger so that I have a paper copy in my file as well.

Direct Service of Case Papers on Me

Normal procedure in AAA and FINRA cases is for all case papers to be filed with the AAA or FINRA, with sufficient copies for the Case Manager to transmit to the arbitrator. ***With your agreement and my approval***, we will follow the "direct communication" protocol: a copy of all case papers may be served on me directly at the same time it is served on other parties. The document must nonetheless be filed with the arbitration-administering organization (with

proof of service on all other parties and me noted). Any other *ex parte* contact with me is prohibited.

Familiarity with Rules and Policies

Counsel and unrepresented parties are expected to be familiar and comply with the any arbitration-administering organization's rules applicable to the case. Please contact your Case Manager if you do not have a copy of these documents.

Questions?

Your Case Manager is extremely knowledgeable about case administration issues; please do not hesitate to call on him or her if you have questions or concerns about the administration of your case. My office staff is similarly knowledgeable for private cases. If you have any questions or concerns about the applicability of these policies to your case, please either raise them with your Case Manager (who will bring them to my attention, if appropriate, or arrange a telephone conference call hearing) or bring them to my attention during our initial preliminary scheduling hearing.

Revised May 2012

Exhibit Number	Description	OFF	ADM	REJ	W/D
