No. 12-3859

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DELAWARE COALITION FOR OPEN GOVERNMENT, INC.,

Plaintiff-Below/Appellee,

v.

THE HON. LEO E. STRINE, JR., THE HON. JOHN W. NOBLE, THE HON. DONALD F. PARSONS, JR., THE HON. J. TRAVIS LASTER AND THE HON. SAM GLASSCOCK, III, IN THEIR OFFICIAL CAPACITIES,

Defendants-Below/Appellants.

On Appeal from the United States District Court for the District of Delaware
Honorable Mary A. McLaughlin, U.S. District Judge
Case No. 1:11-cv-01015

BRIEF FOR APPELLEE

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Dated: January 7, 2013

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1), appellee Delaware Coalition for Open Government, Inc. states that it has no parent corporation and that no publicly traded corporation owns 10% or more of its stock.

/s/ David L. Finger
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PRELIMINARY STATEMENT

Delaware's Court of Chancery enjoys a national reputation for excellence which has brought it to "national preeminence in the field of corporate law...."[1]

The reputation of the Court of Chancery derives not only from its recognized expertise, but also from its ability to process and resolve complex cases promptly and efficiently.[2] Indeed, the Court of Chancery has declared in judicial opinions that the rights of litigants before it "'will be adjudicated as efficiently, promptly and economically in Delaware courts as they would be in [] arbitration were [they] subject to that process.'"[3]

That reputation for judicial excellence is one of the principals reason why Delaware continues to be he preferred venue for incorporation and other entity formation.[4] According to the 2011 Annual Report of the Delaware Division of

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[1] William H. Rehnquist, The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice, 48 Bus. Law. 351, 354 (1992-93).

[2] Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. Corp. L. 771, 777-78 (2009) ("[t]he Court of Chancery is renowned for the unparalleled alacrity with which it conducts trials and decides important issues of corporate law").

[3] *Israel Discount Bank of N.Y. v. First State Depository Co., LLC*, C.A. No. 7237-VCP, 2012 WL 5359296 at *2 (Del. Ch. Oct. 31, 2012) (*quoting Cantor Fitzgerald v. Prebon Sec. (USA) Inc.*, C.A. No. 16769, 1999 WL 135241 at *2 (Del. Ch. Feb. 25, 1999)).

[4] John F. Coyle, *Business Courts and Interstate Competition*, 53 (continued...)

Corporations, over half of all U.S. publicly-traded companies and 63% of corporations listed in the Fortune 500 are incorporated in Delaware, and 86% of all new U.S. Initial Public Offerings in 2011 were incorporated in Delaware.[5] Indeed, "[t]here are more legal entities (980,000) in Delaware than residents (905,000)...."[6]

The State of Delaware benefits greatly from franchise taxes and other revenues generated. Indeed, in 2011, business entity fees and taxes accounted for 24% of Delaware's general fund revenue.[7]

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[4](...continued)
William and Mary L. Rev. 1915, 1952-52 (2012); Lewis S. Black, Jr., *Why Corporations Choose Delaware* at 5-7 (Del. Dept. of State Div. of Corporations 2007) (available online at corp.delaware.gov/whycorporations_web.pdj). The Court can take judicial notice of the contents of state government websites, and Appellee requests that the Court do so. *Bova v. U.S. Bank, N.A.*, 446 F.Supp.2d 926, 930 n.2 (S.D. Ill. 2006); *L'Garde, Inc. v. Raytheon Space and Airborne Systems*, 805 F.Supp.2d 932, 937-38 (C.D. Cal. 2011). On the other hand, the Court should be wary of taking judicial notice of facts contained in private websites. *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3rd Cir. 2007).

[5] Delaware Division of Revenue 2011 Annual Report, available online at http://www.corp.delaware.gov/2011CorpAR.pdf. *See also* Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. Corp. L. 771, 781 (2009).

[6] Rick Geisenberger, *The Delaware Corporation Franchise Tax*, 30 Delaware Lawyer 18 (Fall 2012).

[7] Delaware Division of Revenue 2011 Annual Report, available online at http://www.corp.delaware.gov/2011CorpAR.pdf.

In light of this, and faced with the threat of other states competing for corporate revenues, Delaware has a significant motivation to find new ways of attracting new entities to and keeping existing entities domiciled in Delaware, as well as maintaining Delaware as the preferred forum for the resolution of business disputes.[8] Over the past few years, Delaware has adopted innovations to keep its dominance in corporate and commercial litigation. For example:

(1) In 2003, Delaware expanded the subject matter jurisdiction of the Court of Chancery to include "technology disputes," 10 Del. C. §346-347; 74 *Del. Laws* ch. 46;

(2) In 2007, Delaware amended its Constitution to permit the Delaware Supreme Court to hear and determine questions of law certified to it by the U.S. Securities and Exchange Commission (in addition to the previously-granted power to hear certified questions of law from courts from other jurisdictions), Del. Const. Art. IV §11(8); *CA, Inc. v. AFSCME Employee Pension Plan*, 953 A.2d 227, 229 n.1 (Del. 2008); and

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[8] *E.g.,* John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 Indiana L. Journal 1345 (2012); Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 Stanford L. Rev. 125 (2009); Demetrios G. Kaouris, *Is Delaware Still A Haven for Incorporation?*, 20 Del. J. Corp. L. 965, 969 (1995) (noting that Delaware must constantly innovate its corporate policies in order to retain its "crown" as a center for commercial incorporation and litigation).

(3) The Court of Chancery has encouraged corporations to amend their certificates of incorporation to include language designating it as the exclusive venue for resolving intra-corporate disputes. *In re Revlon, Inc. Shareholders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010).

In 2009, the Delaware Legislature further expanded the jurisdiction of the Court of Chancery, adopting 10 Del. C. §349 (the "Statute")[9], allowing its judiciary to hear and decide business "arbitration" cases.[10]

Like traditional litigation, such "arbitrations" are commenced by one party filing a document with the Court. Chancery Court Rules ("Ch. Ct. R.") 3, 97(a).

Like traditional litigation, payment for the process is made to the Court, on terms set by the Court, as opposed a private arbitrator or arbitration company. Ch. Ct. R. 3, 98(g).

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[9] Similarly, in 2010, the Legislature adopted 10 Del. C. §546, allowing the judges of the Superior Court of the State of Delaware to conduct confidential binding arbitrations for business disputes in matters valued at $100,000 or more. To date, there is no evidence of any arbitrations occurring under that statute.

[10] Prior to this, Chancellor Strine suggested increasing access to the Court of Chancery for "strictly confidential" business mediations (not arbitrations) with no adjudicative action "[f]or businesses hoping to achieve a just settlement without making their dispute public, but who desire the intercession of a judicial mediator to achieve that result...." Leo E. Strine, Jr., *"Mediation-Only" Filings in the Delaware Court of Chancery: Can New Value Be Added By One of America's Business Courts?*, 53 Duke L. J. 585, 594-95 (2003).

Like traditional litigation, the parties have no choice as to who will hear and decide the case. Ch. Ct. R. 97(b) ("[u]pon receipt of a petition, the Chancellor will appoint an Arbitrator"). By contrast, in private arbitration, the parties are free to select the arbitrator in their contract.

Like traditional litigation, the rules governing this arbitration procedure are set forth in the Chancery Court Rules. *See* Ch. Ct. R. 96-98.

Like traditional litigation, there are preliminary conferences and hearings. Ch. Ct. R. 16, 97(c), (d).

Like traditional litigation, the parties can agree upon discovery procedure. Ch. Ct. R. 29, 97(f).

Like traditional litigation, matters are heard and decided by sitting judges, who derive their legal power to serve as arbitrators from the Constitution of the State of Delaware and the Statute (and not from private contract). Del. Const. Art. IV, §10; 10 Del. C. ch. 3. Like traditional litigation, the proceeding takes place in the courthouse during court hours, processed by court personnel.

Like traditional litigation, the parties may offer documentary evidence and live testimony, and can cross-examine witnesses. Ch. Ct. R. 43, 97(d)(6).

Like traditional litigation, the decision of the arbitrator is binding and is entered on the docket and enforceable like any other judgment or decree without separate action. Ch. Ct. R. 58, 98(f)(3). Like traditional litigation, the decision

is appealable, 10 Del. C. §349(c), unless the parties have stipulated that it is not. 10 Del. C. §351.

The one characteristic that differentiates the "arbitration" proceeding from a traditional civil trial (and which renders it unconstitutional) is that the "arbitration" proceeding is statutorily mandated to be confidential – there is no right of public access to the proceeding or the ruling unless there is an appeal. 10 Del. C. §349(b). *See also* Ch. Ct. R. 97(a)(4) (petition and supporting documents are confidential and not part of the public record unless and until an appeal).

Under the Statute, Delaware sells secrecy at the cost of public accountability.

COUNTER-STATEMENT OF THE CASE

On October 25, 2011, Appellee filed an action in the U.S. District Court for the District of Delaware against Appellants, and the Court of Chancery and the State of Delaware, seeking relief under the Civil Rights Act of 1871, 42 U.S.C. §§1983 and 1988, alleging a violation of rights granted under the First Amendment to the Constitution of the United States as made applicable to the states by the Fourteenth Amendment to the United States. Appellee claimed that the Statute violated the public's right of access to judicial proceedings. (Joint Appendix ("JA") 36 D.I. 1 and JA43-49).

The defendants-below filed answers on November 16, 2011 (JA 37 D.I. 9 & 10). The parties filed cross-motions for judgment on the pleadings. (JA38, 39 D.I. 19, 28).

On August 30, 2012, the District Court issued a Memorandum Opinion and an Order (i) granting the motion for judgment on the pleadings as to the State of Delaware and the Court of Chancery on the grounds of sovereign immunity, (ii) denying the motion for judgment on the pleadings of the individual defendants, (iii) granting the motion of Appellee for judgment on the pleadings against the individual defendants. The District Court declared the Statute unconstitutional and enjoined further proceedings under it. (JA40, D.I. 41, 42).

On September 10, 2012, the District Court entered a stipulated Order awarding Appellee its attorney's fees and costs. (JA41 D.I. 44).

This appeal followed.

COUNTER-STATEMENT OF THE FACTS

Appellee Delaware Coalition for Open Government, Inc. ("DelCOG") is a non-profit corporation duly organized and existing under the laws of the State of Delaware. DelCOG is dedicated to promoting and defending the people's right to transparency and accountability in government. (JA43 ¶1).

The Hon. Leo E. Strine, Jr. is the Chancellor of the Court of Chancery of the State of Delaware, whose duties include administering the Statute. (*Id*. ¶2). The

Hons. John W. Noble, Donald F. Parsons, J. Travis Laster and Sam Glasscock, III, are Vice Chancellors of the Court of Chancery of the State of Delaware, whose duties also include administering the Statute. (JA43-44 ¶¶3-6).

In or around April, 2009, the State of Delaware adopted the Statute, which states that:

> (a) The Court of Chancery shall have the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute. For a dispute to be eligible for arbitration under this section, the eligibility criteria set forth in § 347(a) and (b) of this title must be satisfied, except that the parties must have consented to arbitration rather than mediation.
>
> (b) Arbitration proceedings shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal. In the case of an appeal, the record shall be filed by the parties with the Supreme Court in accordance with its rules, and to the extent applicable, the rules of the Court of Chancery.
>
> (c) Any application to vacate, stay, or enforce an order of the Court of Chancery issued in an arbitration proceeding under this section shall be filed with the Supreme Court of this State, which shall exercise its authority in conformity with the Federal Arbitration Act, and such general principles of law and equity as are not inconsistent with that Act.

(JA44-45 ¶12).

In furtherance of the Statute, Appellants adopted Chancery Court Rules 96, 97 and 98 on or about January 5, 2010 (attached to Appellants' Opening Brief ("AOB")). Pursuant to Rule 96(d)(1), arbitration is defined as "the voluntary

submission of a dispute to an Arbitrator for final and binding determination…." Pursuant to Rule 96(d)(2), an "Arbitrator" is defined as "a judge or master sitting permanently in the Court." Pursuant to Rule 96(d), an "Arbitration hearing" is "a proceeding, which may take place over a number of days, pursuant to which the petitioner presents evidence to support its claim and the respondent presents evidence to support its defense, and witnesses for each party shall submit to questions from the Arbitrator and the adverse party, subject to the discretion of the Arbitrator to vary this procedure so long as the parties are treated equally and each party has the right to be heard and is given a fair opportunity to present its case." (JA 45 ¶13).

Pursuant to Rule 97(a)(4), "[t]he Register in Chancery will not include the petition [initiating the Arbitration] as part of the public docketing system. The petition and any supporting documents are considered confidential and not public record until such time, if any, as the proceedings are the subject of an appeal." (*Id*. ¶14).

Pursuant to Rule 98(b), "[a]rbitration hearings are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise…Any communication made in or in connection with the Arbitration that relates to any controversy being arbitrated, whether made to the Arbitrator or a

party, or to any person if made at an arbitration hearing, is confidential." (JA45-46 ¶15).

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings of which Appellee is aware.

SUMMARY OF THE ARGUMENT

Faced with a claim of a right of public access under the First Amendment, the District Court, consistent with law and practice, properly ignored labels and looked to see whether there was a sufficiently analogous government proceeding to which the right of public access attaches (as opposed to practices in the private sector).

The District Court properly recognized that the judicial arbitration process has numerous structural similarities with civil trials (especially in Delaware). Most significantly, a State-empowered judge engages in a core judicial function – hearing evidence, applying the facts to the law, and making binding determinations affecting the substantive legal rights of the parties, which determinations are immediately enforceable by the State. The District Court then properly concluded that the judicial arbitration process is effectively a civil bench trial of commercial disputes. The District Court properly recognized that such trials have been found to be subject to the right of public access to judicial proceedings under the First Amendment in order to promote the principles of democratic self-government.

Affirming the decision of the District Court will not affect ADR programs in other jurisdictions. The Delaware procedure differs from court-adjunct arbitration practices in other jurisdictions, which, consistent with historical practice, either do not employ sitting judges as arbitrators, or limit judicial involvement to non-binding arbitrations, which differ significantly because rulings in such cases are advisory, not adjudicative.[11]

Delaware's inability to provide confidential binding judicial arbitration will not cause a mass exodus from American private arbitration to foreign courts or arbitration, which have no claim to expertise in American business law or custom greater than American private arbitrators.

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[11] "When the arbitration is non-binding, while adversarial in presentation, it actually performs an advisory function because it can only influence the parties' opinion of their case and how they may choose to respond to the arbitrator's non-binding assessment in deciding whether to proceed with litigation or settle through subsequent direct negotiations or other forms of ADR." B. F. Tennille, *et al.*, *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Cases*, 11 Pepperdine Dispute Resolution Law J. 35, 51 (2010) (footnote omitted). *Accord Godfrey v. Hartford Cas. Ins. Co.*, 993 P.2d 281, 285-86 (Wash. App. 2000) (Becker, J., dissenting), *rev'd*, 16 P.3d 617 (Wash. 2001) ("[n]onbinding arbitration is the submission of a dispute to an arbitrator with the understanding at the outset that the result will be purely advisory, and the result will be treated by the parties as a recommendation for settlement...If the parties do settle as a result of nonbinding arbitration, the court does not confirm the arbitration award; rather, it enforces the settlement contract, the terms of which may be different from the arbitrator's award").

Neither Delaware's desire to facilitate new revenue streams nor the business community's desire to hide its conduct from public scrutiny justifies subverting the First Amendment.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE DELAWARE STATUTE VIOLATES THE PUBLIC'S RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS SECURED UNDER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. THE ORIGIN OF, AND RATIONALE FOR, THE FIRST AMENDMENT RIGHT OF PUBLIC ACCESS TO JUDICIAL PROCEEDINGS.

The United States Supreme Court first recognized that the First Amendment grants to the public a right to attend and observe judicial proceedings in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Although there was no majority opinion, seven of the eight participating Justices recognized that, at least in criminal proceedings, there was a long history of public access to judicial proceedings, and that public access promote public confidence in the judicial branch of government and understanding of how the system works. *Id.* at 564-581.

A clear majority of the Supreme Court re-affirmed the existence of a right of public access to judicial proceedings under the First Amendment in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). In declaring

unconstitutional a statute withdrawing public access to a part of trials involving minors, the Court stated:

> the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.

Id. at 606.

The Supreme Court has reaffirmed the principle on several subsequent occasions. *Press-Enterprises v. Superior Court,* 464 U.S. 501 (1984) ("*Press-Enterprise I*") (public's right of access extends to pre-trial criminal judicial proceedings); *Press-Enterprises Co. v. Superior Court*, 478 U.S. 1 (1986) (right of public access extends to preliminary proceedings) ("*Press-Enterprise II*"); *Presley v. Georgia*, 558 U.S. 209 (2010).

B. THE RIGHT OF PUBLIC ACCESS EXTENDS TO CIVIL PROCEEDINGS.

Although the U.S. Supreme Court has not expressly ruled on the application of the right of access to civil proceedings, a footnote in the Opinion of the Court in *Richmond Newspapers* states that "we note that historically both civil and criminal cases have been presumptively open." 448 U.S. at 580 n.17.

In *Publicker Industries, Inc. v. Cohen,* 733 F.2d 1059 (3rd Cir. 1984), in the context of a corporate governance dispute, this Court held that the First Amendment right of public access applies equally to civil cases. The Court found a history of public access to civil proceedings, and, after canvassing authorities, concluded that:

> This survey of authorities identifies as features of the civil justice system many of those attributes of the criminal justice system on which the Supreme Court relied in holding that the First Amendment guarantees to the public and to the press the right of access to criminal trials in *Globe Newspaper Co. v. Superior Court, supra* and *Richmond Newspapers, Inc. v. Virginia, supra.* A presumption of openness inheres in civil trials as in criminal trials. We also conclude that the civil trial, like the criminal trial, "plays a particularly significant role in the functioning of the judicial process and the government as a whole." From these authorities we conclude that public access to civil trials "enhances the quality and safeguards the integrity of the factfinding process." It "fosters an appearance of fairness," and heightens "public respect for the judicial process." It "permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government." Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs. Therefore, we hold that the "First Amendment embraces a right of access to [civil] trials ... to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one."

Id. at 1069-70 (citations omitted). Since then, this Court has repeatedly re-affirmed that the First Amendment right of public access applies to civil judicial proceedings and records. *E.g., In re Cendant Corp.,* 260 F.3d 183, 198 & n.13 (3rd Cir. 2001); *U.S. v. A.D.*, 28 F.3d 1353, 1356 (3rd Cir. 1994); *Leucadia, Inc. v.*

Applied Extrusion Technologies, Inc., 998 F.2d 157, 161 n.6 (3rd Cir. 1993); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3rd Cir. 1991).[12]

C. THE DISTRICT COURT APPLIED THE "EXPERIENCE AND LOGIC" TEST.

Appellants complain that, the District Court, in its ruling, ignored the "experience and logic" test enunciated by the Supreme Court in analyzing public access claims. This assertion is inaccurate.

The District Court did not disregard that test. Rather, it held that, since the process set forth in the Delaware statute was the functional equivalent of a civil trial, and since this Court had set forth in detail how "experience and logic" led to the conclusion that the right of public access under the First Amendment applies to civil trials, it was "not necessary to reiterate the thorough analysis of the experience and logic test performed by the Court of Appeals in Publicker Enterprises." (JA 32).

Thus, the District Court did not ignore the "experience and logic" test. It simply concluded (correctly) that since judicial adjudication in an "arbitration" is

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[12] Other Circuit Courts of Appeal have similarly determined that the First Amendment right of access applies to civil proceedings, and no Circuit Court of Appeal that has addressed the issue has reached a contrary conclusion. *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 298 (2nd Cir. 2012) (citing additional authorities).

effectively the same as judicial adjudication in litigation, the "logic and experience" analysis of *Publicker Enterprises* applied equally in this case, without the need to repeat it.

D. THE DISTRICT COURT PROPERLY ANALOGIZED THE ARBITRATION PROCEEDING TO A CIVIL TRIAL.

Appellants' real complaint is that the District Court analogized the arbitration process to civil trials, as opposed to applying the "experience and logic" test exclusively to private arbitration, divorced from the current context of being part of a government judicial system. Appellants' restrictive approach is simply wrong.

The United States Supreme Court has stated that "the First Amendment question cannot be resolved solely on the label we give the event, *i.e*., 'trial' or otherwise, particularly where the [proceeding] functions much like a full-scale trial." *Press-Enterprise II*, 478 U.S. at 7.

Indeed, the U.S. Supreme Court, in its most recent pronouncement on the subject, stated that the experience requirement looks not just at the specific proceeding at issue, but at "the experience in that *type or kind* of hearing...." *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (italics added).

The word "type" is defined as "[a] group of persons or things sharing common traits or characteristics that distinguish them as an identifiable group of class; a kind; category." *The American Heritage Dictionary of the English Language* 1388 (1970). The word "kind" is defined as a "class or category of similar or related individuals." *Id.* at 721. Thus, it appears that the Supreme Court did not intend to restrict the analysis exclusively to the specific process under examination, but to other proceedings sharing common or similar characteristics.

Consistent with this, courts, including this Court, have addressed claims of public access by looking to comparable proceedings by analogy. *E.g., A.D.*, 28 F.3d at 1358 (in the absence of history of openness of federal delinquency proceedings, Court finds them analogous to criminal proceedings and so subject to First Amendment right of access); *In re Boston Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003) ("[t]radition is not meant, we think, to be construed so narrowly; we look also to analogous proceedings and documents of the same 'type or kind'"); *Society of Professional Journalists v. Secretary of Labor*, 616 F.Supp. 569, 575-76 (D. Utah 1985) (in absence of history of open administrative fact-finding hearings, court analogizes to civil trials and finds a First Amendment right of access), *dismissed as moot and remanded,* 832 F.2d 1180 (10th Cir. 1987).[13] *See also First*

[13] This Court has left open the question of public access to adjudicatory administrative proceedings generally, *North Jersey Media Group, Inc. v. Ashcroft*, (continued...)

Amendment Coalition v. Judicial Inquiry and Review Bd., 784 F.2d 467, 484 (3rd Cir. 1986) (Adams, J., concurring in part and dissenting in part) ("court[s] must be guided by the purposes of the First Amendment, and be sensitive to historical evolution. Where new structures develop to fulfill the role earlier played by other structures, we must seek guidance from the history of the earlier institutions").[14]

Recently, in *New York Civil Liberties Union*, the defendant argued that an adjudicative administrative proceeding which did not exist at the time the First Amendment was adopted could not properly be analogized to a judicial proceeding. The Second Circuit rejected that argument as being "refuted by the reasoning of the public access cases themselves. These focus not on formalistic

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[13](...continued)
308 F.3d 198, 208 n.5 (3rd Cir. 2002), but has noted that "when an administrative agency acts as a quasi-judicial body, it fulfills the same function as a court...." *Chisolm v. Defense Logistics Agency*, 656 F.2d 42, 47 (3rd Cir. 1981).

[14] While Appellants worry that using analogies "introduces tremendous subjectivity and uncertainty into the First Amendment inquiry" (AOB 30), in practice, as the cited cases show, that approach has not "inevitably [led] to erroneous results." (AOB 31). Further, the Supreme Court has warned against bright-line approaches to constitutional questions based on distinctions which can be manipulated by the government. *Bd. of Commr's, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 678-79 (1996). The manipulation in this case is the characterization of litigation as arbitration.

Appellants also argue that the Supreme Court's "type or kind" language in *El Vocero* is relevant only in analyzing the "logic" prong, and not the historical "experience" prong. (AOB 32). Courts, however, also rely on analogies for the "experience" prong. *E.g., A.D.*, 28 F.3d at 1358; *In re Boston Herald, Inc.*, 321 F.3d at 184-85; *Society of Professional Journalists*, 616 F.Supp. at 575-76.

descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake." 684 F.3d at 299.

The Court went on to recognize that:

> changes in the organization of government do not exempt new institutions from the purview of old rules. Rather, they lead us to ask how the new institutions fit into existing legal structures. If, as the NYCTA suggests, government institutions that did not exist at the time of the Framers were insulated from the principles of accountability and public participation that the Framers inscribed in the First Amendment, legislatures could easily avoid constitutional strictures by moving an old governmental function to a new institutional location. Immunizing government proceedings from public scrutiny by placing them in institutions the Framers could not have imagined, as the NYCTA urges, would make avoidance of constitutional protections all too easy.

Id. The Court concluded that:

> the principles governing adjudication do not lose validity when the adjudication moves to another branch of government. Indeed, as the Supreme Court has stated, "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960).
>
> In the present case, the TAB acts as an adjudicatory body, operates under procedures modeled on those of the courts, and "impose[s] official and practical consequences upon members of society." *Richmond Newspapers*, 448 U.S. at 595, 100 S.Ct. 2814 (Brennan, J., concurring). When a neutral adjudicator determines whether public transit users have violated a Rule, that determination has the force of law and, like the criminal trial for which it substitutes, it is "a genuine governmental proceeding." *Id*. at 596, 100 S.Ct. 2814.

> The TAB and the court serve similar functions, in similar ways, and have a similar effect on the parties before them.

Id. at 300.

Appellants argue that this approach is overbroad, because "virtually all adjudicative proceedings would trigger the right because there are always *some* similarities." (AOB 30, italics in original). The test, however, is not whether there are *some* similarities. The true question is how Delaware's statutory judicial arbitration procedure fits into existing legal structures, and whether it has characteristics and serves similar purposes sufficiently to identify it as merely another form of litigation that has traditionally been subject to public access. As shown below, it does.

E. THE STATUTORY JUDICIAL ARBITRATION PROCESS IS SIMPLY CIVIL LITIGATION UNDER ANOTHER NAME.

The mere fact that the proceeding is called "arbitration" does not of itself take the proceeding beyond the First Amendment. "[A] state cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

It is well-recognized that arbitration proceedings are analogous to civil trials. *E.g., United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960) ("[i]n the commercial case, arbitration is the substitute for litigation") (*quoted in Independent Ass'n of Continental Pilots v. Continental Airlines*, 155

F.3d 685, 694-95 (3rd Cir. 1999)); *In re Home Health Corp., Inc.,* 268 B.R. 74, 78 (Bankr. D. Del. 2001) (arbitration "is a trial on the merits, although before a non-judicial tribunal").

Appellants attempt to distinguish the two processes by pointing to claimed differences. As shown below, any differences are, at best, superficial, and arbitration offers no real advantage over litigation, other than the promise of secrecy.

1. <u>The Source of Adjudicatory Power.</u>

Appellants assert that judges' authority to hear trials derives from the "coercive power of the State," while arbitrators' authority derives from private contract. (AOB 34). While this may be true as to purely private arbitration, it ignores the fact that the power of the Chancellor and Vice Chancellors to hear these court-adjunct arbitrations derives from the Statute, an exercise of State power. Absent the Statute, parties could not privately contract to obtain these services. Once a party invokes the Statute, the "coercive power of the State" is exercised to enforce contractual rights.

Appellants and *amici* argue that arbitration is consensual and litigation is not. This is inaccurate. Rarely is any dispute resolution process in any forum consensual. Rather, it is initiated by one party with a grievance which has not been resolved amicably.

The "consensual" act is the pre-dispute decision by the contracting parties to choose arbitration. This decision, however, is nothing more than a choice of venue provision, comparable to venue provisions that select a specific court or jurisdiction for litigation, which practice is commonplace in business and litigation.

Moreover, although, as Appellants note, an arbitrator does not have the power to compel an unwilling party to participate in arbitration (AOB 37), neither does a judge have the power to compel a party to participate in litigation. *See, e.g., Egervary v. Young*, 152 F.Supp.2d 737, 741 (E.D. Pa. 2001) ("I agree that I have no power to compel any defendant to appear at the deposition of third-party witness, anymore than I have the power to compel a defendant to answer a complaint, oppose a motion, or appear at trial so as to avoid a default judgment"). Both, however, have the power to enter a default judgment against the non-participating party. *E.g., The Andersons, Inc. v. Fall Grains, Inc.*, 646 F.Supp.2d 1029, 1032 (C.D. Ill. 2009); *Mendelson v. Delaware River & Bay Authority*, 112 F.Supp.2d 386, 397 (D. Del. 2000); Ch. Ct. R. 55 (authorizing default judgments).

2. <u>Flexibility in Procedure.</u>

Appellants next note that in arbitration the parties are "free to design the governing process and procedures to meet their own specific needs." (AOB 38). The same is true in litigation. For example, the Chancery Court Rules provides

that "[u]nless the Court orders otherwise, the parties may by written stipulation...modify the procedures provided by these Rules for other methods of discovery." Ch. Ct. R. 29. *Accord* Fed. R. Civ. P. 29.

Beyond discovery, courts recognize that parties in civil litigation generally are free within broad limits to agree amongst themselves to modify and simplify the procedures for the resolution of their dispute. *E.g., DDI Seamless Cylinder Intern., Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163, 1166 (7th Cir. 1994); *Hann v. Black*, 946 N.Y.S.2d 722, 723 (N.Y.A.D. 4 Dept. 2012). Thus, parties are free to include in their business contracts limitations on all manner of procedural modifications, which generally will be respected by the courts.

3. <u>Speed.</u>

Appellants and *amici* note that flexibility in procedure permits resolution of cases faster than traditional litigation, and bemoan how long litigation takes. They ignore the fact that the Court of Chancery has a "well-deserved and highly valued reputation for speed." Marcel Kahan & Edward Rock, *How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity*, 58 Emory L. J. 713, 757 (2009). Indeed, the Court of Chancery on more than one occasion has stated publicly that the rights of litigants before it "'will be adjudicated as efficiently, promptly and economically in Delaware courts as they would be in [] arbitration were [they] subject to that process.'" *Israel Discount*

Bank of N.Y., 2012 WL 5359296 at *2 (*quoting Cantor Fitzgerald*, 1999 WL 135241 at *2).[15]

Amici point to the flexibility the Statute grants in shaping a remedy. This is no different in litigation. *Wilmont Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964) ("the powers of the Court [of Chancery] are broad and the means flexible to shape and adjust the precise relief to be granted so as to enforce particular rights and liabilities legitimately connected with the subject matter of the action").

Further, at any stage in the litigation, the parties are free to turn to other ADR techniques. *E.g.,* Ch. Ct. R. 174 (voluntary mediation).

4. Limited Scope of Review.

Appellants next note that the scope of review from an arbitral decision is narrower than standard judicial review. However, parties in litigation also are free to agree to restrict the scope of judicial review. *E.g., DDI Seamless Cylinder Intern., Inc.*, 14 F.3d at 1166-67; *Spaulding v. Univ. of Washington*, 676 F.2d 1232,

[15] *See also* Leo E. Strine, Jr., *The Delaware Way: How We Do Delaware Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. of Corp. Law 673, 682 (2005) ("[t]he capacity and willingness of chancery judges to act with speed fit well with the business community's needs...as a matter of judicial culture, Chancery developed a deep commitment to the timely resolution of disputes, however big or small, and whether expedited or not"); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Law*, 106 Columbia L. Rev. 1749, 1760 (2006) ("[a] sufficiently uncrowded docket permits urgent cases to be resolved expeditiously, sometimes amazingly so").

1235 (9th Cir. 1982). Thus, the Statute affords no benefits that contracting parties could not obtain without it.

5. Additional Similarities.

There are additional similarities between the arbitration procedure and traditional litigation, as noted in the Preliminary Statement to this brief, namely:

* Like traditional litigation, such "arbitrations" are commenced by filing a document with the Court. Ch. Ct. R. 3, 97(a).

* Like traditional litigation, payment for the process is made to the Court, on terms set by the Court, as opposed to the arbitrator or arbitration company. Ch. Ct. R. 3, 98(g).

* Like traditional litigation, the parties have no say in who will hear and decide the case. Ch. Ct. R. 97(b) ("[u]pon receipt of a petition, the Chancellor will appoint an Arbitrator"). By contrast, in private arbitration, the parties are free to select the arbitrator. *E.g., Brook v. Peak Intern., Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002); *Securities Industry Ass'n v. Lewis*, 751F.Supp. 205, 208 (S.D. Fla. 1990).

* Like traditional litigation, the rules governing procedure are set forth in the Rules of Court. *See* Ch. Ct. R. 96-98.

* Like traditional litigation, there are preliminary conferences and hearings. Ch. Ct. R. 16, 97(c), (d).

* Like traditional litigation, the proceeding takes place in the courthouse during court hours, processed by court personnel.

* Like traditional litigation, the parties may offer documentary evidence and live testimony, and can cross examine witnesses. Ch. Ct. R. 43, 97(d)(6).

* Like traditional litigation, the decision of the arbitrator is entered on the docket and enforceable as any other judgment or decree without separate action. Ch. Ct. R. 58, 98(f)(3).

* Like traditional litigation, the decision is appealable, 10 Del. C. §349(c), unless the parties have stipulated that it is not. 10 Del. C. §351.

6. The Substantive Reasons Arbitration is Properly Analogous to Litigation.

"In the First Amendment context, courts must 'look through forms to the substance' of government conduct." *Whit v. Lee*, 227 F.3d 1214, 1220 (9th Cir. 2000) (*quoting Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)).

The differences between arbitration and litigation identified by Appellants are superficial, and do not get to the core of the matter. Rather than focus on the process, this Court should focus on the purpose of the two procedures.

The most important commonality is that the judicial arbitrator interprets the law, decides the facts, applies the law to those facts[16], and renders a binding

[16] Appellants suggest that private arbitrators are not bound by legal (continued...)

decision affecting the substantive legal rights of the parties – in other words, performs the supreme judicial function. *See Burchell v. Marsh*, 58 U.S. 344, 345 (1854) ("arbitrators are judges..."); *Olson v. National Association of Securities Dealers*, 85 F.3d 381, 382 (8th Cir. 1996) ("an arbitrator's role is functionally equivalent to a judge's role..."); *Seldner Corp. v. W.R. Grace & Co.*, 22 F.Supp. 388, 392 (D. Md. 1938) ("[t]he function of arbitrators is judicial in nature"). Indeed, the members of the Court of Chancery enjoy immunity from suit in their role as arbitrators just as they do in their roles as judges. Ch. Ct. R. 98(c).

Whether labeled arbitration or litigation, under the Statute a judicial officer engages in adjudication, *Adams v. Gould, Inc.*, 739 F.2d 858, 862 (3rd Cir. 1984), pursuant to power vested by the State to determine substantive legal rights, with practical consequences to the parties. "An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny." *Joy v. North*, 692 F.2d 880, 893 (2nd Cir. 1982).

The label "arbitration" is not a talisman which protects courts from the constitutional obligations imposed on government. Where the arbitrator is not

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[16](...continued)
precedent. (AOB 39). Delaware, however, authorizes vacating private arbitration awards that are in manifest disregard of the law. *Credit Suisse Securities (USA) LLC v. Investment Hunter, LLC*, C.A. No. 5107-VCN, 2010 WL 2160904 at *3 (Del. Ch. May 27, 2010). As a practical matter, it would curious for the Court of Chancery to promote its arbitration procedure as being unbound by law.

privately retained and paid and the fee is instead paid into a court; where the arbitrator conducts the proceeding in a government courthouse on government time (and government salary) pursuant to procedure set forth in court rules; where the arbitrator is a judicial officer acting pursuant to power granted by the State (and not merely by private contract) and presiding over a proceeding that resembles a bench trial; where the arbitrator functions as a judge, deciding the facts and applicable law; and where the arbitral award is effective and enforceable without bringing a legal action to confirm it, then it is not an arbitration, but a trial – a judicial procedure. *See Elliott v. Ten Eyck Partnership v. City of Long Beach*, 67 Cal.Rptr.2d 140, 144-45 (Cal. App. 1997). *See also Heenan v. Sobati*, 117 Cal.Rptr.2d 352, 353, 358 (Cal. App. 2002) (noting that nomenclature is not controlling, and that "[a]s a sitting judge, Judge McEachen cannot conduct a contractual arbitration. Public judging operates in the public eye, with reported proceedings and under appellate review, to both dispense justice and 'satisfy the appearance of justice'... These distinctions blur if sitting judges, their salaries paid by the state, conduct private, binding arbitrations in the public's courthouses – shielded from the need to follow established rules of law or to justify their decisions by reason, evidence and precedent") (italics in original); *New York Civil Liberties Union*, 684 F.3d at 301 ("'when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals,

it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process,'" *quoting Hannah v. Larche*, 363 U.S. 420, 442 (1960)).

Minor differences in procedure do not alter the fact that judicial officers are engaged in government-sponsored judicial conduct – finding facts, interpreting and applying law, and deciding cases, empowered by and under the auspices of the State judicial system. Judicial arbitrators are deciding the substantive legal rights of the parties. That is a core basis for the First Amendment right of public access. *See Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (finding a right of public access to summary judgment motion papers, because a motion for summary judgment can affect the substantive legal rights of parties the same as a trial); *Republic of Philippines v. Westinghouse Elec. Corp*., 139 F.R.D. 50, 58 (D. N.J.), *stay denied*, 949 F.2d 653 (3rd Cir. 1991) (citing *Rushford*). *See also New York Civil Liberties Union*, 684 F.3d at 300 (where agency acts as an adjudicatory body imposing official and practical consequences on members of society, even with different procedures, agency is subject to rules applicable to courts); *Fitzgerald v. Hampton*, 467 F.2d 755, 764-67 (D.C. Cir. 1972) (where agency hears testimony, receives evidence and makes findings and binding recommendations affecting individual legal rights, agency acts in a quasi-judicial

capacity such that due process requires that hearing be open to the press and the public).

The core purposes behind the First Amendment right of access – to promote public confidence in the fairness of the judiciary, as well as the appearance of fairness – are thwarted when there is one class of parties having their cases being adjudicated in open court and another class having their disputes adjudicated behind closed doors.

F. THIS ARBITRATION IS A JUDICIAL FUNCTION.

Appellants latch on to language in the District Court opinion that judges may not engage in "non-judicial activities," and then go on to demonstrate how judges do engage in some non-adjudicative activities (such as rate setting, permitting, inspection, etc.) and suggest that, if arbitration is a "non-judicial" activity, it does not violate the separation of powers.

This is merely a semantic argument, because the District Court, in using the term "non-judicial activities," was distinguishing traditional adjudicative duties as a judge, as opposed to secret arbitrations.

Arbitration is form of adjudication, *see Adams*, 739 F.2d at 862 , and arbitrators are recognized as performing judicial or quasi-judicial functions. *E.g., Cahn v. Int'l Ladies Garment Union*, 311 F.2d 113, 114-15 (3rd Cir. 1962); *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062 (5th Cir. 1990);

Kirkwood v. Cal. State Automobile Ass'n Inter-Insurance Bureau, 122 Cal.Rptr.3d 480, 486 (Cal. App. 1st Dist. 2011); *Katz v. Uvegi*, 187 N.Y.S.2d 511, 517 (N.Y. Sup. 1959); *Cassara v. Wofford*, 55 So.2d 102, 105 (Fla. 1951).

Even if Delaware had chosen to create a "Delaware Department of Arbitration" in the executive or legislative branch, to use Appellants' example, as opposed to placing it within the judicial branch, this would not immunize it from the requirements of the First Amendment:

> changes in the organization of government do not exempt new institutions from the purview of old rules. Rather, they lead us to ask how the new institutions fit into existing legal structures. If, as the NYCTA suggests, government institutions that did not exist at the time of the Framers were insulated from the principles of accountability and public participation that the Framers inscribed in the First Amendment, legislatures could easily avoid constitutional strictures by moving an old governmental function to a new institutional location. Immunizing government proceedings from public scrutiny by placing them in institutions the Framers could not have imagined, as the NYCTA urges, would make avoidance of constitutional protections all too easy.
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> * * *
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> the principles governing adjudication do not lose validity when the adjudication moves to another branch of government. Indeed, as the Supreme Court has stated, "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960).

New York Civil Liberties Union, 684 F.3d at 299-300.

Whatever name one wants to put on the process, it still functions as a court, determining and affecting the substantive legal rights of the parties before it, and the process involved, adjudication of a commercial dispute, is of a type that has historically been open to the public.

G. THERE IS NO HISTORY OF JUDGES SERVING AS BINDING ARBITRATORS IN COURT-ADJUNCT PROCEEDINGS.

Appellants cite to ethics rules, statutes and case law to show that judges acting as arbitrators is not out of the ordinary. (AOB 43-52). A closer look at those authorities, however, shows that Appellants' sources are not always as advertised, and certainly do not evidence a meaningful history of judicial practice as arbitrators making binding decisions, much less in confidential government-sponsored proceedings. Appellee address Appellants' authorities by jurisdiction.

* California. Appellants cites Cal. Civ. Proc. Code §1141.18(a). That statute, however, grants authority only to *retired* judges to conduct arbitrations, which fact is emphasized by Cal. Civil Rule 3.814(a), which provides that, for court-sponsored arbitration, "[t]he panels of arbitrators must be composed of active or inactive members of the State Bar, retired court commissioners who were licensed to practice law before their appointment as commissioners, and retired judges." There is no reference to sitting judges. Moreover, the arbitration is non-binding with a right to trial *de novo*, Cal. Civil Rule 3.826, and the rules of at least

one California court expressly provide that court-adjunct arbitrations are not confidential. Super. Ct. L.A. County Civ. R. 3.260.

* Connecticut. Appellants cite Conn. Gen. St. §§51-193l - 51-193u. Nothing in those provisions says anything about arbitration. Section 52-549w authorizes "commissioners" to serve as arbitrators in small claims court. Such arbitrations are non-binding, §52-549z, and there is no provision for confidentiality. Moreover, in California, a "commissioner" is not a judicial offer, but simply a member of the bar. Conn. Gen. St. §51-85.

* District of Columbia. Appellants cite a court rule requiring a small claims court judge to "hold himself ready to serve as referee or arbitrator...." Appellants do not offer any evidence as to whether, in practice, such judges actually serve as arbitrators, whether such arbitrations are binding or nonbinding, and whether such arbitrations are kept confidential (there does not appear to be a rule permitting or requiring confidentiality).

* Georgia. Appellants cite an October 11, 2012 Order amending a Rule relating to a business court (established in 2005) which, at subsection 12, authorizes the judges to conduct non-binding arbitration. Such arbitration is not confidential. Ga. Fulton County R. 1000.

* Iowa. Appellants cite *Truitt v. Mackaman*, 144 N.W. 22 (Iowa 1913), which presented what the Iowa Supreme Court characterized as a "very peculiar

stipulation." *Id.* at 22. The plaintiff sued two defendants. The case was bifurcated and went to trial against the first defendant, with judgment in favor of the plaintiff. Thereafter, the plaintiff and the second defendant stipulated to have the case against the evidence in the first trial "submitted to the trial judge as arbitrator," with the decision being considered an arbitration decision. If the decision in the second case was in favor of the plaintiff, and the defendants fully performed within ten day, the case would be dismissed. If there was not full performance, judgment would be entered against the defendants. *Id.* at 23.

The trial court found in favor of the plaintiff against the second defendant. The defendants did not perform in ten days and judgment was entered against them. The defendants appealed. On appeal, the Iowa Supreme Court noted that "[t]he situation is a very peculiar one, but it is one of the parties' own voluntary making." *Id.* at 23. The Iowa Supreme Court treated the stipulation as a judgment by consent from which no appeal could lie, and dismissed the appeal. *Id.*

Appellee has a difficult time seeing how this case, involving proceedings in open court, supports Appellants' argument that sitting judges routinely sit as arbitrators.

* New York. Appellants cite an Opinion of the New York Advisory Committee on Judicial Ethics finding is no ethical restriction on a New York Supreme Court Justice serving as a volunteer arbitrator outside working hours in

New York's small claims courts. But there is no evidence that sitting judges serve as arbitrators in binding, confidential court-adjunct arbitration in any court.

Appellants also cite *In re Goulds Pumps, Inc.*, 841 N.Y.S.2d 219 (N.Y. Sup. 2007) (Table), which cites an ethics rule that "a[] full-time judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law." Again, appellants do not cite any record evidence that New York judges act as arbitrators in confidential court-adjunct binding arbitration.

In New York's Commercial Division, binding arbitration is expressly made non-confidential. N.Y. Commercial Division New York County Alternative Dispute Resolution Rule 6.

* North Carolina. Appellants point to N.C. Gen. Stat. §90-21.62 (relating to medical negligence cases), which provides that, if arbitrating parties fail to select an arbitrator, one is selected from a panel of "emergency superior court judges." Appellants fail to point our that Section 7A-45.2(a) of that same Code defines "emergency superior court judges" as *retired* judges, not sitting judges. *See also Dunn v. Canoy*, 636 S.E.2d 243, 249 (N.C. App. 2006) ("'[a] judge should not act as an arbitrator or mediator,'" *quoting* N.C. Code of Judicial Conduct, Canon 5(E)). Further, there is no evidence of confidentiality as to such arbitrations.

* Oregon. Appellants cite Oregon Uniform Trial Court Rule ("UTCR") 13.090(1), which permits retired and senior judges to serve as arbitrators. "Senior" judges are retired judges. Oregon Rev. St. §1.300(1). Moreover, arbitrations are subject to *de novo* review, and therefore are nonbinding. UTCR 13.250.

* West Virginia. Appellants point to the Code of Judicial Conduct for Administrative Law Judges, which permits such judges to serve as arbitrators under certain conditions. The provision does not indicate if it is referring to private or court-sponsored arbitration. Nor is there any evidence that such judges perform such roles, and whether such arbitrations are binding or non-binding, open or confidential.

* Wyoming. Appellants point to a provision of Wyoming's Code of Judicial Conduct, which provides that the ethical restrictions on judges acting as arbitrators do not apply to part-time judges. Again, Appellants offer no evidence that such judges actually as arbitrators in binding, confidential mediation.

* Federal Law. Appellants points out that, pursuant to the Alternative Dispute Resolution Act of 1998, Magistrate Judges can serve as arbitrators. There is no evidence of the extent to which Magistrate Judges are actually serving as arbitrators. In any event, such arbitrations are non-binding with a right to trial *de novo*. 28 U.S.C. §657(a).

* International Tribunals. Appellants point to a few instances in American history where Justices of the U.S. Supreme Court served as arbitrators in international tribunals. Of course, this says nothing about the practice in the United States. Moreover, the First Amendment does not apply to tribunals sitting in other countries.

* Judges Acting As Private Arbitrators. Appellants cite to John T. Morse, Jr., *The Law of Arbitration and Award* (1872), to suggest that it was common practice historically for sitting judges to serve as arbitrators. Apart from the serious question as to the legitimacy of the general claim based on the authorities cited in the treatise[17] and the lack of evidence of how common any such practice actually was, this reference is inapposite because the author's statement

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[17] In *Dinsmore v. Smith*, 17 Wis. 20, 1863 WL 1095 (Wis. 1863), *overruled in part by Hills v. Passage*, 21 Wis. 294, 1867 WL 1693 (Wis. 1867), there is no reference to arbitration at all. The issue was whether the parties stipulated to having the judge act as a referee (akin to a special master) and the effect of that action. In *Walworth County Bank v. Farmers' Loan and Trust Company*, 22 Wis. 231, 1867 WL 1759 (Wis. 1867), the Wisconsin Supreme Court stated that an improper reference to a judge acts as a discontinuance of the legal action and a submission to private arbitration. There was no discussion of court-adjunct arbitration or whether it was confidential. In *Davis v. Forshee*, 34 Ala. 107, 1859 WL 657 (Ala. 1859), there was no reference to a judge acting as arbitrator, only that five arbitrators were selected by the Clerk of the Court. In *Galloway's Heirs v. Webb*, 3 Ky. 318, 1808 WL 744 (Ky. App. 1808), a statute authorizing "any person, or persons" was interpreted as permitting judges to serve as private arbitrators. That statute applied to extrajudicial arbitrations. Carli N. Conklin, *Transformed, Not Transcended: The Use of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 American Journal of Legal History 39, 48 (Jan. 2006).

refers to the ability of judges to be employed as private arbitrators outside the judicial system.

By contrast, the Statute authorizes judges to act as "arbitrators" as part of a public judicial system, sponsored and administered by the State judicial system, performed in a courthouse, with the result binding as a judgment of a court without the need for court confirmation. Thus, the cited authority does not help establish a history of government-sponsored judge-as-arbitrator secret litigation/arbitration.

H. APPELLANTS' EXPERIENCE AND LOGIC ANALYSIS IS FLAWED.

1. Experience.

Appellants' "experience" analysis provides an extensive look at the history of private arbitration, demonstrating that such arbitration has not historically been open to the public. While this may be so, it is beside the point. It is no great revelation that the public has not had a right of access to private institutions historically, as private businesses generally have no First Amendment obligations. *Columbia v. Pollak*, 343 U.S. 451, 461 (1952).

The real question is whether the public has had a right of access to comparable proceedings in public institutions. Just as government cannot avoid First Amendment responsibilities by moving functions from one institution to another, *New York Civil Liberties Union*, 684 F.3d at 299, neither can government

avoid its constitutional obligations by assuming a function traditionally performed by the private sector. *See Kramer v. New Castle Area Trans. Auth*., 677 F.2d 308, 309 (3rd Cir. 1982) ("[s]tates are not free to assume functions historically performed by the private sector and thereby insulate those activities from federal regulation of interstate commerce").

In this case, the judicial system is the comparable public institution, and civil trials of commercial disputes is the analogous proceeding. As demonstrated above, the Third Circuit (among others) has recognized a long, rich tradition of openness of civil proceedings. *U.S. v. Smith*, 776 F.2d 1104, 1109 (3rd Cir. 1985) ("[w]e have also found that these societal interests and a long history of public access mandated recognition of a First Amendment right of access to civil trials"); *Publicker Industries, Inc.*, 733 F.2d at 1068-70.

2. <u>Logic.</u>

The case law establishes that public access to our judicial system is essential to several fundamental constitutional interests:

(1) Public access to courts promotes free discussion of governmental affairs by imparting a more complete public understanding of and respect for the judicial system. *Richmond Newspapers, Inc.*, 448 U.S. at 571-73, 577 n.12; *Publicker Industries, Inc.*,733 F.2d at 1070.

(2) Public access gives the assurance that the proceedings are conducted fairly to all concerned. *Richmond Newspapers, Inc.*, 448 U.S. at 569-70; *Publicker Industries, Inc.*, 733 F.2d at 1069-70; and

(3) Public access serves as a check on corrupt practices by exposing the judicial process (including the conduct of judges, lawyers and witnesses) to public scrutiny. *Richmond Newspapers, Inc.*, 448 U.S. at 570; *Publicker Industries, Inc.*,733 F.2d at 1069-70.

In addition to damaging those interests, secret judicial arbitration for businesses can foster suspicion that the law and justice apply differently, with one set of rules (substantive and procedural) and secret justice for wealthy companies, and another set of rules for the rest. Indeed, the very fact that arbitration decisions are, as Appellants and *amici* point out, ad hoc and non-precedential only emphasizes the importance of making the proceedings public, so the public is reassured that judges are applying the rules even-handedly and fairly for all. Without that check on the process, the public can lose confidence in the judicial process. *See Publicker Indus., Inc.*, 733 F.2d at 1070; *New York Civil Liberties Union*, 684 F.3d at 302-03.

3. Public Access Will Not Undermine the Viability of Arbitration.

Appellants and *amici* argue that the absence of confidentiality will prevent such proceedings from functioning. This is erroneous. The proceeding can function perfectly well. Indeed, it is recognized that openness enhances the quality and safeguards the integrity of the fact-finding function. *Publicker Industries, Inc.*, 733 F.2d at 1070.

It is the *marketability* of the Delaware program with which Appellants are truly concerned – they fear companies will not want to use it because it denies them confidentiality, notwithstanding all of the other benefits.

As for confidentiality, those matters listed by Appellants – trade secrets and other closely-held information – can be and are protected from disclosure in public litigation. *See Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3rd Cir. 1988); *Publicker Indus., Inc.*, 733 F.2d at 1071.

This leaves the fact that some parties simply do not want their dirty laundry aired in public. In that case, there is a plethora of private arbitration options available, including retired judges. Appellants may complain that this denies them the competitive advantage of trading on their reputation. However, the desire to monetize courts and the judiciary is not and should not be a value the Constitution recognizes or upon which our society should rest.

The flaw in the argument of Appellants and *amici* is that they focus on the narrow perspective of those with self-interests in seeing the program exist – the State of Delaware wants revenues it imagines will result from the proceeding, and the business community wants the expertise of the Court of Chancery without being subjected to public scrutiny. Of course, many civil and criminal litigants would also prefer that they not be subjected to public scrutiny.

The issue of the role which openness plays in the proceeding, however, is determined not from individual perspectives but from the perspective of society as a whole. *See Globe Newspaper Co.*, 457 U.S. at 606. As one Court has stated:

> As articulated by the Supreme Court in *Press-Enterprise II*, the "logic" prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." In assessing this prong, courts generally weigh three considerations: whether public access to a particular proceeding will (1) promote the actual adjudicative function of the proceeding; (2) improve the public's perception of and reaction to such proceedings; and (3) enhance democracy in general by allowing for the public to participate in the free discussion of governmental affairs.

New York Civil Liberties Union v. New York City Transit Authority, 675 F.Supp.2d 411, 434 (S.D.N.Y. 2009), *aff'd*, 684 F.3d 286 (2nd Cir. 2012). *See also Capital Cities Media, Inc. v. Chester,* 797 F.2d 1164, 1177 (3rd Cir. 1986) (Adams, J., concurring) (characterizing the "logic" test as being whether "access would enhance the functioning of the democratic process").

The cases law makes abundantly clear that openness of adjudications enhances the fact-finding process, promotes public confidence in government institutions and allows the public insight into the workings of justice. That some people may be deterred from using the procedure, and may elect to use private arbitration instead, simply does not enter into the calculus.[18]

As the Seventh Circuit stated:

> Many a litigant would prefer that the subject of the case - how much it agreed to pay for the construction of a pipeline, how many tons of coal its plant uses per day, and so on - be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing. People who want secrecy should opt for [private] arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property, and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible. What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step

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[18] *Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 854 F.2d 900 (6th Cir. 1988), cited by Appellants, is inapt because, unlike the proceeding at bar, that case involved a non-binding advisory process designed to facilitate settlements which did not finally establish the legal rights of the parties, and so was found not to be sufficiently analogous to a trial to implicate the logic and experience conclusions associated with civil trials. *Id.* at 904.

Cincinnati Enquire v. Cincinnati Bd. of Educ., 249 F.Supp.2d 911, 917 (S.D. Ohio 2003), is also inapplicable, as that case did not involve access to judicial proceedings or records, but rather resumes of candidates for political office in the possession of the candidates themselves, and not the government.

> that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.

Union Oil Co. of California v. Leavell, 220 F.3d 562, 567-68 (7th Cir. 2000).

For these reasons, contrary to the argument of *amici*, upholding the decision of the District Court will not impair the public good. Absent the Statute (or the confidentiality provision thereof), the public will not lose anything it did not have before. Binding arbitration will still be available, either privately (with confidentiality) or court-adjunct (without confidentiality). For private arbitration, there will still be lawyers and former judges who are experts in corporate and business law who will be available to serve as arbitrators, thereby helping the general economy. Parties will be free to negotiate venue, including a provision keeping any proceedings in the United States, if they so wish.[19]

The only thing the public will not have is confidential binding arbitration run by sitting judges, whose function is to do the people's business. *See Glaxo Group, Ltd. v. Leavitt*, 481 F.Supp.2d 437, 438 (D. Md. 2007) ("this court is a public institution doing the public's business"); *Laker Airways Ltd. v. Pan American*

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[19] *Amici* suggest that, if the Statute is overturned, businesses will take their dispute resolution business overseas. They do not explain why businesses would find foreign arbitration or litigation more attractive than American private arbitration, or why they believe businesses would find foreign tribunals more expert in American (more specifically, Delaware) law than American tribunals.

Airways, 559 F.Supp. 1124, 1128 n.16 (D. D.C. 1983), *aff'd*, 731 F.2d 909 (D.C. Cir. 1984) ("the courts' business is the peoples' business").

"The courts, legislature, administrative agencies, and the state, county and municipal governments should be ever mindful that theirs is public business and the public has a right to know how its servants are conducting its business." *Sheridan Newspapers, Inc. v. City of Sheridan*, 660 P.2d 785, 791 (Wyo. 1983).

4. Delaware's Economic Interest in Keeping the Procedure is Not A Valid Consideration.

Appellants candidly admit that a primary motivator for this procedure is Delaware's desire to maintain revenue streams it believes will result from arbitrations under the Statute. Appellants and *amici* go even further and suggest that the program is necessary to support states and their judicial branches struggling with limited funds.

A State's economic interest in generating revenue does not outweigh the public's rights under the First Amendment. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 573, 586 (1983) (raising tax revenue is not sufficient ground for impairing First Amendment rights); *Villejo v. City of San Antonio*, 485 F.Supp.2d 777, 783 (W.D. Tex. 2007) ("[t]he desire to secure a city's funding is, of course, not a compelling interest that would justify the suppression of its employees' First Amendment speech and associational rights");

Church on the Rock v. City of Albuquerque, 84 F.3d 1237, 1280 (10th Cir. 1986) ("[a] city or state's desire for federal funds is not a compelling government interest" justifying restriction of First Amendment rights); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 61 (Colo. 1991) ("[e]conomic necessity, however, cannot provide the cover for government-supported infringements of speech").

Similarly, the fact that business interests might want such procedures is not a relevant concern, much less an overriding interest. "[A]dmirable, even desirable goals are not always consistent with constitutional limitations; in such cases, we are bound to follow the constraints of the Constitution." *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Div.*, 227 F.3d 627, 642 (6th Cir. 2000), *modified on other grounds on rehearing en banc*, 276 F.3d 808 (6th Cir. 2002).

No court has held that public rights under the First Amendment may as a blanket rule be extinguished by commercial and/or economic interests. This Court should not be the first to do so.

I. THE COURT SHOULD NOT DEFER TO THE LEGISLATURE IN DECIDING WHETHER THE FIRST AMENDMENT RIGHT OF ACCESS APPLIES.

Appellants, relying on *First Amendment Coalition*, argue that the Court should defer to the Delaware Legislature's determination as to whether secret judicial arbitration proceedings should be open to the public.

"Deference to legislative findings cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 436 U.S. 829, 843 (1978). Indeed, deference to the Legislature is inconsistent with the fact that the burden is on the party seeking confidentiality to justify it. *A.D.*, 28 F.3d at 1357 ("the proponent of a legislatively imposed denial of access in a stipulated category of cases, where the trial judge is not free to weigh the competing interests on a case-by-case basis, has a difficult burden to carry"); *Publicker Industries, Inc.*, 733 F.2d at 1071.

There are no cases holding that, if a First Amendment right of access applies to a judicial proceeding, such right can be deferred by legislative enactment. *First Amendment Coalition* involved a case where this Court found there was no First Amendment right of action at the point requested, as it was investigative and not adjudicatory, and assuming, but not deciding, that access was required at some later point in the proceeding, deferred to the determination of the Pennsylvania Legislature as to the proper point, given the overriding interests justifying secrecy.

Here, there are no overriding interests justifying secrecy. Moreover, civil adjudicatory proceedings (which were not involved in *First Amendment Coalition*) are presumptively open from the beginning. There is no history of secrecy of civil proceedings at any stage.

J. FINDING THE DELAWARE STATUTE UNCONSTITUTIONAL WILL NOT AFFECT COURT-ADJUNCT ARBITRATION PROGRAMS IN OTHER JURISDICTIONS.

Finally, Appellants cite a variety of ADR statutes and rules of court from other jurisdictions, and claim that finding the Delaware statute unconstitutional will have dire consequences as to those other court-adjunct programs. This is pure hyperbole.

As demonstrated below those programs will not be affected because (1) sitting judges do not serve as arbitrators in those programs, either by statute, rule of court or Code of Judicial Ethics, and/or (2) the statutes and court rules for those ADR programs do not provide for confidentiality, and/or (3) the arbitration programs are non-binding with a right to trial *de novo*, which does not implicate the same concerns (*see* footnote 11 at p. 11).

Apart from and in addition those reasons (set forth in more detail below), there is simply nothing in the record to indicate that, like the Delaware Statute, the employment of sitting judges as arbitrators is necessary to the success or viability of those other programs. The whole point of the Statute is that people get the benefit of the renowned expert judges of the Court of Chancery. No other ADR program is founded on such a basis.

The following is a summary response to each jurisdiction identified by Appellants in their opening brief, starting with a citation to the statute or rule of court cited to and relied upon by Appellants.

* Arizona (Ariz. Rev. St. §12-133): There is no identification in this statute of sitting (or any) judges acting as arbitrators, or of confidentiality. Section H of the statute provides for trial *de novo*, so the arbitration is non-binding.

* California (Cal. Civ. Proc. Code §1141.10-28): There is no provision for confidentiality. Pursuant to §1141.20(a), there is a right to trial de novo, and so the arbitration is nor binding. There is nothing indicating in practice that sitting judges actually serve as arbitrators.

* Colorado: Colorado does not appear to have a statewide court-adjunct arbitration program. Appellants cited a website of the Office of Dispute Resolution of the Colorado 4th Judicial District, which states that "[t]he Arbiter is usually a lawyer with experience and training in the area of the dispute." Nothing indicates that judges serve as arbitrators, much less in confidential, binding arbitration.

* Connecticut (Conn. Gen. Stat. §52-549u-aa): There is no indication that judges serve as arbitrators (*see* §52-549p, §52-549w). There is a right to trial de novo (§52-549z) so arbitration is non-binding. There is no statutory provision for confidentiality.

* District of Columbia (D.C. Civ. Arb. R. I-XB): There is no indication that judges serve as arbitrators (D.C. Civ. Arb. R. 3), and there is no statutory right to confidentiality.

* Florida (Fla. St. §§44.103-.108): There is no indication that judges serve as arbitrators. There is no statutory right to confidentiality.

* Georgia (Fulton County Local Rule 30, also appearing in Local Rule 1000): This Local Rule does not identify who may serve as an arbitrator and does not provide for confidentiality. It does provide for *de novo* review, making the arbitration non-binding. Rule 1000 of the Local Procedures of the Atlanta Judicial Circuit provides that "[n]on-binding arbitration is not confidential."

* Hawaii (Haw. Rev. St. §601-20): Section (a) of the statute states that arbitration is non-binding. *See also* Hawaii Arbitration Rule 22. Hawaii Arbitration Rule 10 states that arbitrators will be lawyers (no reference to judges). There is no provision for confidentiality.

* Illinois (Ill. Sup. Ct. R. 86-95): Illinois Supreme Court Rule 87(a) limits arbitrators to lawyers and retired judges. This is consistent with Illinois Code of Judicial Conduct Canon 5(E), which states that "[a] judge should not act as an arbitrator or mediator." There is no provision for confidentiality.

* Indiana (Ind. R. of Ct., Rules for ADR): Rule 3.3 refers to lawyers, not judges, as arbitrators.

* Kansas (Kan. Stat. §5-509(a)): The cited statute makes no specific reference to arbitration, but only to a "settlement conference or a non-binding dispute resolution process...." There is no indication as to the role sitting judges play in the process.

* Maine (Me. R. Civ. P. 16(B)(d)(1)): Rule 16(B)(d)(1) provides for non-binding arbitration. According to Maine Rev. St. §18-B(2), ADR providers are not employed by the State (which therefore excludes sitting judges).

* Massachusetts (Mass. Sup. Ct. Jud. Ct. R. 1:18): Under Rule 1:18, sitting judges do not serve is arbitrators. S.J.C.R. 1:18, Frequently Asked Questions.

* Minnesota (Minn. Stat. §484.74 - .76): Arbitration is non-binding. Minn. Stat. §484.73 subd. 1. There is no evidence that sitting judges serve as arbitrators.

* Missouri (Mo. Sup. Ct. R. 17.04): Arbitration is non-binding. Mo. Supr. Ct. R. 17.01(b)(1). Nothing in the Missouri rules identifies judges as arbitrators or provides for confidentiality or binding arbitration.

* Nevada (Nev. Rev. Stat. §38.250): Nothing in the Nevada law identifies judges as arbitrators.

* New Hampshire (N.H. Super. Ct. R. 170): Nothing in the New Hampshire rules identifies sitting judges as arbitrators.

* New Jersey (N.J. Stat. §39:6A-24): Pursuant to New Jersey Code of Judicial Conduct Canon 5(F), sitting judges may not act as arbitrators. Arbitrators may be lawyers or retired judges. N.J. Stat. §§2A:23A-22, 39:6A-27 . There is a right to trial *de novo* so arbitration is non-binding. N.J. Stat. §§2A:23A-28, 39:6A-31.

* New Mexico (N.M. R. Arb. Local Rule 2-601-603): Nothing in New Mexico law identifies sitting judges as arbitrators. There is a right to trial *de novo*, making the award non-binding. N.M. Stat. LR 603, sec. VI(C)(2).

* New York (N.Y. Rules of the Chief Judge art. 28): Section 28.4 identifies lawyers (not judges) as arbitrators. There is a right to trial *de novo* and so arbitration is not binding. Sections 28.11, 28.12. Section 28.16 allows "judicial hearing officers" to hear arbitrations, but "judicial hearing officers" are defined as former (not sitting) judges. N.Y. Rules of the Chief Administrative Judge, Rule 122.1. In New York's Commercial Division, binding arbitration is expressly made non-confidential. N.Y. Commercial Div. New York County Alternative Dispute Resolution Rule 6.

* North Carolina (Rules of Court-Ordered Arbitration in N.C.): North Carolina Code of Judicial Conduct Canon 5(F) provides that "[j]udges should not act as arbitrators." Nothing in the North Carolina arbitration rules contradicts that.

* North Dakota (N.D. Cent. Code §32-29.3): The statute to which Appellants cited applies to traditional private arbitration agreements, not court-adjunct arbitration. North Dakota Supreme Court Rule 8.8 encourages ADR, refers expressly to non-binding arbitration as a form of ADR, and expressly rejects binding arbitration as a form of ADR. Rule 8.9, relating to the roster and qualification of arbitrators, does not include judges.

* Oregon (Or. Rev. Stat. §36.400-36.425): There is no provision identifying judges as arbitrators. Unlike the Oregon mediation rules, there is no provision for confidentiality. Oregon arbitrations are non-binding and subject to trial *de novo*. *Id.* § 36.425.

* Pennsylvania (Pa. R. Civ. P. 1301-13): Pennsylvania Code of Judicial Conduct Canon 5(E) provides that "[j]udges should not act as an arbitrator or mediator," and nothing in the statutes or rules appears to authorized judges sitting as arbitrators. Pennsylvania Rule of Civil Procedure 1302 identifies attorneys "actively engaged in the practice of law," not judges, as arbitrators, and Rule 1311 provides for trial *de novo*, and so arbitration is non-binding. There is no rule or statute mandating confidentiality.

* Rhode Island (R.I. Stat. §8-6-5): Section 8-6-5 authorizes non-binding arbitration. There is no indication that judges sit as arbitrators, or that there is mandatory confidentiality.

* South Carolina (S.C. ADR rules): Nothing in the ADR rules refers to sitting judges serving as arbitrators, and there is nothing indicating that sitting judges are serving as arbitrators.

* Tennessee (Tenn. Ct. R. 31): Arbitrations are non-binding. Rule 31, Section 2(n), Section 3(d). There is no reference to judges serving as arbitrators.

* Federal (Alternative Dispute Resolution Act of 1998): Since any party to arbitration under the ADR Act may seek trial *de novo*, 28 U.S.C. §657(c), it is a non-binding advisory process.

Thus, Appellants' suggestion that other ADR programs will be affected by affirming the District Court's ruling is baseless.

CONCLUSION

WHEREFORE, for the foregoing reasons, appellee Delaware Coalition for Open Government, Inc. respectfully requests that this Court affirm the decision of the District Court, and remand the matter back to the District Court to address a supplemental fee application.

Respectfully submitted,

/s/ David L. Finger

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Dated: January 7, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Third Circuit LAR 31.1(c), the undersigned counsel for plaintiff-below/appellee certifies that this electronic brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 12,784 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii);

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it was prepared using Corel WordPerfect X6 and is set in 14-point sized Times New Roman font;

(iii) is identical to the ten hard copies sent to the Clerk of the Court on January 7, 2013 via FedEx overnight service; and

(iv) has been scanned with a virus detection program and no virus was detected.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or a copy of the word or line printout.

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THIRD CIRCUIT LAR 28.3(d) CERTIFICATION

Pursuant to Third Circuit LAR 28.3(d), the undersigned counsel for plaintiff-below/appellee certifies that he is a member of the Bar of this Court.

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CERTIFICATE OF SERVICE

I, David L. Finger, certify that on this 7th day of January, 2013, I caused the foregoing Answering Brief to be filed with the Court electronically via CM/ECF, which caused electronic notice thereof to be sent to the below-listed participants:

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Addendum

Exhibit A

Not Reported in A.3d, 2012 WL 5359296 (Del.Ch.)
(Cite as: 2012 WL 5359296 (Del.Ch.))

H
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware,
New Castle County.
Re: ISRAEL DISCOUNT BANK OF NEW YORK
v.
FIRST STATE DEPOSITORY COMPANY, LLC.

Civil Action No. 7237–VCP.
Submitted: Oct. 8, 2012.
Decided: Oct. 31, 2012.

Paul D. Brown, Esq., Joseph B. Cicero, Esq., Ann M. Kashishian, Esq., Cousins Chipman & Brown, LLP, Wilmington, DE.
Beth Moskow–Schnoll, Esq., David A. Felice, Esq. Ballard Spahr LLP, Wilmington, DE.

DONALD F. PARSONS, JR., Vice Chancellor.

***1** Dear Counsel:

On April 16, 2012, Certified Assets Management, Inc. ("CAMI") and First State Depository Company, LLC ("FSD" or, collectively with CAMI, "Defendants") moved to dismiss Israel Discount Bank of New York's ("IDB" or "Plaintiff") complaint for breach of contract and conversion of property (the "Complaint") on the grounds that this Court lacked subject matter jurisdiction and that the Complaint failed to state a claim upon which relief can be granted. In a Memorandum Opinion dated September 27, 2012, I denied Defendants' motion to dismiss (the "Opinion"). On October 8, Defendants filed an application for certification of an interlocutory appeal of the ruling and order set forth in the Opinion. IDB opposed the application in a memorandum filed on October 18. For the following reasons, I find that the application does not meet the criteria for certification under Delaware Supreme Court Rule 42. Therefore, I deny Defendants' application.

I. PARTIES' CONTENTIONS

In its application, Defendants assert that this Court lacks subject matter jurisdiction because the parties committed to submit to binding arbitration any dispute over the collateral at issue in this case. Specifically, they argue that IDB's rights to the collateral arise from Collateral Custody Account Agreements ("CCAAs") and that these CCAAs contain an arbitration provision that requires the parties to arbitrate this dispute. Defendants further contend that a letter signed by IDB, FSD, and Republic, which sets forth IDB's rights to direct FSD's conduct with regard to the collateral (the "Bailment Agreement"), [FN1] does not change the parties' obligation to arbitrate this dispute for at least two reasons. First, Defendants emphasize that the Bailment Agreement was dated and executed on the same day as two CCAAs. As a result, they argue that it must be evaluated as but one part of a series of agreements binding the parties to the CCAAs' arbitration provision and to their safe harbor and exculpation provisions. Relatedly, Defendants aver that if the Bailment Agreement is viewed as a freestanding agreement, it would fail for lack of consideration. For these reasons, Defendants ask this Court to certify an interlocutory appeal of the order embodied in the Opinion to allow the Supreme Court to consider these arguments and potentially preserve their claimed right to arbitration.

> FN1. Defendants style the Bailment Agreement as the "Bailee Letter." The agreement was indeed in letter form. The letter sets forth an agreement between FSD, Republic, and IDB regarding the storage at FSD's depository of assets in which IDB has a security interest. The four-page letter includes four signature fields. It is signed by two representatives of IDB, "Confirmed" by a representative of Republic, and "Acknowledged and Agreed to" by a representative of FSD. The document is, therefore, an executed agreement. Accordingly, this Court referred to it in the Opinion, and refers to it herein, as the "Bailment Agreement" or the "Agreement."

IDB opposes the application on the ground that the Opinion is not subject to interlocutory review under Delaware Supreme Court Rule 42. Plaintiff also contends that, with trial scheduled to begin in a few

weeks on November 19, 2012, Defendants will not be prejudiced if they must wait to seek an appeal until after this Court's post-trial ruling, if an appeal is necessary at that time.

II. ANALYSIS

The standard for certification of an interlocutory appeal to the Supreme Court is set forth in its Rule 42(b). No interlocutory appeal will be certified by the trial court or accepted by the Supreme Court unless the order of the trial court determines a substantial issue, establishes a legal right, and meets one of five additional criteria enumerated in Rule 42.[FN2] The Supreme Court only will accept an application for interlocutory appeal in extraordinary or exceptional circumstances.[FN3] To obtain leave to pursue an interlocutory appeal, a party must apply in the first instance to the trial court and must subsequently apply to the Supreme Court.[FN4] The Supreme Court will decide to accept or deny the application in its sole discretion, but it may consider as one factor in exercising this discretion the trial court's decision on whether to certify the appeal.[FN5] When considering whether to certify an interlocutory appeal, the trial court must balance the interests of advancing potentially case-dispositive issues against the additional burden of fragmentation and delay that interlocutory review can create.[FN6]

FN2. Supr. Ct. R. 42(b)(i)-(v).

FN3. *See Wilm. Sav. Fund Soc'y, FSB v. Covell*, 577 A.2d 756, 1990 WL 84687, at *1 (Del. May 16, 1990) (TABLE); *see also* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 14.04, at 14–5 to –6 (2012).

FN4. Supr. Ct. R. 42(c), (d).

FN5. Supr. Ct. R. 42(d)(v).

FN6. *See Castaldo v. Pittsburgh–Des Moines Steel Co.*, 301 A.2d 87, 87 (Del.1973); *see also In re Pure Res., Inc.*, 2002 WL 31357847, at *1 (Del. Ch. Oct. 9, 2002).

A. Substantial Issue

***2** An order of the trial court determines a "substantial issue" when it addresses the merits of the case.[FN7] As the Supreme Court has explained:

FN7. *Castaldo*, 301 A.2d at 87.

> Generally speaking, the substantive element of the appealability of an interlocutory order must relate to the merits of the case.... This is essential to the limitation of appeals and the avoidance of fragmentation of cases necessary to the efficient operation of our system.[FN8]

FN8. *Id.*

Defendants argue that the Opinion addresses the merits of this case in two ways. First, Defendants assert that the Opinion determined that the CCAAs and the Bailment Agreement can and should be read separately. Second, Defendants argue that the Court's denial of their motion to dismiss based on the lack of any consideration supporting the Bailment Agreement was misplaced because the Court improperly relied on past consideration to support FSD's obligations under the Bailment Agreement.

Defendants contend that the CCAAs and the Bailment Agreement should not be read separately because the agreements were executed on the same day, they share as a subject matter collateral pledged to IDB and stored at FSD's depository, and they have certain parties in common. Specifically, FSD, Republic National Business Credit LLC ("Republic"), and CAMI are parties to the CCAAs; and FSD, Republic, and IDB are parties to the Bailment Agreement. Additionally, through its lending relationship with Republic, IDB is an express third-party beneficiary of the CCAAs. The parties to each of the CCAAs agreed to arbitrate "any controversy or claim arising out of or in connection with this Agreement." [FN9] The CCAAs also contain safe harbor and exculpation provisions designed to protect FSD.[FN10] The parties to the Bailment Agreement, however, did not agree to arbitrate claims arising out of that agreement or to protect FSD with safe harbor and exculpation provisions.

FN9. Defs.' Appl. for Certification of Interlocutory Appeal 2.

FN10. *Id.* at 4.

The Supreme Court and this Court repeatedly

have found that determinations of arbitrability do not relate to the merits of a claim and, thus, do not establish a substantial issue under Rule 42.[FN11] This is because the parties' rights "**will be adjudicated as efficiently**, **promptly and economically in Delaware courts as they would be in** [ ] **arbitration were** [**Defendants**] **subject to that process**." [FN12] In this regard, "the issue of whether [plaintiff's] claims should be heard in arbitration or this [C]ourt does not go to the actual merits of those claims." [FN13] Accordingly, my determination that IDB's claims are not subject to arbitration is not sufficient to meet the "substantial issue" prong of Rule 42.

FN11. *See TowerHill Wealth Mgmt., LLC v. Bander Family P'ship, L.P .*, 2008 WL 4615865, at *2 (Del. Ch. Oct. 9, 2008) (noting that the Supreme Court repeatedly has denied attempts to appeal from unfavorable rulings on arbitrability and collecting cases).

FN12. ***Fitzgerald v. Prebon Sec. (USA) Inc.*, 1999 WL 135241, at * 2 (Del. Ch. Feb. 25, 1999)**.

FN13. *TowerHill*, 2008 WL 4615865, at *2.

I also find unpersuasive Defendants' argument that the Opinion determined a substantial issue because it erroneously decided that this dispute was not subject to the CCAAs' arbitration provision because the dispute arose under the Bailment Agreement, which does not have an arbitration clause. Specifically, Defendants argue that the Bailment Agreement would fail for lack of consideration if it is construed as a standalone agreement and, therefore, provides no basis for avoiding the arbitration provision in the CCAAs. I concluded, however, that the Bailment Agreement is supported by sufficient consideration. Defendants evidently contend that that decision relates to the merits of this case and, hence, establishes a "substantial issue" under Rule 42. Admittedly, the existence of the Bailment Agreement plays a central role in this dispute. The merits of the underlying claims, however, are based both on Defendants' alleged breach of the Bailment Agreement by unlawfully releasing collateral without IDB's authorization and on their alleged conversion of the collateral. This case, therefore, would proceed beyond Defendants' motion to dismiss even if the Bailment Agreement were not considered independently of the CCAAs. Thus, the Court's ruling that the Bailment Agreement is supported by consideration does not create an extraordinary or exceptional circumstance that would support certification of Defendants' proposed interlocutory appeal.

***3** Furthermore, for this Court to certify Defendants' application, Defendants also must show that the Opinion established a legal right and that one of five additional criteria specified in Rule 42(b) exists here. For the following reasons, I find that Defendants have not met either of those requirements.

B. Legal Right

An order of the trial court establishes a legal right if it relates to the merits of the action or creates or diminishes the parties' rights with respect to the underlying substantive issues.[FN14] Defendants argue that the Court established a legal right by ruling that IDB has the right to pursue its claims in court rather than through arbitration and by, according to Defendants, determining that CAMI has no rights or remedies under the CCAAs. As noted above, determinations of arbitrability do not address the merits of a case. Moreover, the Opinion did not create or diminish CAMI's rights under the CCAAs. Indeed, it did not rule on CAMI's rights under the CCAAs. Rather, the Opinion made the narrow finding that certain provisions of the CCAAs, most notably the arbitration provision, do not apply to the separate Bailment Agreement. With regard to CAMI, the only claim IDB asserts is for conversion and the Court ruled in the Opinion that "IDB conceivably can prove a set of facts consistent with the allegations in the Complaint that would support a conversion claim against Defendants FSD and CAMI." [FN15] By denying Defendants' motion to dismiss, the Court postponed a final resolution of the parties' legal rights under the various agreements in this case and of Defendants' potential liability on a conversion theory until the Court has a more fully developed record before it. Therefore, the Court did not establish a legal right under Rule 42.

FN14. *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1991 WL 215621, at *1 (Del. Ch. Sept. 25, 1991).

FN15. *Israel Discount Bank of N.Y. v. First State Depository Co.*, 2012 WL 4459802, at *13 (Del. Ch. Sept. 27, 2012) (citations omitted).

C. The Five Additional Criteria

Because I conclude that the Opinion does not establish a legal right, whether Defendants' application also meets one of the five additional criteria enumerated in Rule 42 is inconsequential. Nevertheless, I have considered the three additional criteria that Defendants argue support their application and find that none of them warrant certification of an interlocutory appeal in this instance. First, Defendants argue that the Opinion sustained the controverted jurisdiction of the trial court. The Opinion held that this Court, and not an arbitrator, has subject matter jurisdiction over this dispute. The Supreme Court, however, repeatedly has refused to accept interlocutory appeals from unfavorable rulings as to the arbitrability of a dispute.[FN16] Second, Defendants assert that the Opinion addressed a novel and original legal issue that has yet to be addressed under Delaware law. I disagree. In the Opinion, the Court straightforwardly applied settled Delaware caselaw on motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Lastly, Defendants contend that granting the application would serve considerations of justice. To the contrary, trial in this relatively expedited matter is scheduled to begin in approximately three weeks and this Court has expended considerable time and resources steering this dispute to trial. Considerations of justice, therefore, weigh against delaying trial to accommodate an interlocutory appeal. A post-trial decision on the merits appears likely to be available in the relatively near future. At that point, Defendants can pursue an appeal to the Supreme Court if they deem it appropriate.

FN16. *See* *TowerHill*, 2008 WL 4615865, at *2.

III. CONCLUSION

***4** For the reasons stated in this Letter Opinion, I find that the requirements to obtain certification of interlocutory appeal to the Supreme Court are not present in this case and that no extraordinary or exceptional circumstances exist to support an immediate appeal from this Court's Opinion denying Defendants' motion to dismiss. Accordingly, I deny Defendants' application for certification of an interlocutory appeal.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr. Vice Chancellor

Del.Ch.,2012.
Israel Discount Bank of New York v. First State Depository Co., LLC
Not Reported in A.3d, 2012 WL 5359296 (Del.Ch.)

END OF DOCUMENT

Exhibit B

Not Reported in A.2d, 1999 WL 135241 (Del.Ch.)
(Cite as: 1999 WL 135241 (Del.Ch.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
CANTOR FITZGERALD, L.P., Plaintiff,
v.
PREBON SECURITIES (USA) INC., Defendant.

No. 16769.
Feb. 25, 1999.

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ORDER

STEELE, V.C.

***1** On February 17,1999, Chambers received Prebon Securities (USA) Inc.'s ("PST") application "For Certification of Interlocutory Appeal" from this Court's Memorandum Opinion and Order of February 8, 1999 ("Opinion"). On February 18, 1999, Cantor Fitzgerald, L.P. ("CFLP") responded to and opposed the application.

This 24th day of February, 1999, the following Order refusing to certify the interlocutory appeal is entered for the following reasons:

1. Rule 42 of the Supreme Court requires an application for interlocutory appeal to satisfy the Court that the ruling below:

(a) determines a substantial issue; and

(b) establishes a legal right.

2. There are no exceptional circumstances, urgent or important reasons for considering this Court's ruling denying a routine motion to dismiss or stay a Delaware action in favor of arbitration under a private agreement to which the plaintiff in the Delaware action is not a party.

3. The February 8th Order denied a motion to dismiss or stay Delaware litigation in favor of arbitration in New York arising from a private industry arbitration agreement to which only the defendant in this action was a party. The Order neither addressed a substantive issue in dispute between the parties nor established any legal right.

4. No criteria under Rule 42(b) can be advanced credibly to meet the second prong for certification of this application. No Delaware issue of "first instance" is decided by the Opinion. The application flatly mischaracterizes the Opinion's discussion of court interpretations of threshold terms giving rise to standing to arbitrate or to respond to arbitration. The cases found helpful and determined to be the better reasoned were those which quoted, and presumably read accurately, the Rules underlying arbitration which plainly required associated persons to be natural persons. Members and natural persons associated with them, the Opinion concluded, had to be in a dispute before "certain others" could or would be subject to arbitration under a private agreement to which they were not a party. The Opinion neither defined or interpreted "certain other," thereby creating an "implicit split of authority with any other court, nor did it "ignore other language contained in the same NASD Rule." The Opinion makes clear that a plain reading of the private agreement contemplates that:

(a) Only natural persons constitute "associated person(s)," (a conclusion consistent with the only other Delaware case remotely applicable, *Von Feldt v. Stifel Financial Corp.*, Del. Ch., C.A. No. 15688, Chandler, V.C. (June 6, 1997)); and,

(b) Associated persons and/or members must be parties to the arbitration before the scope of mandatory submission reaches "certain others" who are neither members signatory nor natural persons associated with members. In the absence of a real action in controversy between NASD members and natural persons associated with a member, no examination of CFLP as a "certain other" needed to be undertaken by the Court. That conclusion falls far short of the negligent ignorance of the NASD Rules and disregard of facts critical to other case law claimed by the applicant.

***2** 5. Despite the applicant's hyperbolic suggestion that "NASD members are currently in the precarious position of not knowing what legal consequences attach when they transact business with an affiliate of an NASD member," no record exists suggesting that current NASD interpretation of its own rules is consistent or inconsistent with the Opinion, no record shows what the term "affiliate" means within the context of the NASD rules nor is there any record in regard to any business transaction stayed, terminated, postponed or no longer contemplated as a result of the conclusions reached in the Opinion.

6. Finally, the rights of PSI and CFLP will be adjudicated as efficiently, promptly and economically in Delaware courts as they would be in NASD arbitration were CFLP subject to that process. The social policy generally favoring alternative dispute mechanisms such as private arbitration agreements administered under federal or State law applies to subject matter whose arbitrable status is in dispute, not the standing of persons to bring or the obligation of persons to respond to mandatory arbitration. Therefore, the legal rights Prebon seeks to advance and the substantial issues surrounding them can and will be determined by a final dispositive action in the Delaware courts.

6. This application falls within the general class of purported appeals of rulings on the pleadings which rarely establish a legal right and are therefore unappealable. It neither affects the merits of the case nor changes the status of the parties. *Tortuga Cas. Co. v. National Union Fire Ins. Co.*, Del.Supr., 604 A.2d 419 (1991).

IT IS SO ORDERED.

Del.Ch.,1999.
Fitzgerald v. Prebon Securities (USA) Inc.
Not Reported in A.2d, 1999 WL 135241 (Del.Ch.)

END OF DOCUMENT

Exhibit C

Not Reported in A.2d, 2010 WL 2160904 (Del.Ch.)
(Cite as: 2010 WL 2160904 (Del.Ch.))

Court of Chancery of Delaware.
CREDIT SUISSE SECURITIES (USA) LLC, Plaintiff,
v.
INVESTMENT HUNTER, LLC, Defendant.

C.A. No. 5107-VCN.
Submitted: March 11, 2010.
Decided: May 27, 2010.

West KeySummary**Alternative Dispute Resolution 25T 430**

25T Alternative Dispute Resolution
25TII Arbitration
25TII(I) Exchanges and Dealer Associations
25Tk425 Mutual Dealings of Exchanges or Dealer Associations
25Tk430 k. Award. Most Cited Cases
Arbitration panel acted within its authority by awarding punitive damages to creditor even though New York substantive law did not allow the award of punitive damages. The choice of law provision did not serve to impose any state law special rule designed to limit the authority of the panel.

Daniel B. Rath, Esquire and Rebecca L. Butcher, Esquire of Landis Rath & Cobb LLP, Wilmington, Delaware, and Allan N. Taffet, Esquire, Brian A. Burns, Esquire, and Joshua C. Klein, Esquire of Duval & Stachenfeld LLP, New York, New York, Attorneys for Plaintiff.

Thomas W. Briggs, Jr., Esquire of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, and John Shin, Esquire of Silverman Sclar Shin & Byrne PLLC, New York, New York, Attorneys for Defendant.

MEMORANDUM OPINION

NOBLE, Vice Chancellor.

I. INTRODUCTION

***1** This is an action to confirm an arbitration award which included one million dollars in punitive damages. The losing party did not appear in the arbitration process but now contests the authority of the arbitration panel to award punitive damages. The winning party claims that the losing party's challenge is unfounded and comes too late.

II. BACKGROUND

A. *The Parties*

Plaintiff Credit Suisse Securities (USA) LLC ("Credit Suisse") is a broker-dealer engaged in securities trading and the provision of financial advisory services. Defendant Investment Hunter, LLC ("Investment Hunter") also is a broker-dealer.

B. *The Margin Agreement*

In July 2008, Credit Suisse [FN1] and Investment Hunter entered into a margin agreement (the "Agreement") under which Credit Suisse extended millions of dollars of margin credit to Investment Hunter and its owner, Gary Evans, against 400,000 shares of GreenHunter Energy, Inc. ("GreenHunter") that Investment Hunter and Evans pledged as collateral.[FN2] GreenHunter is a publicly traded renewable energy company which Evans founded and controls.

FN1. The Margin Agreement was signed with Pershing LLC, the clearing broker for Credit Suisse, and later assigned to Credit Suisse. The Court will refer only to Credit Suisse.

FN2. The 400,000 GreenHunter shares pledged as collateral had a market value of $7,628,000 as of July 24, 2008. Compl. Ex. A ("Statement of Claim") ¶ 11.

The Agreement called for any disputes between the parties to be resolved by way of arbitration,

stating, in relevant part:

> 20. ARBITRATION DISCLOSURES:
>
> THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT THE PARTIES AGREE AS FOLLOWS:
>
> ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUE EACH OTHER IN COURT ... EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED.
>
> ARBITRATION AWARDS ARE GENERALLY FINAL AND BINDING; A PARTY'S ABILITY TO HAVE A COURT REVERSE OR MODIFY AN ARBITRATION AWARD IS VERY LIMITED.
>
> ...
>
> THE ARBITRATORS DO NOT HAVE TO EXPLAIN THE REASON(S) FOR THEIR AWARD.
>
> ...
>
> THE RULES OF THE ARBITRATION FORUM IN WHICH THE CLAIM IS FILED, AND ANY AMENDMENTS THERETO, SHALL BE INCORPORATED INTO THIS AGREEMENT.
>
> 21. ARBITRATION AGREEMENT
>
> ANY CONTROVERSY BETWEEN YOU AND U.S. SHALL BE SUBMITTED TO ARBITRATION BEFORE THE NEW YORK STOCK EXCHANGE, INC., ANY OTHER NATIONAL SECURITIES EXCHANGE ON WHICH A TRANSACTION GIVING RISE TO THE CLAIM TOOK PLACE (AND ONLY BEFORE SUCH EXCHANGE), OR THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC....
>
> 22. THE LAWS OF THE STATE OF NEW YORK GOVERN
>
> This agreement and its enforcement shall be governed by the laws of the state of New York without giving effect to its conflicts of laws provisions.[FN3]

FN3. Def. Investment Hunter, LLC's Mem. of Law in Opp'n to Pl.'s Mot. to Confirm Arbitration Award ("Mem. in Opp'n") Ex. 1 ¶¶ 21-22.

The Terms and Conditions provided on Investment Hunter's Account Statement reiterated the terms set forth in the Agreement. The Account Statement restated all of the Arbitration Disclosures contained within the Agreement, including that "the rules of the arbitration forum in which the claim is filed ... shall be incorporated into this agreement." In addition, under a heading entitled "Arbitration Agreement," was the following provision:

> ***2** ANY CONTROVERSY BETWEEN YOU AND U.S. SHALL BE SUBMITTED TO ARBITRATION BEFORE THE FINANCIAL INDUSTRY REGULATORY AUTHORITY OR ANY OTHER NATIONAL SECURITIES EXCHANGE ON WHICH A TRANSACTION GIVING RISE TO THE CLAIM TOOK PLACE (AND ONLY BEFORE SUCH EXCHANGE).... *THE LAWS OF THE STATE OF NEW YORK GOVERN.*[FN4]

FN4. Mem. in Opp'n Ex. 2 at 7 (emphasis in original).

Investment Hunter and Evans represented in the Agreement that the shares of GreenHunter pledged as collateral were not subject to any claims by third parties and that the shares could be liquidated by Credit Suisse to satisfy any margin deficiency, a representation corroborated in a legal opinion by GreenHunter's General Counsel. However, the shares were arguably subject to a lockup agreement entered into more than a year be-

fore the Agreement, a fact that Credit Suisse discovered only after it issued a margin call following a rapid decline in the price of GreenHunter shares. In response, Credit Suisse issued a demand letter to Investment Hunter that sought the payment of all principal, interest, and other obligations outstanding under the Agreement.

C. *The FINRA Arbitration*

In December 2008, Credit Suisse filed its Statement of Claim against Investment Hunter with the Financial Industry Regulatory Authority ("FINRA") regarding Investment Hunter's apparent violation of the Agreement. The Statement of Claim sought compensatory and punitive damages on the grounds of fraudulent inducement, breach of contract, unjust enrichment, and conversion.

After some difficulty in perfecting service, Investment Hunter's registered agents were served with a copy of the Statement of Claim. Nevertheless, Investment Hunter never responded to the Statement of Claim. Likewise, Investment Hunter did not participate in the pre-hearing teleconference conducted by the arbitration panel (the "Panel") appointed in the FINRA Arbitration (the "Arbitration"), or in the Arbitration, where Credit Suisse presented its prima facie case to the Panel.

On August 10, 2009, the Panel entered an award "in full and final resolution of the issues submitted" (the "FINRA Award") in favor of Credit Suisse. [FN5] The Panel determined that Investment Hunter had been properly served with Credit Suisse's Statement of Claim and found it liable for $2,712,525.41 in compensatory damages and $1,000,000 in punitive damages.[FN6]

FN5. Compl. Ex. C ("FINRA Dispute Resolution Case No. 08-04754").

FN6. Investment Hunter was also required to pay attorneys' fees and filing fees, for total award of $3,734,525.41.

D. *Settlement Talks Fail and Credit Suisse Commences this Action*

After the FINRA Award was issued, counsel for Investment Hunter contacted Credit Suisse in an attempt to settle this matter. In order to avoid further litigation costs, Credit Suisse entered into "good faith settlement negotiations." Although the parties established a framework for settlement, because of Investment Hunter's unwillingness or inability to pay, no settlement agreement was ultimately reached. Credit Suisse then commenced this action, seeking an order confirming the FINRA Award and entering judgment against Investment Hunter for the full amount of the award.[FN7]

FN7. Since the issuance of the FINRA Award, Credit Suisse has recovered $2,355,784 of the total amount due, primary through the sale of those shares pledged to Credit Suisse as collateral in the Agreement. Credit Suisse also received $25,000 from Investment Hunter as a condition to engaging in continued settlement discussions in an attempt to resolve the matter. As such, Credit Suisse now seeks the approximately $1.4 million remaining unpaid under the arbitration award.

E. *Investment Hunter Finally Objects*

***3** After Investment Hunter initially failed to file an answer (or otherwise respond to the Complaint filed) in this case, Credit Suisse moved for a default judgment. After receiving notice of the motion for default judgment, Investment Hunter filed its Answer and asserted that Credit Suisse had failed to state a claim because FINRA did not have authority to award punitive damages since the parties' underlying agreement was governed by New York law, which prohibits the award of punitive damages by arbitrators.[FN8]

FN8. The Answer also asserted that the parties had reached a settlement agreement which, in conjunction with amounts already paid, superseded the FINRA Award and, otherwise, that FINRA lacked jurisdiction over Investment Hunter as a

result of insufficient service of process under the Code of Arbitration Procedure. These arguments have not been advanced, and, moreover, it should be noted that the Panel determined that service on Investment Hunter had been sufficient, and, more importantly, Investment Hunter has not argued that it was not on notice of Credit Suisse's claim.

Credit Suisse has moved to confirm the FINRA Award.

F. *The Parties' Contentions*

Investment Hunter contests the FINRA Award's inclusion of punitive damages because the underlying Agreement calls for the contract and its enforcement to be governed by New York law, and, under New York law, arbitrators may not award punitive damages. As such, according to Investment Hunter, the Panel exceeded its authority-or lacked jurisdiction-to include punitive damages as part of the FINRA Award; thus, the award cannot be enforced to the extent that it awards punitive damages.[FN9]

FN9. Investment Hunter does not challenge any part of the FINRA Award other than its punitive damages aspect.

Credit Suisse asserts that, while a general contractual choice-of-law provision operates to provide the substantive law that governs an arbitration, it does not necessarily mandate the application of that state's arbitration rules. As such, it contends, the Federal Arbitration Act (the "FAA" or the "Act"),[FN10] not New York law, governs since the Agreement expressly incorporated the arbitration rules of the National Association of Securities Dealers ("NASD"),[FN11] which permit the award of punitive damages. Similarly, even if the contract operates to mandate the use of a state's procedural rules, where there is a conflict with the FAA, the FAA rules trump conflicting state rules.

FN10. 9 U.S.C. §§ 1-16.

FN11. FINRA now performs the work of NASD.

Furthermore, Credit Suisse asserts that Investment Hunter is barred from even challenging the FINRA Award because the 90-day statutory period for doing so under the FAA has expired. Investment Hunter counters that, under New York law, it would not be barred by a failure to move to vacate the FINRA Award within the 90-day period set by the FAA; instead, it would be able to raise an objection to the arbitrators' authority at any time in response to a motion by Credit Suisse to confirm the FINRA Award.[FN12] Investment Hunter also argues that the tardiness of its challenge to the FINRA Award should be excused under the equitable tolling doctrine because its delay was the result of unsuccessful settlement discussions with Credit Suisse.[FN13]

FN12. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Fireman's Fund Ins. Co.,* 121 A.D.2d 529, 504 N.Y.S.2d 24, 24 (N.Y.App.Div.1986) ("Although an aggrieved party has only 90 days in which to move to vacate or modify an award (CPLR 7511[a]), said party may choose not to make a motion and raise the objection when the victor moves to confirm the award.").

FN13. Credit Suisse claims that the FAA's three-month limit is strictly construed and cannot be extended on equitable grounds.

III. DISCUSSION

A. *The Standard of Review*

This Court's authority to overturn an arbitration award is "narrowly circumscribed," and the award will be upheld if "any grounds for the award can be inferred from the record." [FN14] Under the FAA, awards may be vacated only on very limited grounds, such as where the award was procured by corruption or fraud, where the arbitrators were clearly partial or guilty of misconduct, or where the arbitrators exceeded their powers in granting the award.[FN15] In reviewing an arbitration award, the

Court may not pass its own judgment on the evidence or the law that was submitted to the arbitrator. Nevertheless, "an **arbitrator's** decision may be vacated if it is in manifest **disregard** of the **law** or if the record shows no support for the award." [FN16] Summary judgment, frequently the procedural means employed for assessing arbitration awards, [FN17] is appropriate here because there are no material facts in dispute and the Court is called upon to apply principles of law.

FN14. *Audio Jam, Inc. v. Fazelli,* 1997 WL 153814, at *1 (Del.Ch. Mar.20, 1997) (citations omitted).

FN15. Federal Arbitration Act, 9 U.S.C. § 10(a).

FN16. *Falcon Steel Co., Inc. v. HCB Contractors, Inc.,* 1991 WL 50139, at *2 (Del.Ch. Apr.4, 1991).

FN17. *See TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc.,* 953 A.2d 726, 730 (Del.Ch.2008) ("A motion for summary judgment is the 'common [method] for this court to determine whether to vacate or confirm an arbitration award.' ") (citation omitted).

B. *Did the FINRA Panel Exceed its Authority by Awarding Punitive Damages?*

***4** Although the intent of the FAA is to foster the public policy favoring arbitration,[FN18] parties remain free to contract for the procedural and substantive rules they desire, whether or not such rules are consistent with the purposes and provisions of the Act. As the Supreme Court explained, "[w]here ... the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA," even if the ultimate result differs from the one permitted under the FAA.[FN19] Indeed, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules" and "[i]nterpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration ... simply does not offend [any policy] embodied in the FAA." [FN20] Nevertheless, when a court interprets a choice-of-law provision in an agreement covered by the FAA, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." [FN21]

FN18. *Cf. Hackett v. Milbank, Tweed, Hadley & McCloy,* 86 N.Y.2d 146, 630 N.Y.S.2d 274, 654 N.E.2d 95, 100 (N.Y.1995) ("The overriding policy of the [FAA] is the enforcement of arbitration agreements according to their terms, including the parties' choice of governing law.").

FN19. *Volt Info. Sciences, Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Where state rules somehow conflict with Congressional objectives in passing the Act, however, the FAA would preempt them. *Id.* at 477.

FN20. *Id.* at 476.

FN21. *Id. See also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

Investment Hunter relies heavily on *Luckie,* [FN22] where the New York Court of Appeals broadly read a choice-of-law provision directing that New York law would govern "the agreement and its enforcement," as indicating the parties' "intention to arbitrate to the extent allowed by [this

State's] law," [FN23] and, perhaps, "that the whole of New York arbitration law would apply." [FN24] As such, the inclusion of the phrase "and its enforcement" evidenced "an intention to abide by New York arbitration law as well as New York substantive law." [FN25] Investment Hunter argues that, because the Agreement's choice-of-law provision indicates an apparent intention to abide by New York arbitration law, the Panel's decision to award punitive damages ran afoul of New York arbitration law and thus was beyond the scope of the Panel's authority and should not be confirmed. Indeed, it is well-settled that, under New York arbitration law, arbitrators may not award punitive damages.[FN26]

FN22. *In the Matter of Smith Barney, Harris Upham & Co., Inc. v. Luckie,* 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308 (N.Y.1995), *cert. denied sub nom. Manhard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 516 U.S. 811, 116 S.Ct. 59, 133 L.Ed.2d 23 (1995).

FN23. *Id.* at 1313 (bracketed text in original).

FN24. *Id.* at 1317 (Kaye, C.J., concurring).

FN25. *Prudential v. Laurita,* 1997 WL 109438, at *3 (S.D.N.Y. Mar.11, 1997).

FN26. *See, e.g., Garrity v. Lyle Stuart, Inc.,* 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353 N.E.2d 793, 794 (N.Y.1976); *Matter of Dreyfus Serv. Corp. (Kent),* 183 A.D.2d 446, 584 N.Y.S.2d 483, 483 (N.Y.App.Div.1992) ("Respondent sets forth no compelling reason for this court to depart from the long-standing rule in this State that '[a]n arbitrator has no power to award punitive damages, even if agreed upon by the parties.' ") (citation omitted).

However, Credit Suisse argues that the Panel's decision to award punitive damages is consistent with the Supreme Court's decision in *Mastrobuono,* which came after *Luckie* and which held that, while parties could choose to prohibit arbitrators from awarding punitive damages through contract, they could do so only through a contractual provision that expressed "an unequivocal exclusion of punitive damages claims." [FN27] The Court made clear that a general choice-of-law provision "is not, in itself," such an exclusion. [FN28]

FN27. *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 60, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995).

FN28. *Id.*

The Court in *Mastrobuono* interpreted a "standard-form" contract that provided that the agreement be "governed" by the laws of New York as not precluding the award of punitive damages by arbitrators, despite New York's prohibition of such damages in arbitration awards. Instead, the Court found that the contract's arbitration provision, which provided for "any controversy" to be submitted to arbitration before the NASD,[FN29] "strongly implie[d] that an arbitral award of punitive damages is appropriate." [FN30] It reconciled the arbitration provision's authorization of punitive damage awards with the contract's New York choice-of-law provision by narrowly interpreting the scope of the latter provision:

FN29. The agreement in *Mastrobuono* specifically called for arbitration in accordance with either the rules of the NASD, or the Boards of Directors of the New York Stock Exchange and/or the American Stock Exchange. There, the Court held the provision was broad enough to contemplate a remedy of punitive damages and its ambiguity over which set of arbitration rules would apply did not preclude such an award because "[n]either set of alternative rules purports to limit an arbitrator's discretion to award punitive damages. Moreover, even if there were any doubt as to the ability of an arbitrator to award pun-

itive damages under the Exchanges' rules, the contract expressly allows petitioners ... to choose NASD rules; and the panel of arbitrators in this case in fact proceeded under NASD rules." *Mastrobuono,* 514 U.S. at 61 n. 5.

FN30. *Mastrobuono,* 514 U.S. at 60. Although no provision in the underlying contract directly addressed punitive damages, the *Mastrobuono* court noted that the NASD Code of Arbitration Procedure granted arbitrators broad authority to award damages, and the NASD manual stated that "[p]arties to arbitration are informed that arbitrators can consider punitive damages as a remedy." *Id.* at 61 n. 6.

***5** We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.[FN31]

FN31. *Id.* at 63-64; *see also Smith Barney Shearson Inc. v. Sacharow,* 91 N.Y.2d 39, 666 N.Y.S.2d 990, 689 N.E.2d 884, 889 (N.Y.1997) ("While a choice of law clause incorporates substantive New York principles, it does not also pull in conflicting restrictions on the scope of the authority of arbitrators and the competence of parties to contract for plenary alternative dispute resolution.").

The Court suggested that the only way that the contract's choice-of-law provision could operate to preclude the award of punitive damages was if " 'New York law' mean[t] 'New York decisional law, including that State's allocation of power between courts and arbitrators, notwithstanding otherwise-applicable federal law.' But, as we have demonstrated, the provision need not be read so broadly." [FN32]

FN32. *Mastrobuono,* 514 U.S. at 60.

Credit Suisse asserts that *Mastrobuono* is controlling here "because the facts are analogous in all material respects" and the arbitration provisions are "virtually identical." [FN33] Indeed, but for the inclusion of the "and its enforcement" language in the Agreement's choice-of-law provision, the relevant facts in this case are virtually identical to those of *Mastrobuono:* the Agreement called for the application of NASD rules,[FN34] the relevant rules applied in the Arbitration allowed for punitive damages, [FN35] and the Agreement was subject to the FAA. [FN36]

FN33. Pl.'s Reply Br. at 9.

FN34. *See* Mem. in Opp'n Ex. 1 ¶ 21 ("Any controversy ... shall be submitted to arbitration before ... the [NASD]."); ¶ 20 ("The rules of the arbitration forum in which the claim is filed ... shall be incorporated into this agreement.").

FN35. As with the precursor NASD rules, FINRA rules state that "[n]o predispute arbitration agreement shall include any condition that ... limits the ability of arbitrators to make any award." Pl.'s Reply Br. Ex. B, FINRA Rule 3110(f)(4)(D). Similarly, the FINRA Arbitrator's Manual states that "[a]rbitrators may consider punitive damages as a remedy." Pl.'s Reply Br. Ex. C ("FINRA Arbitrators Manual") at 31.

FN36. The FAA applies to any transaction that affects "interstate commerce." *See, e.g., Roadway Package Sys., Inc. v. Kayser,* 257 F.3d 287, 291-92 (3d Cir.2001). Here, the Agreement establishes an investing and borrowing relationship between Credit Suisse, which has its prin-

cipal place of business in New York, and Investment Hunter, which has its principal place of business in Texas. Therefore, the FAA applies. *See* Compl. ¶¶ 1-2.

Investment Hunter insists that *Mastrobuono* is readily distinguishable from this case because the contract at issue in *Mastrobuono* did not specify that New York law governed "the enforcement" of the agreement; instead, arbitration was to be governed "in accordance with the rules of the [NASD], or the Board of Directors of the New York Stock Exchange and/or the American Stock Exchange." [FN37] Investment Hunter further suggests that, as in *Luckie,* the choice-oflaw provision, referencing not only the substantive law to be applied but also the rules of enforcement, operates to subject the Agreement to New York arbitration law, including its prohibition of punitive damages.

FN37. *Mastrobuono,* 514 U.S. at 59.

Credit Suisse argues that the inclusion of the language "and its enforcement" in the choice-of-law provision does not support the inference of a preclusion of punitive damages because *Mastrobuono* requires that any such waiver be stated explicitly. Indeed, since *Mastrobuono,* courts have routinely held that the FAA supersedes the New York rule against punitive damages when parties contractually agree to NASD or FINRA arbitration. [FN38] Credit Suisse offers up a host of cases decided after *Luckie* and *Mastrobuono* which upheld the award of punitive damages despite robust New York choice-of-law provisions underpinning the contracts; [FN39] however, Investment Hunter has suggested that such cases are inapposite because the underlying contract did not include any choice-of-law provision,[FN40] or because the choice-of-law provision did not contain the "and its enforcement" language,[FN41] or because the deciding court failed to mention and discuss the implications of *Luckie* in making its determination.[FN42]

FN38. *See, e.g., Sacharow,* 666 N.Y.S.2d 990, 689 N.E.2d at 888-89.

FN39. *Shamah v. Schweiger,* 21 F.Supp.2d 208, 216 (E.D.N.Y.1998) (recognizing that "[t]he availability of punitive damages in an arbitration award resulting from a customer agreement mandating the application of New York law has been affirmed in numerous courts, including the Supreme Court's bellwether decision in *Mastrobuono* " and collecting representative decisions; *Sanders v. Gardner,* 7 F.Supp.2d 151, 175-76 (E.D.N.Y.1998) (holding that the assertion that NASD arbitrators lacked authority to award punitive damages under *Garrity* was "invalidated by the holding in *Mastrobuono* " and citing cases upholding punitive damages by arbitrators); *In re Lian,* 273 A.D.2d 163, 710 N.Y.S.2d 52, 52-53 (N.Y.App.Div.2000); *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 285 Ill.App.3d 217, 220 Ill.Dec. 764, 674 N.E.2d 35, 37-38 (Ill.App.Ct.1997); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Adler,* 234 A.D.2d 139, 651 N.Y.S.2d 38, 38-39 (N.Y.App.Div.1996); *Mulder v. Donaldson, Lufkin & Jenrette,* 224 A.D.2d 125, 648 N.Y.S.2d 535, 538 (N.Y.App.Div.1996) (holding that the FAA preempts the *Garrity* rule absent an agreement to exclude punitive damages); *In re R.C. Layne Constr.,* 228 A.D.2d 45, 651 N.Y.S.2d 973, 976 (N.Y.App.Div.1996) (confirming a punitive damages award because the parties expressly agreed that NASD rules governed the arbitration and the parties did not "unequivocally agree to preclude the arbitrators from considering punitive damages"); *Tong v. S.A.C. Capital Mgmt., LLC,* 16 Misc.3d 401, 835 N.Y.S.2d 881, 887-88 (N.Y.Sup.Ct.2007) (holding that a punitive damages claim was within the arbitrator's authority because the FAA preempted the Garrity rule and a choice-of-law provision does not displace the FAA in the

absence of evidence that the parties intended to give up their right to punitive damages); *Sacharow,* 666 N.Y.S.2d 990, 689 N.E.2d at 888-89.

FN40. *Mulder,* 224 A.D.2d 125, 648 N.Y.S.2d 535.

FN41. *Sacharow,* 91 N.Y.2d 39, 666 N.Y.S.2d 990, 689 N.E.2d 884; *Lian,* 273 A.D.2d 163, 710 N.Y.S.2d 52.

FN42. *Roubik,* 285 Ill.App.3d 217, 220 Ill.Dec. 764, 674 N.E.2d 35.

***6** Investment Hunter seems to suggest that the "and its enforcement" language operates as a talisman to shift all rules governing an arbitration over to those of the selected state. Although certain courts appear to have distinguished *Luckie* and *Mastrobuono* on those grounds,[FN43] other courts have read *Luckie* quite narrowly, while expanding the reach of *Mastrobuono.*[FN44]

FN43. *See, e.g., In the Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.,* 4 N.Y.3d 247, 793 N.Y.S.2d 831, 826 N.E.2d 802, 806 (N.Y.2005); *Laurita,* 1997 WL 109438, at *3; *Merrill Lynch, Pierce, Fenner & Smith v. Ohnuma,* 218 A.D.2d 572, 630 N.Y.S.2d 724, 725-26 (N.Y.Sup.Ct.1995).

FN44. *See, e.g., Shaw Group, Inc. v. Triplefine Int'l Corp.,* 322 F.3d 115, 123 (2d Cir.2003) *("Luckie* has been seriously undermined by *Mastrobuono.* Indeed, since *Mastrobuono,* the New York Court of Appeals has limited *Luckie* to its specific facts, which notably included a choice-of-law provision applicable to the 'enforcement' as well as the construction of the contract."); *PaineWebber Inc. v. Bybyk,* 81 F.3d 1193, 1200 (2d Cir.1996) ("In *Mastrobuono,* the Supreme Court rejected the argument that PaineWebber makes here and the argument that the New York Court of Appeals advanced in *Luckie."); Sacharow,* 666 N.Y.S.2d 990, 689 N.E.2d at 888 ("Importantly ... *Luckie* was narrowly tailored to the specific framework presented by the case and was not projected as a preclusion against parties freely contracting to submit every part of their disputes to arbitration.").

Although the "and its enforcement" language perhaps goes beyond merely applying a state's substantive law, the suggestion in *Mastrobuono* that a choice-oflaw provision, without more, does not operate to prescribe "special rules limiting the authority of arbitrators" has not been called into question by *Luckie* or its progeny.[FN45] This seems to reflect the notion that, given the general presumption in favor of arbitration, for parties to curtail an arbitrator's power through contract requires something more explicit than just a choice-of-law provision, even one including reference to contractual enforcement.[FN46]

FN45. *See, e.g., Diamond Waterproofing,* 793 N.Y.S.2d 831, 826 N.E.2d at 806 (citing *Luckie* for the notion that "[a] choice of law provision, which states that New York law shall govern both "the agreement *and its enforcement,* " adopts as "binding New York's rule that threshold Statute of Limitations questions are for the courts"); *Laurita,* 1997 WL 109438 at *3, *6 (discussing the implications of *Luckie* on the timeliness of arbitration claims but relying solely on *Mastrobuono* in determining that the parties had not waived their right to claims to punitive damages); *Ohnuma,* 630 N.Y.S.2d at 725-26 (holding that *Mastrobuono* had not disturbed *Luckie* with respect to the determination of the timeliness of arbitration claims).

The notion that the types of remedies available for a breach of an agreement are integrally relevant to the enforce-

ment of such a contract, and that, therefore, a choice-of-law provision applying state law to a contract's enforcement ought implicitly to include any state-law strictures as to remedy would, perhaps, not be an unreasonable one, if the Court were considering the issue as a matter of first impression. This not unreasonable perspective is, however, undermined by the imprecision of the specific provision at issue, particularly in light of *Luckie* and *Mastrobuono,* the strong federal presumption favoring deference to decisions made by arbitrators, especially FINRA, and case law that seems generally unconcerned with any apparent tension between *Luckie* and *Mastrobuono* in the area of remedies (in contrast to other procedural questions).

FN46. *See also Sec. Ins. Co. of Hartford v. TIG Ins. Co.,* 360 F.3d 322, 327 (2d Cir.2004) (citing *Mastrobuono* and *Bybyk* for the rule that "[i]n cases where an ambiguity is introduced by the choice-of-law provision, federal policy favoring **arbitration** requires a specific reference to the restriction on the parties' substantive rights or the **arbitrator's** powers to establish that the parties clearly intended to limit their rights under the FAA"); *Lian v. First Asset Mgmt., Inc.,* 273 A.D.2d 163, 710 N.Y.S.2d 52, 52 (N.Y.App.Div.2000) (finding that an award of punitive damages by **arbitrators** in the face of a contract that "punitive damages will not be available ... in any proceedings" could be rationally justified and therefore confirmed "on the theory that waivers of punitive damages are **contrary** to rules of the [NASD] and therefore unenforceable in an arbitration subject to those rules" and because the contract only noted the prohibition of punitive damages under New York **law** and "made no reference to the NASD rules permitting punitive damage claims in arbitration proceedings, and of the limiting effect of the United State Supreme Court's ruling in *Mastrobuono* ").

Indeed, in *Bybyk,* the Second Circuit rejected an argument similar to the one that Investment Hunter makes here.[FN47] There, the Court held that the language "[t]his agreement and its enforcement shall be construed and governed by the laws of the State of New York" did not operate to preclude the award of attorneys' fees by arbitrators, despite the fact that New York law also prohibits the award of attorneys' fees in arbitration unless expressly provided in the contract. *Bybyk* cited *Mastrobuono* for the notion that:

FN47. *Bybyk,* 81 F.3d at 1200.

> [A] choice of law provision will not be construed to impose substantive restrictions on the parties' rights under the Federal Arbitration Act, including the right to arbitrate claims for attorneys' fees. Therefore, PaineWebber cannot rely on the New York choice-of-law provision to prevent the Bybyks from seeking in arbitration a remedy that is not foreclosed by the Agreement.[FN48]

FN48. *Id.*

Bybyk did not recognize any distinction between *Mastrobuono* and *Luckie* with respect to remedies and concluded that, in applying a state's law of contract to the actions of the arbitrators, the state's general substantive law applies but not any special rules designed to limit the authority of the arbitrators.[FN49] Any other rule would run afoul of "federal policy favoring arbitration." [FN50] The Court sees no reason why an arbitration award that includes punitive damages ought to be treated any differently from an award granting attorneys' fees as expressly approved in *Bybyk.*

FN49. *Id. See also Nat'l Union Fire Ins. Co. v. Odyssey Am. Reinsurance Corp.,* 2009 WL 4059183, at *7 (S.D.N.Y.

Nov.18, 2009) (citing *Bybyk,* and observing that "the ability of an arbitrator to award attorneys' fees is ... not a matter of substantive law which would be subject to the choice of law provision, as the Second Circuit has since expanded on *Mastrobuono* in holding that a New York choice of law provision does not preclude an arbitral award of attorneys' fees.").

FN50. *Mastrobuono,* 514 U.S. at 62.

Not surprisingly, other courts have applied *Bybyk's* reasoning to other forms of relief, including punitive damages.[FN51] Not long after the decision in *Bybyk,* the Supreme Court of Illinois upheld an order setting aside an NASD arbitration panel's determination that punitive damage claims were not arbitrable because of a contract's choice-of-law provision that provided that "this agreement and its enforcement shall be governed by the laws of the State of New York." [FN52] The Court found that the arbitration panel's decision, which came before *Mastrobuono,* was properly set aside because of the Court's holding in *Mastrobuono,* which it understood to be based on "facts very similar to those presented here ." [FN53] It further noted that "the question of whether the New York choice-of-law clause precludes the arbitrators from awarding punitive damages" was not simply a matter of procedure, but one that "addressed the scope of the arbitrators' authority...." [FN54]

FN51. *See, e.g., Von Steen v. Musch,* 3 Misc.3d 207, 776 N.Y.S.2d 170, 175 (N.Y.Sup.Ct.2004) (holding that petitioner could not rely on *Luckie* to preclude an award for punitive damages, noting that *Bybyk* had suggested that *Luckie* relied on case law reversed in *Mastrobuono); Coleman & Co. Sec., Inc. v. The Giaquinto Family Trust,* 2000 WL 1683450, at *3 (S.D.N.Y. Nov.9, 2000) (citing *Bybyk* and *Mastrobuono* in rejecting the argument that a choice-of-law provision providing that the "agreement and its enforcement shall be governed by the laws of the State of New York" indicated the parties' intent to be bound by New York's substantive rules limiting the authority of arbitrators); *Porush v. Lemire,* 6 F.Supp.2d 178, 184-86 (E.D.N.Y.1998) (relying on the *Bybyk* case to find that a choice-of-law clause stating that all "controversies arising under the Agreement 'shall be governed by and construed, and the substantive rights and liabilities of he parties determined, in accordance with the laws of the State of New York' " did not operate to preclude the award of punitive damages or attorneys' fees by the arbitrators); *Kidder, Peabody & Co., Inc. v. William A. Rosenfield Trust,* 961 F.Supp. 50, 54 (S.D.N.Y.1997) (holding that the decision in *Bybyk* precluded a stay of arbitration of punitive damages and attorneys' fees); *A.S. Goldmen & Co., Inc. v. Bochner,* 1996 WL 413676, *1 (S.D.N.Y. July 24, 1996) (rejecting a stay of pending claims for punitive damages in arbitration, recognizing that *Bybyk* rejected petitioner's "precise argument" that *Luckie,* not *Mastrobuono,* was the controlling precedent).

FN52. *Roubik,* 230 Ill.Dec. 1, 692 N.E.2d at 1169.

FN53. *Id.* at 1170.

FN54. *Id.* at 1175. Investment Hunter suggests that the *Roubik* decision ought to be ignored by the Court because the decision did not attempt to reconcile *Luckie's* holding that the inclusion of the words "and its enforcement" necessarily changes the scope of the choice-of-law provision. However, the court in *Roubik* repeatedly cited to *Bybyk,* which acknowledged *Luckie* while firmly adhering to the rule in *Mastrobuono.* Thus, it is not surprising that the *Roubik* court would not feel the need to reconcile its decision with *Luckie.*

***7** In sum, the Court concludes that the Panel acted within its authority when it awarded punitive damages to Credit Suisse.[FN55]

FN55. With this conclusion, the Court need not decide the timeliness and estoppel arguments interposed by the parties.

IV. CONCLUSION

For the foregoing reasons, Credit Suisse's motion to confirm the FINRA Award is granted. An implementing order will be entered.

Del.Ch.,2010.
Credit Suisse Securities (USA) LLC v. Investment Hunter, LLC
Not Reported in A.2d, 2010 WL 2160904 (Del.Ch.)

END OF DOCUMENT

Exhibit D

Westlaw

A.R.S. § **12-133**

Arizona Revised Statutes Annotated Currentness
Title 12. Courts and Civil Proceedings
Chapter 1. Courts of Record
Article 2. The Superior Court (Refs & Annos)

§ 12-133. Arbitration of claims; agreement of reference; arbitration award; powers of arbitrators; compensation of arbitrators; appeals; deposits; costs

A. The superior court, by rule of court, shall do both of the following:

1. Establish jurisdictional limits of not to exceed sixty-five thousand dollars for submission of disputes to arbitration.

2. Require arbitration in all cases which are filed in superior court in which the court finds or the parties agree that the amount in controversy does not exceed the jurisdictional limit.

B. The court may waive the arbitration requirement on a showing of good cause if all parties file a written stipulation waiving the arbitration requirement.

C. The court shall maintain a list of qualified persons within its jurisdiction who have agreed to serve as arbitrators, subject to the right of each person to refuse to serve in a particular assigned case and subject further to the right of any party to show good cause why an appointed arbitrator should not serve in a particular assigned case. The court rules shall provide that the case subject to arbitration shall be assigned for hearing to a panel of three arbitrators, or in the alternative, to a single arbitrator, each of whom shall be selected by the court.

D. Regardless of whether or not suit has been filed, any case may be referred to arbitration by an agreement of reference signed by the parties or their respective counsel for both sides in the case. The agreement of reference shall define the issues involved for determination in the arbitration proceeding and may also contain stipulations with respect to agreed facts, issues or defenses. In such cases, the agreement of reference shall take the place of the pleadings in the case and shall be filed of record.

E. The arbitration award shall be in writing, signed by a majority of the arbitrators and filed with the court. The court shall enter the award in its record of judgments. The award has the effect of a judgment on the parties unless reversed on appeal.

F. The arbitrators shall administer oaths or affirmations and conduct the hearings pursuant to court rule. The clerk of the superior court shall issue subpoenas, which are enforceable as provided by law.

G. Each arbitrator shall be paid a reasonable sum, not to exceed one hundred forty dollars per day, to be specified by the rules of the appointing court, for each day necessarily expended by the arbitrator in the hearing and determination of the case. The compensation of the arbitrators shall be paid by the county, in which the court has jurisdiction, from its general revenues and shall not be taxed as costs.

H. Any party to the arbitration proceeding may appeal from the arbitration award to the court in which the award is entered by filing, within the time limited by rule of court, a demand for trial de novo on law and fact.

I. On appeal, at the time of filing the demand for trial de novo, and as a condition of filing, the appellant shall deposit a sum equal to the total compensation of the arbitrators, but not exceeding ten per cent of the amount in controversy, which sum shall be deposited with the county. If the court finds that the appellant is unable to make the deposit by reason of lack of funds, the court shall allow the filing of the appeal without the deposit. On motion of the appellant within thirty days after the judgment on the trial de novo, the deposit shall be refunded to the appellant if the judgment on the trial de novo is at least twenty-three per cent more favorable than the monetary relief or other type of relief granted by the arbitration award. If the judgment on trial de novo is not at least twenty-three per cent more favorable than the monetary relief or other type of relief granted by the arbitration award, the court, on its own motion or on motion of the appellee within thirty days after the judgment on the trial de novo, shall order that the deposit be used to pay, or that the appellant pay if the deposit is insufficient, the following costs and fees, unless the court finds on motion that the imposition of the costs and fees would create such a substantial economic hardship as not to be in the interest of justice:

1. To the county, the compensation actually paid to the arbitrator.

2. To the appellee, those costs taxable in any civil action and reasonable attorney fees as determined by the trial judge for services necessitated by the appeal.

3. Reasonable expert witness fees that are incurred by the appellee in connection with the appeal.

J. If the court does not provide an order for the disposition of the deposit required by subsection I of this section within ninety days after the final disposition of the trial de novo, the clerk of the court shall transfer the deposit to the county general fund in an amount not to exceed the deposit but sufficient to reimburse the county for the compensation actually paid to the arbitrator and shall refund any balance of the deposit to the appellant.

K. An arbitrator is personally immune from suit with respect to all acts done and actions taken in furtherance of the purposes of this section.

L. The jurisdictional limit under subsection A, paragraph 1 of this section does not apply to arbitration that is conducted under an alternative dispute resolution program approved by the supreme court.

CREDIT(S)

Added by Laws 1971, Ch. 142, § 1. Amended by Laws 1978, Ch. 35, § 1; Laws 1984, Ch. 53, § 1; Laws 1986, Ch. 360, § 1; Laws 1991, Ch. 110, § 1, eff. Oct. 1, 1991; Laws 1992, Ch. 9, § 1; Laws 2000, Ch. 35, § 1; Laws 2007, Ch. 142, § 1; Laws 2012, Ch. 44, § 1.

HISTORICAL AND STATUTORY NOTES

The 1978 amendment substituted "five" for "three" in subsec. A.

The 1984 amendment rewrote the section, which had read:

"**A.** The superior court may, by rule of court, provide that the parties to all cases which are filed in superior court including motor vehicle accidents and which the court finds or the parties agree that the amount in controversy does not exceed five thousand dollars shall submit their disputes to arbitration. The court shall maintain a list of qualified persons within its jurisdiction who have agreed to serve as arbitrators, subject to the right of each person to refuse to serve in a particular assigned case and subject further to the right of any party to show good

[<< **Previous** Rule] [**Back** to Title Index] [**Next** Rule >>] | **Printer-friendly** version of this page

2012 California Rules of Court

Rule 3.814. Panels of arbitrators

(a) Creation of panels

Every court must have a panel of arbitrators for personal injury cases, and such additional panels as the presiding judge may, from time to time, determine are needed.

(Subd (a) amended effective January 1, 2004; previously amended effective July 1, 1979, and July 1, 2001.)

(b) Composition of panels

The panels of arbitrators must be composed of active or inactive members of the State Bar, retired court commissioners who were licensed to practice law before their appointment as commissioners, and retired judges. A former California judicial officer is not eligible for the panel of arbitrators unless he or she is an active or inactive member of the State Bar.

(Subd (b) amended effective January 1, 2007; previously amended effective July 1, 1979, January 1, 1996, July 1, 2001, and January 1, 2004.)

(c) Responsibilities of ADR committee

The ADR committee is responsible for determining the size and composition of each panel of arbitrators. The personal injury panel, to the extent feasible, must contain an equal number of those who usually represent plaintiffs and those who usually represent defendants.

(Subd (c) amended effective January 1, 2004; previously amended effective July 1, 2001.)

(d) Service on panel

Each person appointed serves as a member of a panel of arbitrators at the pleasure of the ADR committee. A person may be on arbitration panels in more than one county. An appointment to a panel is effective when the person appointed:

(1) Agrees to serve;

(2) Certifies that he or she is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and these rules; and

(3) Files an oath or affirmation to justly try all matters submitted to him or her.

(Subd (d) amended effective January 1, 2004; previously amended effective January 1, 1996, and July 1, 2001.)

(e) Panel lists

Lists showing the names of panel arbitrators available to hear cases must be available for public inspection in the ADR administrator's office.

(Subd (e) amended effective January 1, 2007; previously amended effective July 1, 2001, and January 1, 2004.)

Rule 3.814 amended and renumbered effective January 1, 2007; adopted as rule 1604 effective July 1, 1976; previously amended effective July 1, 1979, January 1, 1996, July 1, 2001, and January 1, 2004.

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California Rules of Court (Revised July 1, 2012)

Rule 3.826. Trial after arbitration

(a) Request for trial; deadline

Within 60 days after the arbitration award is filed with the clerk of the court, a party may request a trial by filing with the clerk a request for trial, with proof of service of a copy upon all other parties appearing in the case. A request for trial filed after the parties have been served with a copy of the award by the arbitrator, but before the award has been filed with the clerk, is valid and timely filed. The 60-day period within which to request trial may not be extended.

(Subd (a) amended effective January 1, 2012; previously amended effective January 1, 1985, July 1, 1990, January 1, 2004, and January 1, 2007.)

(b) Prosecution of the case

If a party makes a timely request for a trial, the case must proceed as provided under an applicable case management order. If no pending order provides for the prosecution of the case after a request for a trial after arbitration, the court must promptly schedule a case management conference.

(Subd (b) amended effective January 1, 2007; previously amended effective January 1, 2004.)

(c) References to arbitration during trial prohibited

The case must be tried as though no arbitration proceedings had occurred. No reference may be made during the trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings, and none of the foregoing may be used as affirmative evidence, or by way of impeachment, or for any other purpose at the trial.

(Subd (c) amended effective January 1, 2004.)

(d) Costs after trial

In assessing costs after the trial, the court must apply the standards specified in Code of Civil Procedure section 1141.21.

(Subd (d) amended effective January 1, 2007; previously amended effective July 1, 1979, and January 1, 2004.)

Rule 3.826 amended effective January 1, 2012; adopted as rule 1616 effective July 1, 1976; previously amended effective July 1, 1979, July 1, 1990, and January 1, 2004; previously amended and renumbered effective January 1, 2007.

West's Annotated **California** Codes Currentness
Los Angeles County Court Rules
Los Angeles County
Superior Court
Superior Court of **California** County of Los Angeles Court Rules
Chapter Three. Civil Division Rules
Alternative Dispute Resolution

Rule 3.260. Confidentiality

Except as provided below, court-annexed mediation and neutral evaluation is subject to the confidentiality privilege set forth in Evidence Code sections 703.5 and 1115-1128 and no communications made in connection with the mediation or the neutral evaluation, including the evaluation, may be disclosed to the judge or to anyone else not involved in the mediation or neutral evaluation unless otherwise agreed to by all parties. The mediator or neutral evaluator must require the parties and all persons attending the mediation or neutral evaluation meeting to sign a confidentiality agreement.

This rule does not prohibit:

(1) Disclosures as may be stipulated in writing by all parties and the mediator or neutral evaluator;

(2) A report to or inquiry by the ADR Administrator concerning a complaint against a mediator or a neutral evaluator;

(3) The neutral evaluator from discussing the neutral evaluation meeting with the court's ADR staff, who shall maintain the confidentiality of the neutral evaluation meeting;

(4) Any participant or the mediator or neutral evaluator from responding to an appropriate request for information made by persons authorized by the ADR department of the clerk's office to monitor or evaluate the court's ADR program;

(5) Disclosures required by law; and

(6) A settlement agreement signed by all parties waiving the confidentiality provision of Evidence Code section 1152 *et seq.*, and which contains a provision asking the court to dismiss and retain jurisdiction to enforce the terms of the settlement agreement pursuant to Code of Civil Procedure section 664.6.

Arbitration proceedings and the arbitration award are not confidential.

CREDIT(S)

Adopted, eff. July 1, 2011.

Los Angeles County Superior Court Rules, Rule **3.260,** CA R LOS ANGELES SUPER CT Rule **3.260**

Current with amendments received through 8/1/12

West's Annotated California Codes Currentness
Code of Civil Procedure (Refs & Annos)
Part 3. Of Special Proceedings of a Civil Nature (Refs & Annos)
Title 3. Of Summary Proceedings
Chapter 1. Confession of Judgment Without Action (Refs & Annos)

§ 1132. Entry of judgment; obligations for which judgment may be confessed; conditions

(a) A judgment by confession may be entered without action either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any superior court.

(b) A judgment by confession shall be entered only if an attorney independently representing the defendant signs a certificate that the attorney has examined the proposed judgment and has advised the defendant with respect to the waiver of rights and defenses under the confession of judgment procedure and has advised the defendant to utilize the confession of judgment procedure. The certificate shall be filed with the filing of the statement required by Section 1133.

§ 1133. Defendant's written statement; form

STATEMENT IN WRITING AND FORM THEREOF. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum;

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due;

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

§ 1134. Defendant's written statement; filing; entry of judgment; costs; judgment roll

(a) The statement required by Section 1133 shall be filed with the clerk of the court in which the judgment is to be entered, who must endorse upon it, and enter a judgment of the court for the amount confessed with the costs provided in subdivision (b).

(b) At the time of filing, the plaintiff shall pay as court costs that shall become a part of the judgment the fee

(b) If an action is or remains submitted to arbitration pursuant to this chapter more than four years and six months after the plaintiff has filed the action, then the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a request for a de novo trial is filed under Section 1141.20 shall not be included in computing the five-year period specified in Section 583.310.

§ 1141.18. Arbitrators; qualifications; compensation; selection; disqualification

(a) Arbitrators shall be retired judges, retired court commissioners who were licensed to practice law prior to their appointment as a commissioner, or members of the State Bar, and shall sit individually. A judge may also serve as an arbitrator without compensation. People who are not attorneys may serve as arbitrators upon the stipulation of all parties.

(b) The Judicial Council rules shall provide for the compensation, if any, of arbitrators. Compensation for arbitrators may not be less than one hundred fifty dollars ($150) per case, or one hundred fifty dollars ($150) per day, whichever is greater. A superior court may set a higher level of compensation for that court. Arbitrators may waive compensation in whole or in part. No compensation shall be paid before the filing of the award by the arbitrator, or before the settlement of the case by the parties.

(c) In cases submitted to arbitration under Section 1141.11 or 1141.12, an arbitrator shall be assigned within 30 days from the time of submission to arbitration.

(d) Any party may request the disqualification of the arbitrator selected for his or her case on the grounds and by the procedures specified in Section 170.1 or 170.6. A request for disqualification of an arbitrator on grounds specified in Section 170.6 shall be made within five days of the naming of the arbitrator. An arbitrator shall disqualify himself or herself, upon demand of any party to the arbitration made before the conclusion of the arbitration proceedings on any of the grounds specified in Section 170.1.

§ 1141.19. Arbitrators; powers

Arbitrators approved pursuant to this chapter shall have the powers necessary to perform duties pursuant to this chapter as prescribed by the Judicial Council.

§ 1141.19.5. Arbitration; limitation on production of evidence

In any arbitration proceeding under this chapter, no party may require the production of evidence specified in subdivision (a) of Section 3295 of the Civil Code at the arbitration, unless the court enters an order permitting pretrial discovery of that evidence pursuant to subdivision (c) of Section 3295 of the Civil Code.

§ 1141.20. Finality of award; de novo trial; request; limitation; calendar

(a) An arbitration award shall be final unless a request for a de novo trial or a request for dismissal in the form required by the Judicial Council is filed within 60 days after the date the arbitrator files the award with the court.

(b) Any party may elect to have a de novo trial, by court or jury, both as to law and facts. Such trial shall be calendared, insofar as possible, so that the trial shall be given the same place on the active list as it had prior to arbitration, or shall receive civil priority on the next setting calendar.

➡§ 1141.21. Judgment on trial de novo equal to or less favorable than arbitration award for party electing; payment of nonrefundable costs and fees

(a)(1) If the judgment upon the trial de novo is not more favorable in either the amount of damages awarded or the type of relief granted for the party electing the trial de novo than the arbitration award, the court shall order that party to pay the following nonrefundable costs and fees, unless the court finds in writing and upon motion that the imposition of these costs and fees would create such a substantial economic hardship as not to be in the interest of justice:

(A) To the court, the compensation actually paid to the arbitrator, less any amount paid pursuant to subparagraph (D).

(B) To the other party or parties, all costs specified in Section 1033.5, and the party electing the trial de novo shall not recover his or her costs.

(C) To the other party or parties, the reasonable costs of the services of expert witnesses, who are not regular employees of any party, actually incurred or reasonably necessary in the preparation or trial of the case.

(D) To the other party or parties, the compensation paid by the other party or parties to the arbitrator, pursuant to subdivision (b) of Section 1141.28.

(2) Those costs and fees, other than the compensation of the arbitrator, shall include only those incurred from the time of election of the trial de novo.

(b) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs and fees under subparagraphs (B) and (C) of paragraph (1) of subdivision (a) shall be imposed only as an offset against any damages awarded in favor of that party.

(c) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs under subparagraph (A) of paragraph (1) of subdivision (a) shall be imposed only to the extent that there remains a sufficient amount in the judgment after the amount offset under subdivision (b) has been deducted from the judgment.

Westlaw

C.G.S.A. § **51-85**

Connecticut General Statutes Annotated Currentness
Title 51. Courts
Chapter 876. Attorneys (Refs & Annos)

§ 51-85. Authority and powers of commissioners of the superior court

Each attorney-at-law admitted to practice within the state, while in good standing, shall be a commissioner of the superior court and, in such capacity, may, within the state, sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgments of deeds. Each such attorney may also issue subpoenas to compel the attendance of witnesses and subpoenas duces tecum in administrative proceedings. If, in any administrative proceeding, any person disobeys such subpoena or, having appeared in obedience thereto, refuses to answer any proper and pertinent question or refuses to produce any books, papers or documents pursuant thereto, application may be made to the superior court or any judge thereof for an order compelling obedience.

CREDIT(S)

(1949 Rev., § 7648; 1977, P.A. 77-386, § 1, eff. June 14, 1977; 1978, P.A. 78-280, § 80, eff. July 1, 1978.)

HISTORICAL AND STATUTORY NOTES

Amendments

1977 Amendment. 1977, P.A. 77-386, § 1, added the second and third sentences.

1978 Amendment. 1978, P.A. 78-280, § 80, substituted, in the third sentence, "superior court" for "court of common pleas".

Derivation:

1902 Rev., § 461.
1905, P.A. ch. 124.
1909, P.A. ch. 183.
1911, P.A. ch. 177.
1918 Rev., § 5468.
1921, P.A. ch. 67.
1930 Rev., § 5352.
1935, Supp. § 1629c.

C. G. S. A. § **51-85,** CT ST § **51-85**

Current with enactments from the 2012 February Regular Session
and June 12 Special Session

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Connecticut General Statutes Annotated Currentness
Title 51. Courts
Chapter 882. Superior Court
Part IA. Magistrates

§ 51-193l. Appointment of magistrates. Submission of names of probate judges for approval as magis- trates

The Chief Court Administrator shall make such orders and rules as he deems necessary to provide for the appointment of magistrates to hear and decide cases pursuant to the provisions of sections 51-193t and 51-193u. Any commissioner of the Superior Court, admitted to practice in this state for at least five years, who is able and willing to hear such cases designated in accordance with sections 51-193t and 51-193u may be appointed as a magistrate. Any probate judge who is a commissioner of the superior court admitted to practice in this state for at least five years may submit his name to the Probate Court Administrator, who shall submit a list of such names to the Office of the Chief Court Administrator for approval to be placed on a list of available magistrates for one or more judicial districts.

§§ 51-193m to 51-193q. Repealed. (1985, P.A. 85-464, § 6.)

§§ 51-193m to 51-193q. Repealed. (1985, P.A. 85-464, § 6.)

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§§ 51-193m to 51-193q. Repealed. (1985, P.A. 85-464, § 6.)

§ 51-193r. Compensation of magistrates

Each commissioner of the superior court shall receive, for acting as a magistrate in accordance with the provisions of sections 51-193t and 51- 193u the sum of one hundred fifty dollars for each day he is engaged as a magistrate.

§ 51-193s. Repealed. (1985, P.A. 85-464, § 6.)

§ 51-193t. Hearing of small claims matters by magistrate

(a) Notwithstanding the provisions of chapter 922a, [FN1] the hearing and determination of small claims matters may be assigned to magistrates. Magistrates may handle all aspects of the small claims session including, but not limited to, the determination of all uncontested and contested matters, motions to open judgment, motions to transfer to the regular civil docket, and any motions concerning any postjudgment remedy resulting from a small claims judgment.

(b) A magistrate appointed to hear a small claims matter shall not be bound by the rules regarding the admissibility of evidence, but all testimony shall be given under oath or affirmation. Either party may be represented by counsel but no record of the proceedings before the magistrate shall be required to be kept.

[FN1] C.G.S.A. § 52-549a et seq.

§ 51-193u. Hearing of violations and infractions by magistrate. Authority of magistrate decision. Demand for trial de novo

(a) Cases involving motor vehicle violations, excluding alleged violations of sections 14-215, 14-222, 14-222a, 14-224 and 14-227a and any other motor vehicle violation involving a possible term of imprisonment, or any violation, as defined in section 53a-27, which are scheduled for the entering of a plea may be handled by a magistrate.

(b) Infractions and violations designated in subsection (a) of this section in which a plea of not guilty has been entered may be heard by a magistrate. Magistrates shall not have the authority to conduct jury trials.

(c) Magistrates shall have the authority to accept pleas of guilty or of not guilty, to accept pleas of nolo contendere and enter findings of guilty thereon, to impose fines, to set bonds, to forfeit bonds, to continue cases to a date certain, to enter nolles brought by the prosecutorial official, to recommend suspension under section 14-111b, 14-140 or 15-154, to order notices of intention to suspend motor vehicle licenses and registrations, to order issuance of a mittimus if a defendant has been found able to pay and fails to pay, to remit fines, to impose or waive fees and costs, to hear and decide motions, to dismiss cases and to decide cases that are tried before him.

(d) A decision of the magistrate, including any penalty imposed, shall become a judgment of the court if no demand for a trial de novo is filed. Such decision of the magistrate shall become null and void if a timely demand for a trial de novo is filed. A demand for a trial de novo shall be filed with the court clerk within five days of the date the decision was rendered by the magistrate and, if filed by the prosecutorial official, it shall include a certification that a copy thereof has been served on the defendant or his attorney, in accordance with the rules of court. No record of the proceedings shall be required to be kept.

Current with enactments from the 2012 February Regular Session and June 12 Special Session
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Connecticut General Statutes Annotated Currentness
Title 52. Civil Actions
➡ Chapter 922B. Fact-Finding and Arbitration

§ 52-549n. Certain contract actions referred to fact-finders. Rules of procedure

In accordance with the provisions of section 51-14, the judges of the Superior Court may make such rules as they deem necessary to provide a procedure in accordance with which the court, in its discretion, may refer to a fact-finder for proceedings authorized pursuant to this chapter, any contract action pending in the Superior Court, except claims under insurance contracts for uninsured and or underinsured motorist coverage, in which only money damages are claimed and which is based upon an express or implied promise to pay a definite sum, and in which the amount, legal interest or property in controversy is less than fifty thousand dollars exclusive of interest and costs. Such cases may be referred to a fact-finder only after the certificate of closed pleadings has been filed, no claim for a jury trial has been filed at the time of reference, and the time prescribed in section 52-215 for filing a jury trial claim within thirty days of the return day or within ten days after the issue of fact has been joined has expired.

§ 52-549o. Assignment of fact-finders. Hearings

The Chief Court Administrator may assign to each judicial district such number of fact-finders as he deems advisable. The Chief Court Administrator, or his designee, shall designate the holding of fact-finding hearings at such times and in such courthouse facilities as he deems to be in the best interest of court business, taking into consideration the convenience of litigants and their counsel and the efficient use of courthouse personnel and facilities.

§ 52-549p. Appointment of fact-finders. Compensation. Powers

(a) Upon publication of a notice in the Connecticut Law Journal, any commissioner of the superior court admitted to practice in this state for at least five years, who is willing and able to act as a fact-finder, may submit his name to the Office of the Chief Court Administrator for approval to be placed on a list of available fact-finders for one or more judicial districts. The criteria for selection and approval of the fact-finders shall be promulgated by the judges of the superior court. Upon selection and approval by the Chief Court Administrator, for such term as he may fix, the fact-finders shall be sworn or affirmed to try justly and equitably all matters at issue submitted to them. The Chief Court Administrator, in his discretion, may at any time revoke any such approval.

(b) Each fact-finder shall receive one hundred dollars for each day he is assigned to a courthouse facility to conduct hearings as a fact-finder, and an additional twenty-five dollars for each finding of fact filed with the court. In difficult or extraordinary cases the Chief Court Administrator may, in his discretion, make a further allowance not to exceed two hundred dollars for services rendered attendant to but not part of the hearing.

(c) Such fact-finders shall have the power to: (1) Issue subpoenas for the attendance of witnesses and for the production of books, papers and other evidence, such subpoenas to be served in the manner provided by law for service of subpoenas in a civil action and to be returnable to the fact-finders; (2) administer oaths or affirmations; and (3) determine the admissibility of evidence and the form in which it is to be offered.

§ 52-549q. Repealed. (1982, P.A. 82-441, § 21, eff. April 1, 1983.)

§ 52-549r. Rules of evidence to apply to fact-finding proceedings. Finding of fact. Award

In matters submitted to fact-finding a record shall be made of the proceedings and the rules of evidence in civil cases in this state shall apply. The fact-finders shall proceed to determine the matters in controversy submitted to them, and shall prepare and sign a finding of fact, which shall include an award of damages if applicable. Within one hundred twenty days of the completion of the fact-finder's hearing the fact-finder shall file the finding of fact with the clerk of the court together with sufficient copies thereof for the parties and their counsel.

§ 52-549s. Consideration of finding by court. Objections. Authority of court re finding

(a) Not less than fourteen days after the filing of the finding, the clerk shall schedule the matter for consideration by the court. The parties may file objections to the acceptance of the finding of fact in accordance with rules established by the judges of the superior court. The court may (1) render judgment in accordance with the finding; (2) reject the finding and remand the case to the fact-finder who originally heard the matter for a rehearing on all or part of the finding of fact; (3) reject the finding and remand the matter to another fact-finder for a rehearing; (4) reject the finding and revoke the reference or (5) take any other action the court may deem necessary.

(b) The court may correct a finding at any time before the acceptance of the finding, upon the written stipulation of the parties.

(c) The fact-finder shall not be called as a witness, nor shall the decision of the fact-finder be admitted in evidence at another proceeding ordered by the court.

§ 52-549t. Failure to appear. Payment of fees of fact-finder. Dismissal of action

(a) Where a party fails to appear at the hearing, the fact-finder shall nonetheless proceed with the hearing and shall make a finding of fact, as may be just and proper under the facts and circumstances of the action, which shall be filed with the clerk of the court pursuant to section 52-549r for consideration by the court pursuant to section 52-549s. If, pursuant to section 52-549s, the party who failed to appear files an objection to the acceptance of the finding of fact and the objection is sustained by the court, the court may require that party to pay to the court an amount not greater than the total fees then payable to the fact-finder for services in the case.

(b) If all parties fail to appear at the hearing, the fact-finder shall file a request with the court to dismiss the action. If the court does not dismiss the action it may be heard by the fact-finder upon order of the court. Such order may provide for the payment by any party to the court of an amount not greater than one hundred dollars.

§ 52-549u. Arbitration of certain civil actions. Rules of procedure

In accordance with the provisions of section 51-14, the judges of the Superior Court may make such rules as they deem necessary to provide a procedure in accordance with which the court, in its discretion, may refer to an arbitrator, for proceedings authorized pursuant to this chapter, any civil action in which in the discretion of the court, the reasonable expectation of a judgment is less than fifty thousand dollars exclusive of legal interest and costs and in which a claim for a trial by jury and a certificate of closed pleadings have been filed. An award under this section shall not exceed fifty thousand dollars, exclusive of legal interest and costs. Any party may petition the court to become eligible to participate in the arbitration process as provided in this section.

§ 52-549v. Assignment of arbitrators. Arbitration proceedings

The Chief Court Administrator may assign to each judicial district such number of arbitrators as he deems advisable. The Chief Court Administrator, or his designee, shall designate the holding of arbitration proceedings at such times and in such courthouse facilities as he deems to be in the best interest of court business, taking into consideration the convenience of litigants and their counsel, and the efficient use of courthouse personnel and facilities.

§ 52-549w. Appointment of arbitrators. Compensation. Powers

(a) Upon publication of a notice in the Connecticut Law Journal, any commissioner of the Superior Court admitted to practice in this state for at least five years, who has civil litigation experience and who is willing and able to act as an arbitrator, may submit his name to the Office of the Chief Court Administrator for approval to be placed on a list of available arbitrators for one or more judicial districts. The criteria for selection and approval of arbitrators shall be promulgated by the judges of the Superior Court. Upon selection and approval by the Chief Court Administrator, for such term as he may fix, the arbitrators shall be sworn or affirmed to try justly and equitably all matters at issue submitted to them. The Chief Court Administrator, in his discretion, may at any time revoke any such approval.

(b) Each arbitrator shall receive one hundred dollars for each day he is assigned to a courthouse facility to conduct proceedings as an arbitrator and an additional twenty-five dollars for each decision filed with the court. In difficult or extraordinary cases, the Chief Court Administrator may, in his discretion, make a further allowance not to exceed two hundred dollars for services rendered attendant to but not part of the hearing.

(c) Such arbitrators shall have the power to: (1) Issue subpoenas for the attendance of witnesses and for the production of books, papers and other evidence, such subpoenas to be served in the manner provided by law for service of subpoenas in a civil action and to be returnable to the arbitrators; (2) administer oaths or affirmations; and (3) determine the admissibility of evidence and the form in which it is to be offered.

§ 52-549x. Decision of arbitrator

Within one hundred twenty days of the completion of the arbitration hearing the arbitrator shall file his decision with the clerk of the court together with sufficient copies thereof for the parties or their counsel. In his decision the arbitrator shall state the number of days on which hearings concerning that case were held before such arbitrator.

§ 52-549y. Failure to appear. Judgment. Motion to open or set aside judgment. Dismissal of action. Payment of arbitration fee

(a) Where a party fails to appear at the hearing, the arbitrator shall nonetheless proceed with the hearing and shall make a decision, as may be just and proper under the facts and circumstances of the action, which shall be entered as a judgment forthwith by the court. Such judgment may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which it was rendered. If the court opens or sets aside the judgment, it may resubmit the actions to the arbitrator. Any order opening or setting aside the judgment may be upon condition that the moving party pay into the court an amount not greater than the total fees then payable to the arbitrator for services in the case.

(b) If all parties fail to appear at the hearing, the arbitrator shall file a request with the court to dismiss the action. If the court does not dismiss the action, it may be heard by the arbitrator upon order of the court. Such order may provide for the payment by any party to the court of an amount not greater than one hundred dollars.

§ 52-549z. Appeal. Trial de novo

(a) A decision of the arbitrator shall become a judgment of the court if no appeal from the arbitrator's decision by way of a demand for a trial de novo is filed in accordance with subsection (d) of this section.

(b) A decision of the arbitrator shall become null and void if an appeal from the arbitrator's decision by way of a demand for a trial de novo is filed in accordance with subsection (d) of this section.

(c) For the purpose of this section the word "decision" shall include a decision and judgment rendered pursuant to subsection (a) of section 52- 549y, provided the appeal is taken by a party who did not fail to appear at the hearing, and it shall exclude any other decision or judgment rendered pursuant to said section.

(d) An appeal by way of a demand for a trial de novo must be filed with the court clerk within twenty days after the deposit of the arbitrator's decision in the United States mail, as evidenced by the postmark, and it shall include a certification that a copy thereof has been served on each counsel of record, to be accomplished in accordance with the rules of court. The decision of the arbitrator shall not be admissible in any proceeding resulting after a claim for a trial de novo or from a setting aside of an award in accordance with section 52-549aa.

(e) The Superior Court may refer any proceeding resulting from the filing of a demand for a trial de novo under subsection (d) of this section to a judge trial referee without the consent of the parties, and said judge trial referee shall have and exercise the powers of the Superior Court in respect to trial, judgment and appeal in the case, including a judgment of fifty thousand dollars or more.

§ 52-549aa. Setting aside award. Trial de novo

In addition to the absolute right to a trial de novo as provided under section 52-549z, the court in which such award is filed may set aside an award of arbitrators and order a trial de novo in the Superior Court upon proof that the arbitrators acted arbitrarily or capriciously in the course of the hearings before them or that the award was procured by corruption or other undue means.

Current with enactments from the 2012 February Regular Session and June 12 Special Session
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District of Columbia State Rules Currentness
Superior Court Rules of Civil Procedure
➡ Rules of the Civil Arbitration Program

Introduction

The Superior Court of the District of Columbia has adopted the Civil Arbitration Rules in order to provide a Court-sponsored arbitration program for parties with lawsuits pending in the Civil Division. The Arbitration Program is an integral component of the Court's Civil Delay Reduction project. The rules authorize the Court to assign certain actions filed in the Civil Division to the Arbitration Program.

The Court-sponsored program is not intended to supersede or modify the provisions of the D.C. Uniform Arbitration Act, D.C.Code 1981, Title 16, Chapter 42 or the Federal Arbitration Act, 9 U.S.C. Section 1, both of which apply when the parties themselves make a written contractual agreement to submit their dispute to arbitration rather than resort to the Court's system. The Superior Court Arbitration Program is intended to operate exclusively and independently of the procedures set forth in the D.C. Uniform Arbitration Act and the Federal Arbitration Act.

Rule I. Eligibility of Cases for and Assignment to Arbitration

(a) All cases filed in the Civil Division shall be eligible for assignment to the Superior Court Civil Arbitration Program, with the exception of (1) actions in the Small Claims and Conciliation Branch, (2) actions in the Landlord and Tenant Branch, (3) actions seeking only equitable or declaratory relief, (4) class actions and (5) cases in which one of the parties is incarcerated. Any case so assigned shall be governed by these rules.

(b) The individual calendar Judge may assign a case to arbitration at any time.

(c) Arbitration is non-binding unless otherwise agreed to in writing by the parties. The parties may agree to binding arbitration at any time by filing with the Multi-Door Dispute Resolution Division (hereinafter referred to as the Multi-Door Division) a written praecipe to that effect signed by counsel for each party and by any unrepresented party. Parties to a binding arbitration waive their right to appeal the arbitrator's decision on any grounds except those listed under Rule XII.

(d) The parties may submit a case to binding arbitration before an arbitrator other than one assigned under this program by filing a praecipe with the Court indicating this fact. These Rules shall not apply to any case so submitted.

(e) Where cases are consolidated, if the oldest case was assigned to arbitration then all of the consolidated cases shall be assigned to arbitration, unless otherwise ordered by the Judge to whom the case has been assigned.

Rule II. Removal of Cases From the Arbitration Program

(a) For good cause the arbitrator may recommend, or any party may move, that the Court remove the case from the Arbitration Program. If a party files such a motion with the arbitrator, the arbitrator shall attach a recommended decision to the motion. The arbitrator shall file a copy of such a motion (and a recommended decision on the motion) with the Multi-Door Division. The arbitrator shall stay the arbitration proceeding pending a ruling by

the Court on the recommendation or motion. A motion to remove shall only be granted for good cause.

(b) The individual calendar Judge shall submit to the Multi-Door Division a copy of his or her decision. The Clerk of the Multi-Door Division shall notify the arbitrator and the parties of that decision.

(c) An individual calendar Judge may order removal of a case on his or her calendar from the Arbitration Pro- gram.

(d) A case that is stayed pursuant to court order shall be removed from the arbitration program.

Rule III. Qualifications and Service of Arbitrators

(a) Anyone who seeks to be considered for the position of arbitrator shall certify in writing that he or she (1) is an active or inactive member of the District of Columbia Bar who has been licensed to practice law in any jurisdiction for at least 5 years and (2) has participated as lead attorney in at least 3 civil trials of over 4 hours in length in a court of record or in at least 3 hearings of over 4 hours in length before an administrative law judge. The Multi-Door Division shall select and train arbitrators from applicants so qualified, or who are otherwise certified by the Director of the Multi-Door Division as being authorized to arbitrate.

(b) The Multi-Door Division shall maintain a file, open to public inspection, containing current information about the arbitrators.

(c) The Director of the Multi-Door Division may remove an arbitrator from a case for administrative reasons, and the Director may recommend to the Chief Judge or the Chief Judge's designee that an arbitrator be removed from the program for non-performance, inadequate performance or other good cause.

Rule IV. Assignment of Arbitrators

(a) The Court shall provide one arbitrator for each case assigned to arbitration. The parties shall forward to the arbitrator or panel of arbitrators a copy of the complaint and answer within 14 days of the assignment of the arbitrator.

(b) The parties may agree among themselves to select a particular arbitrator from a roster of eligible arbitrators provided by the Multi-Door Division. Otherwise, when a Judge assigns a case to arbitration an arbitrator shall be assigned pursuant to procedures designated by the Presiding Judge of the Civil Division. The Multi-Door Division shall make available to the public copies of the current assignment procedures.

(c) Parties may have their case decided by a panel of 3 arbitrators if all parties so request at the time of assignment to arbitration and pay the fee established by the Chief Judge of the Superior Court for each additional arbitrator. The Multi-Door Division shall distribute the current fee schedule upon request. The parties shall deposit with the Civil Finance Office a check to cover the additional arbitrators' fees within 10 days of assignment of their case to arbitration. The parties shall submit a receipt for payment of this fee to the Multi-Door Division. The Director of the Multi-Door Division shall designate one arbitrator to preside, who shall be responsible for scheduling and coordinating all proceedings.

(d) A party who objects to the assignment of an arbitrator must file a request for recusal with the arbitrator within 5 days of the arbitrator's assignment. The request for recusal shall be accompanied by an affidavit that states the facts and reasons for the request. An arbitrator may recuse himself or herself without stating the reasons for

so doing. The arbitrator's decision on withdrawal shall be guided by the standards for recusal for a trial Judge of this Court. An arbitrator who withdraws shall immediately give written notice to the Multi-Door Division and all parties. The Multi-Door Division shall assign another arbitrator within 10 days of the arbitrator's notification of recusal. If an arbitrator does not withdraw in response to a party's request, the party may file a motion with the Multi-Door Division requesting that the individual calendar Judge remove the arbitrator. The moving party shall mail or electronically transmit copies of the motion for removal of the arbitrator to the arbitrator and all parties. The Multi-Door Division shall forward the motion to the individual calendar Judge and reassign the case to another arbitrator if so ordered by the Judge. The arbitration proceedings shall be stayed pending the decision of the individual calendar Judge.

Rule V. Compensation of Arbitrators

The Court shall compensate each arbitrator according to a schedule established by the Chief Judge of the Superior Court. The fee shall be paid after the Arbitration Award is filed or the case is otherwise removed from arbitration.

Rule VI. Powers of the Arbitrator

(a) The arbitrator shall have the same authority to act in the arbitration proceedings as a Superior Court Judge assigned to hear a non-jury civil action, except that the arbitrator shall have no power to hold any person in contempt, but may so recommend to the calendar Judge to whom the case has been assigned. The arbitrator's authority shall include, but not be limited to, the power to place all witnesses under oath or affirmation pursuant to Rule IX(h)(3), the power to issue subpoenas, rule on evidentiary matters, decide discovery disputes, compel the production of documents, impose sanctions for failure to comply with orders compelling discovery, enter judgment by default or consent, and stay execution of such judgment conditioned upon the agreement in writing of all parties to pay certain express amounts over a stated period of time. However, only the calendar Judge to whom the case has been assigned may grant a subsequent request to vacate the stay of execution and enter judgment.

(b) The arbitrator shall have the exclusive power to decide all motions pending at the time of assignment to arbitration or filed after assignment to arbitration, with the following exceptions: (1) motions to remove a case from arbitration, (2) motions to remove the arbitrator from a case in accordance with Rule IV(d), (3) motions to consolidate cases and (4) motions to continue the arbitration hearing more than 60 days beyond the 120-day deadline for conducting an arbitration hearing. The arbitrator may grant or deny a motion without explaining the reasons for the decision. The arbitrator's rulings on motions are not appealable.

(c) In the case of motions listed in Rule VI(b)(1)-(4) above, the arbitrator shall file a copy of the motion and the recommended ruling with the Multi-Door Division within 15 days of the motion's receipt. Within 5 days thereafter, the Multi-Door Division shall transmit the motion and arbitrator's recommended ruling to the individual calendar judge. The arbitrator's recommended ruling shall be deemed an order of the Court unless the individual calendar judge orders otherwise within 15 days of his or her receipt of the arbitrator's ruling.

(d) The arbitrator may suspend particular requirements of Superior Court Rules of Civil Procedure 26-37 unless such a suspension would substantially prolong resolution of the case or impede a fair arbitration decision.

(e) All settlements and judgments involving minors must, in accordance with D.C.Code Section 21-120, be approved by the individual calendar Judge to whom the case has been assigned.

(f) The arbitrator's authority ends with the filing of the Arbitration Award, except that the arbitrator shall have the authority to rule on subsequent Bills of Costs. The arbitrator's decisions are not binding on the Court in the event of a trial de novo or removal of the case from the arbitration program.

Rule VII. Discovery

(a) Formal discovery is permitted in arbitration cases but informal discovery is encouraged. Discovery must be completed 15 days prior to the arbitration hearing. Discovery may be used in any subsequent Court proceeding if permitted by the Superior Court Rules of Civil Procedure.

(b) The deadline for the completion of any subsequent discovery after the filing of a demand for trial de novo is the 60th day after any party has filed a timely demand for a trial de novo.

Rule VIII. Filing Procedures

(a) Every motion shall be in writing and served on all other parties or their counsel and transmitted to the arbitrator to ensure receipt at least 10 days prior to the arbitration hearing, except motions made before the arbitrator in the presence of affected opposing parties or their counsel and motions made under emergency conditions.

(b) Parties shall file any of the following motions or papers with the Multi-Door Division: (1) a demand for trial de novo, (2) objections to the arbitration proceedings or award or (3) motions to request removal of an arbitrator in accordance with Rule IV(d). A party shall mail or electronically transmit copies of all motions and associated papers to all other parties.

(c) Parties shall file with the Civil Clerk's Office all papers as required under the Superior Court Rules of Civil Procedure, except for motions, oppositions and responses thereto filed prior to the filing of an arbitration award. Parties shall mail or electronically transmit a copy of each paper to the arbitrator and all parties.

(d) The arbitrator shall mail or electronically transmit any arbitration orders and recommended rulings to the parties. The arbitrator shall file with the Multi-Door Division any of the following documents: (1) recommended rulings attached to motions to consolidate cases or to remove the case from arbitration, (2) a ruling to extend the arbitration proceedings up to 60 days beyond the deadline for conducting an arbitration hearing, (3) a recommendation to extend the arbitration proceedings more than 60 days beyond the deadline for conducting an arbitration hearing, (4) notification of recusal as the assigned arbitrator or reason(s) for a decision not to recuse, (5) the Arbitration Award and (6) other forms as required by the Multi-Door Division.

(e) The Multi-Door Division shall forward to the individual calendar Judge copies of any of the following: (1) an arbitrator's recommended ruling attached to a motion to consolidate cases or to remove a case from arbitration, (2) a party's motion requesting removal of an arbitrator from the case in accordance with Rule IV(d), (3) an arbitrator's recommendation to extend the arbitration proceedings more than 60 days beyond the 120-day deadline for conducting an arbitration hearing and (4) parties' objections to the arbitration proceedings or to an award.

(f) The deadline for filing motions addressed to the Court is the fifteenth day after the close of discovery in accordance with Rule VII(b). Previous rulings of the arbitrator are not binding on the Judge. All motions papers filed after a demand for a trial de novo shall be filed with the Civil Clerk's office and a chambers' copy submitted to the assigned Judge.

Rule IX. Arbitration Hearing

(a) Date. The arbitrator shall conduct the hearing within 120 days of his or her assignment as arbitrator and, unless consent is granted by all parties or the case has been reassigned to another arbitrator in accordance with Rule XII(f), no earlier than 60 days after the date the case was assigned to arbitration. The arbitrator shall give the Multi-Door Division and the parties written notice of the hearing at least 30 days prior to the hearing date. In the event a defendant is added to the case after the arbitrator has set a hearing date, the arbitrator shall set a new hearing date which is at least 60 days after the date the motion to add a defendant is granted.

(b) Time and Location. After consultation with counsel and unrepresented parties, the arbitrator shall fix a time and place for the hearing which, to the extent practicable, will be convenient for the hearing participants. Hearings shall take place within the District of Columbia unless the arbitrator and all parties agree to a different location.

(c) Attendance. All parties and their attorneys must attend the arbitration hearing unless excused by the arbitrat- or.

(d) Continuances.

(1) The arbitrator may continue the hearing upon request by any party and a showing of good cause, so long as the hearing is held within the 120-day period required by Rule IX(a). The arbitrator's decision to grant or deny a continuance is not appealable.

(2) The arbitrator may grant a continuance of up to 60 days beyond the 120-day period upon a showing by a party of exceptional circumstances. The arbitrator shall promptly notify the Multi-Door Division in writing of the reasons for granting such a continuance and of the new hearing date. The arbitrator's decision to grant or deny a continuance is not appealable.

(3) If the arbitrator believes good grounds exist to continue the hearing more than 60 days beyond the 120-day period, he or she must file a recommendation to that effect with the Multi-Door Division. The arbitrator's decision not to recommend a continuance is not appealable. The Multi-Door Division shall forward such a recommendation to the individual calendar Judge, who shall approve or disapprove the continuance based solely upon the arbitrator's recommendation. The Multi-Door Division shall notify the arbitrator of the Court's decision.

(4) Arbitration hearings that are subsequently continued may be held upon 10 days written notice, unless the parties agree on an earlier date.

(e) Nonappearance of Party. The arbitrator may conduct an arbitration hearing in the absence of any party who, after due notice, fails to appear. The arbitrator may impose liability or determine damages against an absent defendant based upon evidence presented by the plaintiff but not solely upon the absence of the defendant. A decision for the defendant on the plaintiff's claim may be based solely upon the absence of the plaintiff.

(f) Evidence. Formal rules of evidence shall guide the arbitration hearing, but strict adherence is not required. Generally, rules of evidence should be liberally construed to promote the ends of justice. Relevance, fairness and reliability shall be the primary considerations in the admission of evidence.

(1) In actions involving personal injury and/or property damage, the arbitrator may receive in evidence doctors' and dentists' reports and the bills or estimates listed in subsections A-E below without further proof, provided

that at least 2 weeks written notice shall have been given to all adverse parties accompanied by a copy of any bills, estimates or reports to be offered in evidence. Any objection to the use or authenticity of such bills, estimates or reports must be made at least one week in advance of the hearing.

(A) Hospital bills on the official letterhead or billhead of the hospital, when dated and itemized;

(B) Bills of doctors and dentists, when dated and containing a statement showing the date of each visit and the charge therefor;

(C) Bills of registered nurses, licensed practical nurses, or physical therapists, when dated and containing an itemized statement of the days and hours of service and the charges therefor;

(D) Bills for medicine, eye glasses, hearing aids, prosthetic devices, or similar items, when dated and item- ized;

(E) Property repair bills or estimates, when identified, dated and itemized, setting forth the charges for labor and material used in the repair of the property. In the case of an estimate, the party intending to offer the estimate shall include with the notice and copy of the estimate sent to the adverse party, a statement indicating whether or not the property was repaired, and if so, whether the estimated repairs were made in full or in part, attaching a copy of the receipted bill showing the items of repair made and the amount paid. Estimates shall bear a statement of the issuer that they are true and correct, and that the charges appearing therein are fair, reasonable, and those customarily charged to members of the public.

(2) The arbitrator may receive the testimony of a witness without requiring the witness' presence if the testimony is presented by signed affidavit, provided that at least 2 weeks written notice shall have been given to all adverse parties accompanied by a copy of such affidavit. Any objection to the use or authenticity of such affidavits must be made one week in advance of the arbitration hearing.

(g) Recording of the Hearing. The Court will not provide or pay for a record of the arbitration hearing, but any party may record the hearing and shall notify all other parties in advance of the intent to record. If a party intends to tape record the hearing, the party shall allow any other party to examine, duplicate and transcribe the record at that party's own expense. If a party intends for a court reporter to be present and transcribe the hearing, all other parties may arrange to secure a copy of the transcript from the court reporter. The recording or its transcription shall not be admitted as evidence in any subsequent proceeding in Superior Court, except as provided for by Rule XI(f) below.

(h) Conduct of the Hearing. The arbitrator has wide latitude in conducting the arbitration hearing, but at a minimum shall incorporate the following events in sequence:

(1) The arbitrator shall make a written record of the date, time and location of the hearing and the names of all parties, counsel and witnesses in attendance. The arbitrator shall attach this record to the arbitration award.

(2) The arbitrator shall decide all pending pre-hearing motions before the plaintiff presents his or her case, unless the arbitrator expressly defers a decision until issuance of the award or sooner.

(3) The arbitrator or other duly-qualified officer shall place all witnesses under oath or affirmation. See D.C.Code, Section 16-4307.

(4) The plaintiff shall present his or her claims, proof and witnesses. The defendant shall present his or her claims, proof and witnesses. The arbitrator may accept appropriate rebuttal evidence. All witnesses shall be subject to cross-examination by the parties and to questions by the arbitrator.

(5) The arbitrator shall inquire of all parties whether they have any further proof or witnesses to be heard. At this time the arbitrator may continue or conclude the hearing.

(i) Witness Fees. Witness fees in any case referred to arbitration shall be the same as those now or hereafter provided for in trials in the Civil Division of Superior Court, and shall be paid by the same party who would have paid had the case been tried in Superior Court.

Rule X. Arbitration Award and Judgment

(a) The arbitrator shall file an Arbitration Award, as to each party and on a form provided by the Multi-Door Division, with the Multi-Door Division and shall mail or electronically transmit it to all parties, within 15 days after the arbitration hearing. The arbitrator may provide findings of fact and conclusions of law, but they are not required.

(b) If the time for filing a demand for trial de novo expires without such action, the Clerk of the Civil Division shall enter the Award as a judgment of the Court as to each party. This judgment shall have the same force and effect as a final judgment of the Court in a civil action, but may not be appealed nor be the subject of a motion under Superior Court Rules of Civil Procedure 59 or 60(b).

(c) Rules 54 and 54-I of the Rules of Civil Procedure govern the award of costs on arbitration awards entered as final judgments of the court.

Rule XI. Trial De Novo

(a) Parties who agreed to submit their case to binding arbitration shall be deemed to have waived their right to file a request for a trial de novo.

(b) Any party to a non-binding arbitration may file a demand for trial de novo with the Multi-Door Division within 15 days after the filing of the Arbitration Award. In the event any party objects to the Award pursuant to Rule XII below, a demand for trial de novo must be made within 15 days after denial of the objection.

(c) A demand for a trial de novo by any party returns the case to the trial calendar as to all parties.

(d) If any party files a demand for trial de novo, the Director of the Multi-Door Division or the Director's designee shall notify the Clerk of the Civil Division who shall schedule the case for a pre-trial hearing with the individual calendar Judge.

(e) The trial de novo shall be conducted as though no arbitration proceeding had occurred. No reference shall be made to the Arbitration Award in any pleading, brief, or other written or oral statement to the trial court or jury either before or during the trial, nor shall a jury be informed that there has been an arbitration proceeding.

(f) Sworn testimony of a witness given during the arbitration proceeding is admissible in subsequent proceedings to the extent allowed by court rules and District of Columbia law, except that the testimony shall not be identified as having been given in an arbitration proceeding. The arbitrator shall not be called as a witness at the

trial de novo.

Rule XII. Objections to Arbitration Proceeding and Award

(a) A party may file objections to the binding or non-binding arbitration proceeding or Award for any of the following reasons and no other:

(1) the Award was procured by corruption, fraud or other undue means;

(2) there was evident partiality by an arbitrator appointed as a neutral or corruption in the arbitrator or misconduct prejudicing the rights of any party; or

(3) the arbitrator exceeded his or her powers.

(b) A party shall file any such objections with the Multi-Door Division within 15 days of the filing of the Arbitration Award and shall mail or electronically transmit copies of the objections to the arbitrator and all parties.

(c) A party may file an opposition to the objections with the Multi-Door Division within 15 days of the filing of the objections and shall mail or electronically transmit copies of the opposition to the arbitrator and all parties.

(d) An arbitrator may file a response to the objections with the Clerk of the Multi-Door Division within 15 days of the filing of the objections and shall mail or electronically transmit copies of the response to all parties.

(e) The Multi-Door Division shall forward the objections and any oppositions or responses to the individual calendar Judge no later than 30 days after the filing of the objections.

(f) The individual calendar Judge may dismiss or sustain the objections. In the event the Judge sustains the objections, he or she shall vacate the Arbitration Award. The Multi-Door Division shall assign a new arbitrator to the case and shall ensure that a new hearing is held within 60 days of assignment of the case to the new arbitrator, unless otherwise directed by the individual calendar Judge.

Rule XIII. Modification or Correction of Award

(a) A party may apply to modify or correct the Arbitration Award within 60 days after its filing.

(b) A party shall file an application to modify or correct the Award with the Multi-Door Division and shall mail or electronically transmit copies of the application to the arbitrator and all parties.

(c) The Multi-Door Division shall forward the application to the individual calendar Judge to whom the case is assigned no later than 5 days after receipt of the application.

(d) The Judge shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the Award;

(2) The arbitrator rendered an award upon a matter not submitted to him or her and the Award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The Award is imperfect in a matter of form, not affecting the merits of the controversy.

(e) If the application is granted, the Judge shall (1) modify and correct the award so as to effect its intent, (2) confirm the Award as so modified and corrected, and (3) vacate any judgment incorporating the Award and issue a new judgment incorporating the corrected Award. Otherwise, the Judge shall confirm the Award as made.

Rule XIV. Appearance and Withdrawal of Attorneys

(a) The provisions of Rule 101 of the Superior Court Rules of Civil Procedure apply to all matters assigned to arbitration. No corporation may appear in any arbitration proceedings except through a person authorized by Superior Court Civil Rule 101 to appear in this Court in a representative capacity.

(b) If an attorney's appearance at a previously-scheduled arbitration hearing conflicts with a later-scheduled trial or other Court proceeding that does not involve an incarcerated or detained person, the attorney must notify the Judge in the trial or other proceeding. The Judges of this Court shall defer to the arbitration hearing.

Rule XV. Applicability of Superior Court Rules of Civil Procedure

Except as otherwise provided herein, the Superior Court Rules of Civil Procedure shall apply to all proceedings under the Arbitration Program. In the event of a conflict between an Arbitration Rule and a Rule of Civil Procedure, the Arbitration Rule shall control.

Current with amendments received through 1/1/2012
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CHAPTER 44
MEDIATION ALTERNATIVES TO JUDICIAL ACTION

44.1011 Definitions.—As used in this chapter:

(1) "Arbitration" means a process whereby a neutral third person or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding as provided in this chapter.

(2) "Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decisionmaking authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives. "Mediation" includes:

(a) "Appellate court mediation," which means mediation that occurs during the pendency of an appeal of a civil case.

(b) "Circuit court mediation," which means mediation of civil cases, other than family matters, in circuit court. If a party is represented by counsel, the counsel of record must appear unless stipulated to by the parties or otherwise ordered by the court.

(c) "County court mediation," which means mediation of civil cases within the jurisdiction of county courts, including small claims. Negotiations in county court mediation are primarily conducted by the parties. Counsel for each party may participate. However, presence of counsel is not required.

(d) "Family mediation" which means mediation of family matters, including married and unmarried persons, before and after judgments involving dissolution of marriage; property division; shared or sole parental responsibility; or child support, custody, and visitation involving emotional or financial considerations not usually present in other circuit civil cases. Negotiations in family mediation are primarily conducted by the parties. Counsel for each party may attend the mediation conference and privately communicate with their clients. However, presence of counsel is not required, and, in the discretion of the mediator, and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.

(e) "Dependency or in need of services mediation," which means mediation of dependency, child in need of services, or family in need of services matters. Negotiations in dependency or in need of services mediation are primarily conducted by the parties. Counsel for each party may attend the mediation conference and privately communicate with their clients. However, presence of counsel is not required and, in the discretion of the mediator and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.

History.—s. 1, ch. 87-173; s. 1, ch. 90-188; s. 43, ch. 94-164; s. 54, ch. 95-280.

Note.—Former s. 44.301.

44.102 Court-ordered mediation.—

(1) Court-ordered mediation shall be conducted according to rules of practice and procedure adopted by the Supreme Court.

(2) A court, under rules adopted by the Supreme Court:

(a) Must, upon request of one party, refer to mediation any filed civil action for monetary damages, provided the requesting party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties, unless:

1. The action is a landlord and tenant dispute that does not include a claim for personal injury.
2. The action is filed for the purpose of collecting a debt.
3. The action is a claim of medical malpractice.
4. The action is governed by the Florida Small Claims Rules.
5. The court determines that the action is proper for referral to nonbinding arbitration under this chapter.
6. The parties have agreed to binding arbitration.
7. The parties have agreed to an expedited trial pursuant to s. 45.075.
8. The parties have agreed to voluntary trial resolution pursuant to s. 44.104.

(b) May refer to mediation all or any part of a filed civil action for which mediation is not required under this section.

(c) In circuits in which a family mediation program has been established and upon a court finding of a dispute, shall refer to mediation all or part of custody, visitation, or other parental responsibility issues as defined in s. 61.13. Upon motion or request of a party, a court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process.

(d) In circuits in which a dependency or in need of services mediation program has been established, may refer to mediation all or any portion of a matter relating to dependency or to a child in need of services or a family in need of services.

(3) All written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119.

(4) The chief judge of each judicial circuit shall maintain a list of mediators who have been certified by the Supreme Court and who have registered for appointment in that circuit.

(a) Whenever possible, qualified individuals who have volunteered their time to serve as mediators shall be appointed. If a mediation program is funded pursuant to s. 44.108, volunteer mediators shall be entitled to reimbursement pursuant to s. 112.061 for all actual expenses necessitated by service as a mediator.

(b) Nonvolunteer mediators shall be compensated according to rules adopted by the Supreme Court. If a mediation program is funded pursuant to s. 44.108, a mediator may be compensated by the county or by the parties.

(5)(a) When an action is referred to mediation by court order, the time periods for responding to an offer of settlement pursuant to s. 45.061, or to an offer or demand for judgment pursuant to s. 768.79, respectively, shall be tolled until:

1. An impasse has been declared by the mediator; or
2. The mediator has reported to the court that no agreement was reached.

(b) Sections 45.061 and 768.79 notwithstanding, an offer of settlement or an offer or demand for judgment may be made at any time after an impasse has been declared by the mediator, or the mediator has reported that no agreement was reached. An offer is deemed rejected as of commencement of trial.

History.—s. 2, ch. 87-173; s. 2, ch. 89-31; s. 2, ch. 90-188; s. 2, ch. 93-161; s. 10, ch. 94-134; s. 10, ch. 94-135; s. 44, ch. 94-164; s. 18, ch. 96-406; s. 2, ch. 97-155; s. 2, ch. 99-225; s. 2, ch. 2002-65; s. 1, ch. 2004-291; s. 31, ch. 2005-236.

Note.—Former s. 44.302.

44.103 Court-ordered, nonbinding arbitration.—

(1) Court-ordered, nonbinding arbitration shall be conducted according to the rules of practice and procedure adopted by the Supreme Court.

(2) A court, pursuant to rules adopted by the Supreme Court, may refer any contested civil action filed in a circuit or county court to nonbinding arbitration.

(3) Arbitrators shall be selected and compensated in accordance with rules adopted by the Supreme Court. Arbitrators shall be compensated by the parties, or, upon a finding by the court that a party is indigent, an arbitrator may be partially or fully compensated from state funds according to the party's present ability to pay. At no time may an arbitrator charge more than $1,500 per diem, unless the parties agree otherwise. Prior to approving the use of state funds to reimburse an arbitrator, the court must ensure that the party reimburses the portion of the total cost that the party is immediately able to pay and that the party has agreed to a payment plan established by the clerk of the court that will fully reimburse the state for the balance of all state costs for both the arbitrator and any costs of administering the payment plan and any collection efforts that may be necessary in the future. Whenever possible, qualified individuals who have volunteered their time to serve as arbitrators shall be appointed. If an arbitration program is funded pursuant to s. 44.108, volunteer arbitrators shall be entitled to be reimbursed pursuant to s. 112.061 for all actual expenses necessitated by service as an arbitrator.

(4) An arbitrator or, in the case of a panel, the chief arbitrator, shall have such power to administer oaths or affirmations and to conduct the proceedings as the rules of court shall provide. The hearing shall be conducted informally. Presentation of testimony and evidence shall be kept to a minimum, and matters shall be presented to the arbitrators primarily through the statements and arguments of

counsel. Any party to the arbitration may petition the court in the underlying action, for good cause shown, to authorize the arbitrator to issue subpoenas for the attendance of witnesses and the production of books, records, documents, and other evidence at the arbitration and may petition the court for orders compelling such attendance and production at the arbitration. Subpoenas shall be served and shall be enforceable in the manner provided by law.

(5) The arbitration decision shall be presented to the parties in writing. An arbitration decision shall be final if a request for a trial de novo is not filed within the time provided by rules promulgated by the Supreme Court. The decision shall not be made known to the judge who may preside over the case unless no request for trial de novo is made as herein provided or unless otherwise provided by law. If no request for trial de novo is made within the time provided, the decision shall be referred to the presiding judge in the case who shall enter such orders and judgments as are required to carry out the terms of the decision, which orders shall be enforceable by the contempt powers of the court, and for which judgments execution shall issue on request of a party.

(6) Upon motion made by either party within 30 days after entry of judgment, the court may assess costs against the party requesting a trial de novo, including arbitration costs, court costs, reasonable attorney's fees, and other reasonable costs such as investigation expenses and expenses for expert or other testimony which were incurred after the arbitration hearing and continuing through the trial of the case in accordance with the guidelines for taxation of costs as adopted by the Supreme Court. Such costs may be assessed if:

(a) The plaintiff, having filed for a trial de novo, obtains a judgment at trial which is at least 25 percent less than the arbitration award. In such instance, the costs and attorney's fees pursuant to this section shall be set off against the award. When the costs and attorney's fees pursuant to this section total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and attorney's fees, less the amount of the award to the plaintiff. For purposes of a determination under this paragraph, the term "judgment" means the amount of the net judgment entered, plus all taxable costs pursuant to the guidelines for taxation of costs as adopted by the Supreme Court, plus any postarbitration collateral source payments received or due as of the date of the judgment, and plus any postarbitration settlement amounts by which the verdict was reduced; or

(b) The defendant, having filed for a trial de novo, has a judgment entered against the defendant which is at least 25 percent more than the arbitration award. For purposes of a determination under this paragraph, the term "judgment" means the amount of the net judgment entered, plus any postarbitration settlement amounts by which the verdict was reduced.

History.—s. 3, ch. 87-173; s. 3, ch. 89-31; s. 3, ch. 90-188; s. 3, ch. 93-161; s. 43, ch. 2004-265; s. 32, ch. 2005-236; s. 1, ch. 2007-206.

Note.—Former s. 44.303.

44.104 Voluntary binding arbitration and voluntary trial resolution.—

(1) Two or more opposing parties who are involved in a civil dispute may agree in writing to submit the controversy to voluntary binding arbitration, or voluntary trial resolution, in lieu of litigation of the issues involved, prior to or after a lawsuit has been filed, provided no constitutional issue is involved.

(2) If the parties have entered into an agreement which provides in voluntary binding arbitration for a method for appointing of one or more arbitrators, or which provides in voluntary trial resolution a method for appointing a member of The Florida Bar in good standing for more than 5 years to act as trial resolution judge, the court shall proceed with the appointment as prescribed. However, in voluntary binding arbitration at least one of the arbitrators, who shall serve as the chief arbitrator, shall meet the

qualifications and training requirements adopted pursuant to s. 44.106. In the absence of an agreement, or if the agreement method fails or for any reason cannot be followed, the court, on application of a party, shall appoint one or more qualified arbitrators, or the trial resolution judge, as the case requires.

(3) The arbitrators or trial resolution judge shall be compensated by the parties according to their agreement.

(4) Within 10 days after the submission of the request for binding arbitration, or voluntary trial resolution, the court shall provide for the appointment of the arbitrator or arbitrators, or trial resolution judge, as the case requires. Once appointed, the arbitrators or trial resolution judge shall notify the parties of the time and place for the hearing.

(5) Application for voluntary binding arbitration or voluntary trial resolution shall be filed and fees paid to the clerk of court as if for complaints initiating civil actions. The clerk of the court shall handle and account for these matters in all respects as if they were civil actions, except that the clerk of court shall keep separate the records of the applications for voluntary binding arbitration and the records of the applications for voluntary trial resolution from all other civil actions.

(6) Filing of the application for binding arbitration or voluntary trial resolution will toll the running of the applicable statutes of limitation.

(7) The chief arbitrator or trial resolution judge may administer oaths or affirmations and conduct the proceedings as the rules of court shall provide. At the request of any party, the chief arbitrator or trial resolution judge shall issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence and may apply to the court for orders compelling attendance and production. Subpoenas shall be served and shall be enforceable in the manner provided by law.

(8) A voluntary binding arbitration hearing shall be conducted by all of the arbitrators, but a majority may determine any question and render a final decision. A trial resolution judge shall conduct a voluntary trial resolution hearing. The trial resolution judge may determine any question and render a final decision.

(9) The Florida Evidence Code shall apply to all proceedings under this section.

(10) An appeal of a voluntary binding arbitration decision shall be taken to the circuit court and shall be limited to review on the record and not de novo, of:

(a) Any alleged failure of the arbitrators to comply with the applicable rules of procedure or evidence.

(b) Any alleged partiality or misconduct by an arbitrator prejudicing the rights of any party.

(c) Whether the decision reaches a result contrary to the Constitution of the United States or of the State of Florida.

(11) Any party may enforce a final decision rendered in a voluntary trial by filing a petition for final judgment in the circuit court in the circuit in which the voluntary trial took place. Upon entry of final judgment by the circuit court, any party may appeal to the appropriate appellate court. Factual findings determined in the voluntary trial are not subject to appeal.

(12) The harmless error doctrine shall apply in all appeals. No further review shall be permitted unless a constitutional issue is raised.

(13) If no appeal is taken within the time provided by rules promulgated by the Supreme Court, then the decision shall be referred to the presiding judge in the case, or if one has not been assigned, then to the chief judge of the circuit for assignment to a circuit judge, who shall enter such orders and judgments as are required to carry out the terms of the decision, which orders shall be enforceable by the contempt powers of the court and for which judgments execution shall issue on request of a party.

(14) This section shall not apply to any dispute involving child custody, visitation, or child support, or to any dispute which involves the rights of a third party not a party to the arbitration or voluntary trial resolution when the third party would be an indispensable party if the dispute were resolved in court or when the third party notifies the chief arbitrator or the trial resolution judge that the third party would be a proper party if the dispute were resolved in court, that the third party intends to intervene in the action in court, and that the third party does not agree to proceed under this section.

History.—s. 4, ch. 87-173; s. 4, ch. 89-31; s. 4, ch. 90-188; s. 3, ch. 99-225.

Note.—Former s. 44.304.

44.106 Standards and procedures for mediators and arbitrators; fees.—The Supreme Court shall establish minimum standards and procedures for qualifications, certification, professional conduct, discipline, and training for mediators and arbitrators who are appointed pursuant to this chapter. The Supreme Court is authorized to set fees to be charged to applicants for certification and renewal of certification. The revenues generated from these fees shall be used to offset the costs of administration of the certification process. The Supreme Court may appoint or employ such personnel as are necessary to assist the court in exercising its powers and performing its duties under this chapter.

History.—s. 6, ch. 87-173; s. 6, ch. 90-188.

Note.—Former s. 44.306.

44.107 Immunity for arbitrators, mediators, and mediator trainees.—

(1) Arbitrators serving under s. 44.103 or s. 44.104, mediators serving under s. 44.102, and trainees fulfilling the mentorship requirements for certification by the Supreme Court as a mediator shall have judicial immunity in the same manner and to the same extent as a judge.

(2) A person serving as a mediator in any noncourt-ordered mediation shall have immunity from liability arising from the performance of that person's duties while acting within the scope of the mediation function if such mediation is:

(a) Required by statute or agency rule or order;

(b) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or

(c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by ss. 44.401-44.406.

The mediator does not have immunity if he or she acts in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(3) A person serving under s. 44.106 to assist the Supreme Court in performing its disciplinary function shall have absolute immunity from liability arising from the performance of that person's duties while acting within the scope of that person's appointed function.

History.—s. 5, ch. 89-31; s. 7, ch. 90-188; s. 1, ch. 95-421; s. 2, ch. 2004-291.

Note.—Former s. 44.307.

44.108 Funding of mediation and arbitration.—

(1) Mediation and arbitration should be accessible to all parties regardless of financial status. A filing fee of $1 is levied on all proceedings in the circuit or county courts to fund mediation and arbitration services which are the responsibility of the Supreme Court pursuant to the provisions of s. 44.106. The clerk of the court shall forward the moneys collected to the Department of Revenue for deposit in the State Courts Revenue Trust Fund.

(2) When court-ordered mediation services are provided by a circuit court's mediation program, the following fees, unless otherwise established in the General Appropriations Act, shall be collected by the clerk of court:

(a) One-hundred twenty dollars per person per scheduled session in family mediation when the parties' combined income is greater than $50,000, but less than $100,000 per year;

(b) Sixty dollars per person per scheduled session in family mediation when the parties' combined income is less than $50,000; or

(c) Sixty dollars per person per scheduled session in county court cases.

No mediation fees shall be assessed under this subsection in residential eviction cases, against a party found to be indigent, or for any small claims action. Fees collected by the clerk of court pursuant to this section shall be remitted to the Department of Revenue for deposit into the State Courts Revenue Trust Fund to fund court-ordered mediation. The clerk of court may deduct $1 per fee assessment for processing this fee. The clerk of the court shall submit to the chief judge of the circuit and to the Office of the State Courts Administrator, no later than 30 days after the end of each quarter of the fiscal year, a report specifying the amount of funds collected and remitted to the State Courts Revenue Trust Fund under this section and any other section during the previous quarter of the fiscal year. In addition to identifying the total aggregate collections and remissions from all statutory sources, the report must identify collections and remissions by each statutory source.

History.—s. 6, ch. 89-31; s. 8, ch. 90-188; s. 6, ch. 91-152; s. 8, ch. 2001-122; s. 12, ch. 2001-380; s. 66, ch. 2003-402; s. 44, ch. 2004-265; s. 33, ch. 2005-236; s. 24, ch. 2008-111; s. 12, ch. 2010-153; s. 4, ch. 2011-133.

Note.—Former s. 44.308.

44.201 Citizen Dispute Settlement Centers; establishment; operation; confidentiality.—

(1) The chief judge of a judicial circuit, after consultation with the board of county commissioners of a county or with two or more boards of county commissioners of counties within the judicial circuit, may establish a Citizen Dispute Settlement Center for such county or counties, with the approval of the Chief Justice.

(2)(a) Each Citizen Dispute Settlement Center shall be administered in accordance with rules adopted by a council composed of at least seven members. The chief judge of the judicial circuit shall serve as chair of the council and shall appoint the other members of the council. The membership of the council shall include a representative of the state attorney, each sheriff, a county court judge, and each board of county commissioners within the geographical jurisdiction of the center. In addition, council membership shall include two members of the general public who are not representatives of such officers or boards. The membership of the council also may include other interested persons.

(b) The council shall establish qualifications for and appoint a director of the center. The director shall administer the operations of the center.

(c) A council may seek and accept contributions from counties and municipalities within the geographical jurisdiction of the Citizen Dispute Settlement Center and from agencies of the Federal Government, private sources, and other available funds and may expend such funds to carry out the purposes of this section.

(3) The Citizen Dispute Settlement Center, subject to the approval of the council and the Chief Justice, shall formulate and implement a plan for creating an informal forum for the mediation and settlement of disputes. Such plan shall prescribe:

(a) Objectives and purposes of the center;

Ga. Fulton Co. **Rule 1000**

West's Code of **Georgia** Annotated Currentness
Local Court Rules and Procedures
Local Procedures of the Atlanta Judicial Circuit (**Fulton** County) (Refs & Annos)
Atlanta Judicial Circuit Superior Court Rules (**Fulton** County) (Refs & Annos)

Rule 1000 (A.J.C.) Civil Arbitration

<(Revised 1997)>

1. Referral

1a.

All civil actions filed and seeking primarily money damages of twenty-five thousand dollars ($25,000) or less, or for damages in an unstated amount, shall be required to go through compulsory, but non-binding, arbitration. Any party to an action not otherwise qualifying, or to a domestic relations case wherein appropriate issues are to be determined, excluding custody and divorce, may petition the Court that the case or issues be scheduled for arbitration, when it is not for the purpose of delay. The trial judge to whom the case has been assigned may order arbitration at any time, at his or her discretion, on any case, whether or not it otherwise qualifies for arbitration; or the Court may, at its discretion, remove a case from arbitration, or limit the issues to be arbitrated.

1b.

Parties may, at their own expense, choose private arbitration.

2. Timing of the Arbitration Process

2a.

Upon filing the complaint with the clerk, the docket clerk shall stamp all cases, including service copies, with an ad damnum of twenty-five thousand dollars ($25,000) or less, or with unstated monetary damages, with the date and time for arbitration. Cases assigned to arbitration by order of the judge shall be assigned an arbitration date and time at the request of the judge.

2b.

The Alternative Dispute Resolution Program (ADRP) Administrator shall schedule and set dates for arbitration hearings and shall furnish such dates to the docket

clerk to assign on a basis of the order of filing; the ADRP Administrator shall set such arbitration dates not less than 180 days subsequent to filing, and as close to such period as is reasonable and practical, so that arbitration hearings shall be held approximately 180 days after filing. In domestic relations cases the ADRP Administrator shall set arbitration dates.

2c.

The ADRP Administrator, or designee, shall determine the number of cases to be set on a date and during each period during such date; in accordance with such schedule, the docket shall assign cases to the periods 9:00 a.m., 11:30 a.m., or 2:30 p.m., as directed by the ADRP Administrator, in the sequence of their filing.

2d.

The ADRP Administrator, or designee, shall arrange for places for arbitration hearings to be held in the courthouse, or adjacent thereto, for each hearing date; the locations of such arbitration hearings will be posted outside the ADRP Office on the day of the hearing.

3. Exemption

3a.

All domestic relations cases involving custody and/or divorce, all civil cases filed and seeking primarily money damages in excess of twenty-five thousand ($25,000), and all cases alleging malpractice against health care providers shall be excluded from arbitration, unless requested by a party or ordered by the Court.

3b.

Any party may petition the Court to have a case removed from arbitration or reassigned to another form of alternative dispute resolution.

4. Appointment of Arbitrators

Lawyers willing to serve as arbitrators will submit to the ADRP Administrator, or designee, a written application which will indicate years of trial experience, any training or experience in alternative dispute resolution methods and proof of registration with the **Georgia** Office of Dispute Resolution as an arbitrator. The ADRP Administrator, or designee, will compile two lists of arbitrators: 1) Lawyers with five (5) consecutive years of trial experience and 2) all other lawyers willing to so serve. Such lists shall be updated annually. No arbitrator may hear more than twenty-four (24) arbitration cases in the Program in a given calendar year.

5. Qualifications of Arbitrators

5a.

All arbitrators must maintain current registration as such with the **Georgia** Office of Dispute Resolution.

5b.

Any neutral so registered with the **Georgia** Office of Dispute Resolution shall be qualified to serve as an arbitrator in this Program provided said neutral is authorized to practice law in the State of **Georgia** and is appointed under Paragraph Four of this Rule.

5c.

An arbitration panel shall consist of the Chief Arbitrator, who shall preside, and two arbitrators; the Chief Arbitrator shall be randomly selected from the list of lawyers with five consecutive years of trial experience. All arbitrators are to be selected and assigned randomly to a panel except where special experience or expertise is requested in writing and agreed upon by the parties.

5d.

Any party may move for an order disqualifying an arbitrator for good cause. If the ADRP Administrator, or designee, receives two or more complaints as to an arbitrator's conduct from another arbitrator, a party or counsel, then inquiry shall be made as to the conduct of the arbitrator about whom the complaints were made; if two or more complaints are made, the ADRP Administrator, or designee shall notify said arbitrator in writing of the charges and ask if he or she wishes a hearing; if a hearing is requested, it shall be held before a panel of arbitrators selected in the normal fashion and evidence of the conduct presented; if the charges are found justified, or if no hearing is requested, the lawyer's name shall be stricken from the arbitration rolls.

6. Compensation of Arbitrators

Arbitrator's fees shall be determined from time to time by the Court. Any lawyer serving as an arbitrator may waive such compensation, and at the end of the year, the arbitrator will be publicly recognized for such public service contributed during such calendar year.

7. Immunity

An arbitrator in a civil arbitration hearing shall not be held civilly liable for any decision, action, statement or omission made during arbitration, except in

circumstances where the decision, action, statement or omission was made with willful disregard of the property or safety of any party to the arbitration process, or was made with malice or gross negligence.

8. Confidentiality

8a.

Non-binding arbitration is not confidential. Any statement made during arbitration undertaken pursuant to these rules is not confidential, is subject to disclosure, and may be used in evidence in any subsequent administrative or judicial proceeding for any lawful purpose. Any document or other evidence generated in connection with such an arbitration proceeding is subject to discovery.

8b.

Any agreement resulting from such an arbitration is not immune from discovery, unless all parties to the proceeding so agree in writing. Notwithstanding the foregoing, any otherwise discoverable material is not rendered immune from discovery by use in an arbitration held pursuant to this rule.

8c.

No arbitrator may be required to testify concerning an arbitration and the arbitrator's notes or other records are not subject to discovery. Notwithstanding the foregoing, evidence may be admitted from an arbitrator with regard to the existence of an agreement reached in the arbitration involving the arbitrator. Moreover, confidentiality does not extend to any actual or threatened violence which occurs during an arbitration. Confidentiality does not extend to documents or communications relevant to legal claims brought against an arbitrator of the ADR program or arising out of an arbitration procedure.

9. Appearance

9a.

The appearance of all parties or their attorneys is required by the court at non-binding arbitration hearings. Appearance by telephone may be required on non-resident parties.

9b.

On the arbitration date, the ADRP Administrator, or designee, shall call the calendar of the arbitration cases at each present time and shall assign such cases to an arbitration panel as such panel becomes available.

9c.

In the event that a party fails to appear, argument will be heard and evidence will be received from those parties appearing.

10. Sanctions for Failing to Appear

Failure to appear at an arbitration as required by the Court may subject those absent to a citation for contempt and the imposition of sanctions permitted by law, including dismissal or entry of judgment after notice to the non-attending party and failure by the party to show good cause to appear.

11. Communication Between the Neutral and the Parties

The parties and their attorneys are not permitted to engage in ex parte communications with the neutral, prior to the conclusion of the arbitration procedure, regarding the substance of the dispute to be resolved. Additionally, in non-binding arbitration no such communication is permitted until 31 days after the posting of the award.

12. Communications with the Court

In order to preserve the objectivity of the Court and the neutrality of the arbitrator, there should be no communication between the arbitrator and the Court unless it is in writing with copies to the parties or their attorneys, or through the ADR program administrator. With the consent of the parties, the arbitrator may communicate to the Court the arbitrator's assessment that the case is inappropriate for arbitration, or to request additional time to complete arbitration, or to advise of procedural action on the part of the Court which might facilitate the arbitration process, or to communicate information concerning discovery, pending motions or other action of the Court of any party which, if resolved or completed, would facilitate the progress of the arbitration process or the possibility of settlement.

13. Completion of the Arbitration Process

13a.

The arbitration procedure shall be completed within such time as may be ordered by the Court.

13b.

The scheduling of a case for arbitration hearing shall not remove the case from assignment to a judge, discovery, motions practice for regular court procedures. From the time of filing until the arbitration date, parties may carry on discov-

ery; all discovery disputes and other motions shall be determined by the judge to whom the case has been assigned in the regular practice under the Uniform Rules; discovery or motions pending shall not be grounds for the ADRP Administrator to allow the removal of a case from an arbitration date; a continuance from arbitration may only be granted for legal excuse or good cause shown. Legal excuse and good cause may include scheduling conflicts of which the ADRP Administrator has received notice pursuant to Uniform Superior Court Rule 17.1, illness, the addition of new parties, leaves of absence filed pursuant to Uniform Rule 16, written notice to the disposition of the case and removal or transfer to another court. Any discovery motions not ruled upon prior to the arbitration hearing date shall be deemed waived for the purpose of the arbitration hearing only, unless presented by the movant for determination on such date, and the presiding judge shall enter such order as is appropriate after hearing the motion. Such motions are limited to five (5) minutes of oral argument per side.

13c.

If the case is settled, or disposed of; prior to the arbitration date, the counsel for the parties shall notify not only the calendar clerk of the Judge to whom the case has been assigned, but shall also notify the ADRP Administrator (or designee) in writing. The ADRP Administrator shall schedule sufficient arbitration panels on each date to handle the remaining arbitration cases.

13d.

The arbitration panel shall swear witnesses and receive evidence; the rules of evidence shall be the same as followed in equitable proceedings or at temporary restraining order hearings, except as otherwise specified herein. Thirty (30) days prior to the arbitration hearing date, each party must specify in writing and provide to each party copies of all documents to be tendered into evidence. The opposing party must, by written demand made at least twenty (20) days prior to the arbitration date, state for which documents live testimony will be required for the purposes of cross-examination or attacking its authenticity. If the arbitrators decide that such live testimony is unnecessary for cross-examination, then the party requiring such witness to be in attendance, rather than allowing the document, shall be liable for such person's witness fee and travel expenses. Documents unobjected to prior to the twenty (20) days shall be deemed authenticated but subject to objections as to admissibility at the time of the hearing. Parties are free to make stipulations or to waive any rules of evidence by agreement for the purposes of such arbitration hearing only. Failure to serve such service copies in timely fashion prior to the hearing will require such party to have documents authenticated as provided by law at the time of the hearing, unless all parties agree to waive the service requirement.

13e.

At the arbitration hearing, the Chief Arbitrator shall rule on all objections, motions, and admissions of evidence; the Chief Arbitrator may confer with the other arbitrators prior to making any rulings, but the panel is not required to do so.

13f.

Arbitration hearings are intended to be brief evidentiary outlines of the case and not formal trials. Each side will be limited to a five *(5)* minute opening statement, unless there is a conflict of interest between the parties of such side, in which event each party with a conflict of interest may make a separate opening of five *(5)* minutes. At the discretion of the panel, testimony may be admitted into evidence by way of summarization by the attorney, if the witness is made available for examination. Affidavits, depositions, or portions of depositions may also be admitted into evidence as appropriate. Witnesses may be subpoenaed as they would be to a trial. Closing argument shall be fifteen *(15)* minutes per side, unless there is a conflict of interest between the parties of such side, in which event such party with a conflict of interest may make a separate argument often (10) minutes.

13g.

At the close of the arbitration hearing, the arbitrators shall confer and return a written award for one side or the other, which shows the damages, if any and which shows any dissent. A simple majority of the arbitrators is required to return an award. The award is published to the parties, and the written award filed with the ADRP Administrator, or designee, on the day of the hearing. No written findings of fact and conclusions of law are required.

13h.

Arbitration hearings are not officially reported. Counsel, at his or her own expense, may engage a private court reporter to record the proceedings at the arbitration hearing.

13i.

Following a non-binding arbitration hearing, any party may file a demand for trial, within thirty (30) days of the filing of the arbitration award, with ADRP Administrator, or designee who shall make a notation and entry of the date of filing of the award and the trial demand; the demand for trial shall be in the form of a pleading and shall contain the style of the case, the case number and a demand for jury or non-jury trial. Filing such demand for trial will entitle all parties to a de novo trial of all issues of fact or of law which were raised or could be raised in the arbitration hearing; such case will be tried before the judge to whom the case has been assigned in the ordinary procedure and course of time as if no arbitration hearing had been held Arbitration proceedings shall not delay or

impede the normal trial of such case.

13j.

If no party files a demand pursuant to paragraph 13i, it shall be deemed a consent to the arbitration award and shall constitute a waiver of trial. After the expiration of such thirty (30) days without the filing of a demand, an appropriate judgment, order, or dismissal may be entered.

13k.

Where a party, after demand for trial, does not substantially improve said party's position by trial or other judicial proceedings in the case, then the trial judge has discretion to tax the arbitration panel's fees against said party. For purposes of this rule, substantially improving a party's position shall mean either: (a) reversal of the award, or (b) increase or decrease of the award by 15% or more, depending upon whether the party demanding the trial is a plaintiff or defendant. The judge to whom the case has been assigned shall not be advised of the award, unless it is agreed to by all parties, until after a verdict or other disposition has been entered.

13l.

For purposes of taxing an arbitration panel's fees, it shall be determined by dividing the total dollar amount paid to the arbitrators who heard the case by the total number of cases decided by such arbitration panel on that date.

Rule 1000, GA R **FULTON** CTY SUP CT **Rule 1000**

Current with amendments received through January 31, 2008.

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SUPREME COURT OF GEORGIA

Atlanta October 11, 2012

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

It is ordered that Paragraph 5 of Atlanta Judicial Circuit Rule 1004 governing the Fulton County Superior Court Business Case Division, be amended to establish a Transfer Fee not to exceed $2,500, as follows:

1.

The Judges of the Fulton Superior Court hereby create a "Business Case Division" (hereinafter referred to as the "Division").

2.

The purpose of the Division is to provide judicial attention and expertise to certain complex Business Cases.

3.

(a) The Division may accept for assignment Business Cases, which include actions brought pursuant to the following:

(i) Georgia Securities Act of 1973, as amended, OCGA § 10-5-1, et seq.;

(ii) Uniform Commercial Code, OCGA § 11-1-101, et seq.;

(iii) Georgia Business Corporation Code, OCGA § 14-2-101, et seq.;

(iv) Uniform Partnership Act, OCGA § 14-8-1, et seq.;

(v) Uniform Limited Partnership Act, OCGA § 14-9A-1, et seq.;

(vi) Georgia Revised Uniform Limited Partnership Act, OCGA § 14-9-100, et seq.;

(vii) Georgia Limited Liability Company Act, OCGA § 14-11-100, et seq.; and

In addition, Business Cases may include any action in which the amount in controversy (or, in a case of injunction relief the value of the relief sought or the cost of not getting the relief) exceeds $1,000,000 and where one or more parties to the action or the Court believes warrants the attention of the Division, including, but not limited to, large contractual and business tort cases as well as other complex commercial litigation involving a material issue related to the law governing corporations, partnerships, limited partnerships, limited liability partnerships, and limited liability companies, including issues concerning governance, involuntary dissolution of a corporation, mergers and acquisitions, breach of duty of

directors, election or removal of directors, enforcement or interpretation of shareholder agreements, and derivative actions.

(b) Notwithstanding anything contained herein to the contrary, cases that include the following claims shall not be classified as a Business Case without the consent of all parties:

(i) Personal injury;

(ii) Wrongful death;

(iii) Employment discrimination; and

(iv) Consumer claims in which each individual plaintiff's claims are in the aggregate less than $1,000,000.

4.

The Division is to be comprised of one or more Judges who manage, administer, and try the cases assigned to this Division, as the Chief Judge shall designate (the "Division Judge" or "Division Judges"). The Division Judges may select a judge to serve as the head of the Division (the "Division Leader"), who will be in charge of addressing issues with regard to case assignment, creating and implementing Division policies, representing the Division to the public, and performing all other functions that are necessary for the administration of this Division.

5.

A Business Case filed in the Fulton County Superior Court shall be eligible for assignment to the Division based upon: (1) the parties' joint request; (2) the motion of a party; or (3) a request submitted by the Superior Court Judge currently assigned that case, with notice to the parties. By filing a motion to transfer a case into the Division pursuant to subsections (I) or (2) above, the movant(s) agrees pursuant to OCGA § 15-6-77 (1) to pay, pro rata, a transfer fee in an amount not to exceed $2,500 as set forth in the "Standing Order Regarding Transfer Fee Amount" as currently published online at **http://home.fultoncourt.org/** ("Transfer Fee") to be used solely for the Business Court. Pursuant to Rule 1.2(B) of the Uniform Superior Court Rules, the Clerk of Court shall maintain the original of such Standing Order and provide copies of it, upon request. In the event that a Superior Court Judge requests that a case be assigned to the Division pursuant to subsection (3), no such Transfer Fee shall be required. The motion or request shall be directed to the Business Case Division Committee, via the Business Court Program Director, to determine, after allowing the parties twenty (20) days for briefing of the issue, whether the case is a Business Case Division case and whether it should be accepted for assignment into the Business Case Division. Pursuant to Uniform Superior Court Rule 6.7, the Chief Judge may shorten the time requirement applicable to transfer motions upon written notice and good cause shown. If so accepted, the Business Court Program Director shall reassign the case to a Division Judge within the Business Case Division.

6.

Upon a motion or request, if a majority of the Business Court Committee deems the case appropriate for assignment to the Division, the Business Court Program Director shall assign the case to the Division. Within the Division, the Business Court Program Director shall assign the Division's cases in rotation, taking into account, reasonably estimated discovery, dispositive motions, availability of the Division Judge, the Division Judge's current case load, and trial time, as far as practicable, and any other applicable concerns. The Business Court Program Director shall make every effort to fairly assign the case load within the Division.

7.

When an active Judge's case has been reassigned to a Division Judge as a Business Case, the Court Administrator shall make such additional assignments to the active Judge as are necessary to comply with these rules.

8.

The Chief Judge/District Administrative Judge shall select or re-select all Division Judges from those Judges, considering their experience, training, and other relevant factors, who volunteer for such assignment for a period of two years. At the end of each two year term, the Chief Judge/District Administrative Judge shall decide the continuation of such assignment if the Division Judge volunteers for continued service. The Chief Judge/District Administrative Judge may reassign such Division Judge at any time in the best interests of the Court and the Division.

9.

The Business Cases assigned to the Division shall be governed by applicable law, including the Georgia Civil Practice Act, OCGA § 9-11-1, et seq., and the Uniform Superior Court Rules.

10.

The Division Judges, in consultation with all parties and pursuant to applicable law, shall have the ability to modify the schedule for the administration of Business Cases, including the schedule for conducting discovery, filing dispositive motions, conducting pre-trial procedures, and conducting jury and non-jury trials.

11.

In particular, the Division Judges, pursuant to OCGA § 9-ll-5(e) may modify the procedure for filing papers with the Court, including allowing such filings to be made by facsimile or by e-mail with the Court. Upon the written consent of all parties and upon any necessary waivers as may be required by law, the Division Judges may allow for service of

papers filed with the Court by electronic means, including by facsimile or by e-mail. In the event that any procedures are modified pursuant to this paragraph, an electronic signature shall be deemed an original signature.

12.

The Division Judges, in consultation with all parties, shall have the ability to order non-binding mediation, arbitration, or other means of alternative dispute resolution as dictated by the needs of a particular Business Case. The Division Judges themselves, with the consent of all parties, may conduct such non-binding mediation, arbitration, or other means of alternative dispute resolution.

13.

The calendar for the Division shall be prepared under the supervision of the Division Judges and shall be made available to all parties with Business Cases pending in the Division. Pursuant to agreement of the parties and the Court, the Court may notify parties of such calendar by electronic means, including by facsimile or by e-mail.

14.

Subject to the rules of evidence, the Division encourages the parties to use electronic presentations and technologically generated demonstrative evidence to enhance the trier-of-fact's understanding of the issues before it and to further the convenience and efficiency of the litigation process.

15.

Within thirty (30) days of a Business Case being assigned to the Division, or such shorter or longer time as the Division Judges shall order, the parties shall meet with the Division Judge to whom the Business Case is assigned to discuss the entry of a case management order, including the following issues: (i) the length of the discovery period, the number of fact and expert depositions, and the length of such depositions; (ii) a preliminary deposition schedule; (iii) the identity and number of any motions to dismiss or other preliminary or pre-discovery motions which shall be filed and the time period in which they shall be filed, briefed, and, if appropriate, argued; (iv) the time period after the close of discovery within which post-discovery dispositive motions shall be filed, briefed, and, if appropriate, argued; (v) the need for any alternative form of dispute resolution, specifically including mediation; (vi) an estimate of the volume of documents and electronic information likely to be the subject of discovery from the parties and non-parties, and whether there are means by which to render document discovery more manageable and less expensive; (vii) and modifications to the rules under the Civil Practice Act or the Uniform Superior Court Rules as may be applicable to a particular case; (viii) such other matters as the Division Judge may assign to the parties for their consideration. Prior to the meeting with the Division

Judge, lead counsel for each party shall meet in person to discuss subparts (i) through (viii) of this paragraph. At the initial meeting with the Division Judge, the parties shall submit a proposed case management order to the Division Judge for consideration.

16.

In an effort to reduce the length of discovery and quickly resolve any discovery disputes, the Division Judges shall be available to the parties to resolve disputes that arise during the course of discovery.

17.

In addition to telephone conferencing pursuant to Rule 9 of the Uniform Superior Court Rules, by mutual agreement between the parties and the Division Judges, counsel may arrange for any hearing or other conference to be conducted by video conference, subject to the same rules of procedure and decorum as if the hearing or conference were held in open court. In addition to charging the parties for other costs associated with Business Cases pending in the Division, the Clerk may charge the parties a fee for such video conferencing or may include the costs of such video conferencing in any standard fee charged to parties participating in Business Cases pending in the Division.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

West's **Hawai'i** Revised Statutes Annotated Currentness
Division 4. Courts and Judicial Proceedings
Title 32. Courts and Court Officers
Chapter 601. Courts Generally

[§ 601-20]. Court annexed arbitration program

(a) There is established within the judiciary a court annexed arbitration program which shall be a mandatory and nonbinding arbitration program to provide for a procedure to obtain prompt and equitable resolution of certain civil actions in tort through arbitration. The supreme court shall adopt rules for the implementation and administration of the program by January 1, 1987.

(b) All civil actions in tort, having a probable jury award value, not reduced by the issue of liability, exclusive of interest and costs, of $150,000 or less, shall be submitted to the program and be subject to determination of arbitrability and to arbitration under the rules governing the program. The rules shall include a procedure to classify and establish the order of priority according to which the actions will be processed for the determination of arbitrability and for the arbitration under the program. The court may, at its discretion, remove any action from the program.

(c) The chief justice may hire on a contractual basis, and at the chief justice's pleasure remove, without regard to chapter 76, an arbitration administrator, who shall be responsible for the operation and management of the program, and such other persons deemed necessary for the purposes of the program in the judgment of the chief justice.

CREDIT(S)

Laws 1986, Sp. Sess., ch. 2, § 21; Laws 2000, ch. 253, § 150.

CROSS REFERENCES

International Arbitration, Mediation, and Conciliation Act, see § 658D-1 et seq.

Medical claims, arbitration, see § 671-16.5.

Uniform Arbitration Act, see § 658A-1 et seq.

LIBRARY REFERENCES

Alternative Dispute Resolution 114, 125.
Westlaw Topic Nos. 25Tk114; 25Tk125.

West's **Hawai'i** Revised Statutes Annotated Currentness
Hawai'i Court Rules
Rules of the Circuit Courts of the State of **Hawai'i**
Exhibit A. **Hawai'i Arbitration Rules**

Rule 10. Qualifications of Arbitrators

(A) The Judicial Arbitration Commission shall create and maintain a panel of arbitrators consisting of attorneys licensed to practice in the State of **Hawai'i** and, in its discretion, qualified non-attorneys.

(B) Attorneys serving as arbitrators shall have substantial experience in civil litigation, and shall have been licensed to practice law in the State of **Hawai'i** for a period of five (5) years, or can provide the Judicial Arbitration Commission with proof of equivalent qualifying experience.

(C) Arbitrators shall be required to complete an orientation and training program following their selection to the panel and other additional training sessions or classes scheduled by the Judicial Arbitration Commission or Arbitration Administrator.

(D) Arbitrators shall be sworn or affirmed by the Chief Justice or his designee to uphold these rules of the Program, the laws of the State of **Hawai'i**, and the Code of Ethics of the American Arbitration Association.

(E) An arbitrator who would be disqualified for any reason that would disqualify a judge under the Code of Judicial Conduct shall immediately resign or be withdrawn as an arbitrator.

(F) Any issue concerning the qualification of a person to serve as an arbitrator on the panel of arbitrators shall be referred to the Judicial Arbitration Commission for a final, non-reviewable determination.

CREDIT(S)

[Amended effective May 1, 1987; March 20, 1997.]

Table of Rules

Arbitration Rule 10, HI R CIR CT EX A ARB Rule **10**

Current with amendments received through 8/15/2012

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West's **Hawai'i** Revised Statutes Annotated Currentness
Hawai'i Court Rules
Rules of the Circuit Courts of the State of **Hawai'i**
Exhibit A. **Hawai'i Arbitration Rules**

Rule 22. Request for Trial De Novo

(A) Within twenty (20) days after the award is served upon the parties, any party may file with the clerk of the court and serve on the other parties and the Arbitration Administrator a written Notice of Appeal and Request for Trial De Novo of the action. This period may be extended to a period of no more than forty (40) days after the award is served upon the parties, by stipulation signed by all parties remaining in the action and filed with the Arbitration Administrator within twenty (20) days after service of the award upon the parties.

(B) After the filing and service of the written Notice of Appeal and Request for Trial De Novo, the case shall be set for trial pursuant to applicable court rules.

(C) Demand For Jury Trial.

(1) If any issue in the action is triable of right by a jury and a jury trial is not demanded by the date the decision exempting or removing the case from the Program is served upon the parties, the trial shall include a jury if a demand for jury trial is served upon the parties not later than ten (10) days after service of the decision exempting or removing the case from the Program or by the deadline set forth in the **Hawai'i** Rules of Civil Procedure, whichever is later, and the demand is filed in accordance with the **Hawai'i** Rules of Civil Procedure. The demand for jury trial fee shall be paid as provided by law.

(2) If any issue in the action is triable of right by a jury and a jury trial is not demanded by the date the Notice of Appeal and Request for Trial De Novo is served upon the parties, the trial de novo shall include a jury if a demand for jury trial is served upon the parties not later than ten (10) days after service of the Notice of Appeal and Request for Trial De Novo, and the demand is filed in accordance with the **Hawai'i** Rules of Civil Procedure. The demand for jury trial fee shall be paid as provided by law.

(3) In the case of an action admitted or readmitted to the Program after being exempted or removed, if any issue in the action is triable of right by a jury and a jury trial is not demanded by the date the Notice of Appeal and Request for Trial De Novo is served upon the parties, subsection (C)(2) of this rule shall govern.

(D) After a written Notice of Appeal and Request for Trial De Novo has been filed and served, it may not be withdrawn except by stipulation of all remaining parties

or by order of the Arbitration Judge. The Arbitration Judge shall not allow withdrawal of a Notice of Appeal and Request for Trial De Novo over objection of any non-appealing party but may order that an objecting party be deemed an appealing party for purposes of these rules. The Arbitration Judge in allowing a withdrawal may do so upon such terms and conditions as the Court deems proper, including an order that the appealing party pay the attorneys' fees and costs incurred by non-appealing parties after service of the Notice of Appeal and Request for Trial De Novo. In the event a Notice of Appeal and Request for Trial De Novo is withdrawn pursuant to this rule and no other Notice of Appeal and Request for Trial De Novo remains, judgment shall be entered in accordance with Rule 21.

CREDIT(S)

[Amended effective January 2, 1995; February 1, 1995 for those cases in which the "Notice of Appeal and Request for Trial De Novo" was filed on or after February 1, 1995; amended effective May **22**, 1996; July 1, 2006.]

Table of Rules

PUBLISHER'S NOTE

On December 21, 1994, the Court ordered that Rule **22**(D) was effective February 1, 1995, but only applies to cases in which the "Notice of Appeal and Request for Trial De Novo" was filed on or after February 1, 1995.

Arbitration Rule 22, HI R CIR CT EX A ARB Rule **22**

Current with amendments received through 8/15/2012

END OF DOCUMENT

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness
Court Rules
Illinois Supreme Court Rules (Refs & Annos)
Article I. General Rules
Mandatory Arbitration (Refs & Annos)

Rule 86. Actions Subject to Mandatory Arbitration

(a) Applicability to Circuits. Mandatory arbitration proceedings shall be undertaken and conducted in those judicial circuits which, with the approval of the Supreme Court, elect to utilize this procedure and in such other circuits as may be directed by the Supreme Court.

(b) Eligible Actions. A civil action shall be subject to mandatory arbitration if each claim therein is exclusively for money in an amount or of a value not in excess of the monetary limit authorized by the Supreme Court for that circuit or county within that circuit, exclusive of interest and costs.

(c) Local Rules. Each judicial circuit court may adopt rules for the conduct of arbitration proceedings which are consistent with these rules and may determine which matters within the general classification of eligible actions shall be heard in arbitration.

(d) Assignment from Pretrials. Cases not assigned to an arbitration calendar may be ordered to arbitration at a status call or pretrial conference when it appears to the court that no claim in the action has a value in excess of the monetary limit authorized by the Supreme Court for that circuit or county within that circuit, irrespective of defenses.

(e) Applicability of Code of Civil Procedure and Rules of the Supreme Court. Notwithstanding that any action, upon filing, is initially placed in an arbitration track or is thereafter so designated for hearing, the provisions of the Code of Civil Procedure and the rules of the Supreme Court shall be applicable to its proceedings except insofar as these rules otherwise provide.

Rule 87. Appointment, Qualification and Compensation of Arbitrators

(a) List of Arbitrators. A list of arbitrators shall be prepared in the manner prescribed by a circuit rule. The list shall consist of a sufficient number of members of the bar engaged in the practice of law and retired judges within the circuit in which the court is situated.

(b) Panel. The panel of arbitrators shall consist of three members of the bar, or such lesser number as may be agreed upon by the parties, appointed from the list of available arbitrators, as prescribed by circuit rule, and shall be chaired by a member of the bar who has engaged in trial practice for at least three years or by a retired judge. Not more than one member or associate of a firm or office association of attorneys shall be appointed to the same panel.

(c) Disqualification. Upon appointment to a case, an arbitrator shall notify the court and withdraw from the case if any grounds appear to exist for disqualification pursuant to the Code of Judicial Conduct.

(d) Oath of Office. Each arbitrator shall take an oath of office in each county or circuit in which the arbitrator intends to serve on an arbitration panel. The oath shall be in conformity with the form provided in Rule 94 herein and shall be executed by the arbitrator when such arbitrator's name is placed on the list of arbitrators.

Arbitrators previously listed as arbitrators shall be relisted on taking the oath provided in Rule 94.

(e) Compensation. Each arbitrator shall be compensated in the amount of $100 per hearing.

Rule 88. Scheduling of Hearings

The procedure for fixing the date, time and place of a hearing before a panel of arbitrators shall be prescribed by circuit rule provided that not less than 60 days' notice in writing shall be given to the parties or their attorneys of record. The hearing shall be held on the scheduled date and within one year of the date of filing of the action, unless continued by the court upon good cause shown. The hearing shall be held at a location provided or authorized by the court.

Rule 89. Discovery

Discovery may be conducted in accordance with established rules and shall be completed prior to the hearing in arbitration. However, such discovery shall be conducted in accordance with Rule 222, except that the timelines may be shortened by local rule. No discovery shall be permitted after the hearing, except upon leave of court and good cause shown.

Rule 90. Conduct of the Hearings

(a) Powers of Arbitrators. The arbitrators shall have the power to administer oaths and affirmations to witnesses, to determine the admissibility of evidence and to decide the law and the facts of the case. Rulings on objections to evidence or on other issues which arise during the hearing shall be made by the chairperson of the panel.

(b) Established Rules of Evidence Apply. Except as prescribed by this rule, the established rules of evidence shall be followed in all hearings before arbitrators.

(c) Documents Presumptively Admissible. All documents referred to under this provision shall be accompanied by a summary cover sheet listing each item that is included detailing the money damages incurred by the categories as set forth in this rule and specifying whether each bill is paid or unpaid. If at least 30 days' written notice of the intention to offer the following documents in evidence is given to every other party, accompanied by a copy of the document, a party may offer in evidence, without foundation or other proof:

(1) bills (specified as paid or unpaid), records and reports of hospitals, doctors, dentists, registered nurses, licensed practical nurses and physical therapists, or other health-care providers;

(2) bills for drugs, medical appliances and prostheses (specified as paid or unpaid);

(3) property repair bills or estimates, when identified and itemized setting forth the charges for labor and material used or proposed for use in the repair of the property;

(4) a report of the rate of earnings and time lost from work or lost compensation prepared by an employer;

(5) the written statement of any expert witness, the deposition of a witness, the statement of a witness which the witness would be allowed to express if testifying in person, if the statement is made by affidavit or by certification as provided in section 1-109 of the Code of Civil Procedure; [FN1]

(6) any other document not specifically covered by any of the foregoing provisions, and which is otherwise admissible under the rules of evidence.

The pages of any Rule 90(c) package submitted to the arbitrators should be numbered consecutively from the first page to the last page of the package in addition to any separate numbering of the pages of individual documents comprising such package.

(d) Opinions of Expert Witnesses. A party who proposes to use a written opinion of any expert witness or the testimony of any expert witness at the hearing may do so provided a written notice of such intention is given to every other party not less than 30 days prior to the date of hearing, accompanied by a statement containing the identity of the expert witness, the expert's qualifications, the subject matter, the basis of the expert's conclusions, and the expert's opinion as well as any other information required by Rule 222(d)(6).

(e) Right to Subpoena Maker of the Document. Any other party may subpoena the author or maker of a document admissible under this rule, at that party's expense, and examine the author or maker as if under cross-examination. The provisions of the Code of Civil Procedure relative to subpoenas, section 2- 1101, [FN2] shall be applicable to arbitration hearings and it shall be the duty of a party requesting the subpoena to modify the form to show that the appearance is set before an arbitration panel and to give the time and place set for the hearing.

(f) Adverse Examination of Parties or Agents. The provisions of the Code of Civil Procedure relative to the adverse examination of parties or agents, section 2-1102, [FN3] shall be applicable to arbitration hearings as upon the trial of a case.

(g) Compelling Appearance of Witness at Hearing. The provisions of Rule 237, herein, shall be equally applicable to arbitration hearings as they are to trials. The presence of a party may be waived by stipulation or excused by court order for good cause shown not less than seven days prior to the hearing. Remedies upon a party's failure to comply with notice pursuant to Rule 237(b) may include an order debarring that party from rejecting the award.

(h) Prohibited Communication. Until the arbitration award is issued and has become final by either acceptance or rejection, an arbitrator may not be contacted *ex parte*, nor may an arbitrator publicly comment or respond to questions regarding a particular arbitration case heard by that arbitrator. Discussions between an arbitrator and judge regarding an infraction or impropriety during the arbitration process are not prohibited by this rule. Nothing in this rule shall be construed to limit or expand judicial review of an arbitration award or limit or expand the testimony of an arbitrator at judicial hearing to clarify a mistake or error appearing on the face of an award.

[Rule 90(c) Cover Sheet]

IN THE CIRCUIT OF COUNTY, ILLINOIS

```
Plaintiff              )
                      )
                      )   No.
                      )
v.                     )
                      )
                      )
Defendant              )
                      )
```

NOTICE OF INTENT PURSUANT TO SUPREME COURT RULE 90(C)

Pursuant to Supreme Court Rule 90(c), the plaintiff(s) intend(s) to offer the following documents that are attached into evidence at the arbitration proceeding:

```
I.   Healthcare Provider Bills  Amount Paid  Amount Unpaid
     1.
     2.
     3.
     4.
     5.
     6.
     7.
     8.
     9.
    10.
II.  Other Items of Compensable Damages
     1.
     2.
     3.
     4.
     5.
```

_____
Attorney for Plaintiff

[FN1] 735 ILCS 5/1-109.

[FN2] 735 ILCS 5/2-1101.

[FN3] 735 ILCS 5/2-1102.

Rule 91. Absence of Party at Hearing

(a) Failure to be Present at Hearing. The arbitration hearing shall proceed in the absence of any party who, after due notice, fails to be present. The panel shall require the other party or parties to submit such evidence as the panel may require for the making of an award. The failure of a party to be present, either in person or by counsel, at an arbitration hearing shall constitute a waiver of the right to reject the award and a consent to the entry by the court of a judgment on

the award. In the event the party who fails to be present thereafter moves, or files a petition to the court, to vacate the judgment as provided therefor under the provisions of the Code of Civil Procedure for the vacation of judgments by default, sections 2-1301 and 2-1401, [FN1] the court, in its discretion, in addition to vacating the judgment, may order the matter for rehearing in arbitration, and may also impose the sanction of costs and fees as a condition for granting such re- lief.

(b) Good-Faith Participation. All parties to the arbitration hearing must participate in the hearing in good faith and in a meaningful manner. If a panel of arbitrators unanimously finds that a party has failed to participate in the hearing in good faith and in a meaningful manner, the panel's finding and factual basis therefor shall be stated on the award. Such award shall be *prima facie* evidence that the party failed to participate in the arbitration hearing in good faith and in a meaningful manner and a court, when presented with a petition for sanctions or remedy therefor, may order sanctions as provided in Rule 219(c), including, but not limited to, an order debarring that party from rejecting the award, and costs and attorney fees incurred for the arbitration hearing and in the prosecution of the petition for sanctions, against that party.

[FN1] 735 ILCS 5/2-1301, 5/2-1401.

Rule 92. Award and Judgment on Award

(a) Definition of Award. An award is a determination in favor of a plaintiff or defendant.

(b) Determining an Award. The panel shall make an award promptly upon termination of the hearing. The award shall dispose of all claims for relief. The award may not exceed the monetary limit authorized by the Supreme Court for that circuit or county within that circuit, exclusive of interest and costs. The award shall be signed by the arbitrators or the majority of them. A dissenting vote without further comment may be noted. Thereafter, the award shall be filed immediately with the clerk of the court, who shall serve notice of the award, and the entry of the same on the record, to other parties, including any in default.

(c) Judgment on the Award. In the event none of the parties files a notice of rejection of the award and requests to proceed to trial within the time required herein, any party thereafter may move the court to enter judgment on the award.

(d) Correction of Award. Where the record and the award disclose an obvious and unambiguous error in mathematics or language, the court, on application of a party within the 30-day period allowed for rejection of an award, may correct the same. The filing of such an application shall stay all proceedings, including the running of the 30-day period for rejection of the award, until disposition of the application by the court.

Rule 93. Rejection of Award

(a) Rejection of Award and Request for Trial. Within 30 days after the filing of an award with the clerk of the court, and upon payment to the clerk of the court of the sum of $200 for awards of $30,000 or less or $500 for awards greater than $30,000, any party who was present at the arbitration hearing, either in person or by counsel, may file with the clerk a written notice of rejection of the award and request to proceed to trial, together with a certificate of service of such notice on all other parties. The filing of a single rejection shall be sufficient to enable all parties except a party who has been debarred from rejecting the award to proceed to trial on all issues of the case without the necessity of each party filing a separate rejection. The filing of a notice of rejection shall not be effective as to any party who is debarred from rejecting an award.

(b) Arbitrator May Not Testify. An arbitrator may not be called to testify as to what transpired before the arbitrators

and no reference to the fact of the conduct of the arbitration hearing may be made at trial.

(c) Waiver of Costs. Upon application of a poor person, pursuant to Rule 298, herein, the sum required to be paid as costs upon rejection of the award may be waived by the court.

Rule 94. Form of Oath, Award and Notice of Award

The oath, award of arbitrators, and notice of award shall be in substantially the following form:

In the Circuit Court of the _____ Judicial Circuit, _____ County, Illinois.

(Or, in the Circuit Court of Cook County, Illinois)

OATH

I do solemnly swear (or affirm) that I will support, obey, and defend the Constitution of the United States and the Constitution of the State of Illinois and that I will faithfully discharge the duties of my office.

_____

Name of Arbitrator Date

AWARD OF ARBITRATORS

In the Circuit Court of the _____ Judicial Circuit, _____ County, Illinois.

(Or, in the Circuit Court of Cook County, Illinois)

A.B., C.D., etc. (naming all plaintiffs), Plaintiffs	)	
v.	)	No. _____
H.J., K.L., etc. (naming all defendants), Defendants	)	Amount Claimed _____

[ ] All parties participated in good faith.
[ ] did NOT participate in good faith based upon the following findings.

Findings:

_____

_____

Indiana Rules of Court
Rules for Alternative Dispute Resolution

Including Amendments Received Through January 1, 2011

TABLE OF CONTENTS

Preamble

These rules are adopted in order to bring some uniformity into **alternative dispute resolution** with the view that the interests of the parties can be preserved in settings other than the traditional judicial dispute resolution method.

RULE 1. GENERAL PROVISIONS

Rule 1.1. Recognized Alternative Dispute Resolution Methods

Alternative dispute resolution methods which are recognized include settlement negotiations, arbitration, mediation, conciliation, facilitation, mini-trials, summary jury trials, private judges and judging, convening or conflict assessment, neutral evaluation and fact-finding, multi-door case allocations, and negotiated rulemaking.

Rule 1.2. Scope of These Rules

Alternative dispute resolution methods which are governed by these rules are (1) Mediation, (2) Arbitration, (3) Mini-Trials, (4) Summary Jury Trials, and (5) Private Judges.

Rule 1.3. Alternative Dispute Resolution Methods Described

(A) Mediation. This is a process in which a neutral third person, called a mediator, acts to encourage and to assist in the resolution of a dispute between two (2) or more parties. This is an informal and nonadversarial process. The objective is to help the disputing parties reach a mutually acceptable agreement between or among themselves on all or any part of the issues in dispute. Decision-making authority rests with the parties, not the mediator. The mediator assists the parties in identifying issues, fostering joint problem-solving, exploring settlement alternatives, and in other ways consistent with these activities.

(B) Arbitration. This is a process in which a neutral third person or a panel, called an arbitrator or an arbitration panel, considers the facts and arguments which are presented by the parties and renders a decision. The decision may be binding or nonbinding as provided in these rules.

(C) Mini-Trials. A mini-trial is a settlement process in which each side presents a highly abbreviated summary of its case to senior officials who are authorized to settle the case. A neutral advisor may preside over the proceeding and give advisory opinions or rulings if invited to do so. Following the presentation, the officials seek a negotiated settlement of the dispute.

(D) Summary Jury Trials. This is an abbreviated trial with a jury in which the litigants present their evidence in an expedited fashion. The litigants and the jury are guided by a neutral who acts as a presiding official who sits as if a judge. After an advisory verdict from the jury, the presiding official may assist the litigants in a negotiated settlement of their controversy.

(E) Private Judges. This is a process in which litigants employ a private judge, who is a former judge, to resolve a pending lawsuit. The parties are responsible for all expenses involved in these matters, and they may agree upon their allocation.

Rule 1.4. Application of Alternative Dispute Resolution

These rules shall apply in all civil and domestic relations litigation filed in all Circuit, Superior, County, Municipal, and Probate Courts in the state.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass alternative dispute resolution.

Mediation sessions shall be closed to all persons other than the parties of record, their legal representatives, and other invited persons.

Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by the mediators.

RULE 3. ARBITRATION

Rule 3.1. Agreement to Arbitrate

At any time fifteen (15) days or more after the period allowed for a peremptory change of venue under Trial Rule 76(B) has expired, the parties may file with the court an agreement to arbitrate wherein they stipulate whether arbitration is to be binding or nonbinding, whether the agreement extends to all of the case or is limited as to the issues subject to arbitration, and the procedural rules to be followed during the arbitration process. Upon approval, the agreement to arbitrate shall be noted on the Chronological Case Summary of the Case and placed in the Record of Judgments and Orders for the court.

Rule 3.2. Case Status During Arbitration

During arbitration, the case shall remain on the regular docket and trial calendar of the court. In the event the parties agree to be bound by the arbitration decision on all issues, the case shall be removed from the trial calendar. During arbitration the court shall remain available to rule and assist in any discovery or pre-arbitration matters or motions.

Rule 3.3. Assignment of Arbitrators

Each court shall maintain a listing of lawyers engaged in the practice of law in the State of Indiana who are willing to serve as arbitrators. Upon assignment of a case to arbitration, the plaintiff and the defendant shall, pursuant to their stipulation, select one or more arbitrators from the court listing or the listing of another court in the state. If the parties agree that the case should be presented to one arbitrator and the parties do not agree on the arbitrator, then the court shall designate three (3) arbitrators for alternate striking by each side. The party initiating the lawsuit shall strike first. If the parties agree to an arbitration panel, it shall be limited to three (3) persons.

If the parties fail to agree on who should serve as members of the panel, then each side shall select one arbitrator and the court shall select a third. When there is more than one arbitrator, the arbitrators shall select among themselves a Chair of the arbitration panel. Unless otherwise agreed between the parties, and the arbitrators selected under this provision, the Court shall set the rate of compensation for the arbitrator. Costs of arbitration are to be divided equally between the parties and paid within thirty (30) days after the arbitration evaluation, regardless of the outcome. Any arbitrator selected may refuse to serve without showing cause for such refusal.

Rule 3.4. Arbitration Procedure

(A) Notice of Hearing. Upon accepting the appointment to serve, the arbitrator or the Chair of an arbitration panel shall meet with all attorneys of record to set a time and place for an arbitration hearing. (Courts are encouraged to provide the use of facilities on a regular basis during times when use is not anticipated, i.e. jury deliberation room every Friday morning.)

(B) Submission of Materials. Unless otherwise agreed, all documents the parties desire to be considered in the arbitration process shall be filed with the arbitrator or Chair and exchanged among all attorneys of record no later than fifteen (15) days prior to any hearing relating to the matters set forth in the submission. Documents may include medical records, bills, records, photographs, and other material supporting the claim of a party. In the event of binding arbitration, any party may object to the admissibility of these documentary matters under traditional rules of evidence; however, the parties are encouraged to waive such objections and, unless objection is filed at least five (5) days prior to hearing, objections shall be deemed waived. In addition, no later than five (5) days prior to hearing, each party may file with the arbitrator or Chair a pre-arbitration brief setting forth factual and legal positions as to the issues being arbitrated; if filed, pre-arbitration briefs shall be served upon the opposing party or parties. The parties may in their Arbitration Agreement alter the filing deadlines. They are encouraged to use the provisions of Indiana's Arbitration Act (IC 34-57-1-1 et seq.) and the Uniform Arbitration Act (IC 34-57-2-1 et seq.) to the extent possible and appropriate under the circumstances.

(C) Discovery. Rules of discovery shall apply. Thirty (30) days before an arbitration hearing, each party shall file a listing of witnesses and documentary evidence to be considered. The listing of witnesses and documentary evidence shall

West's **Kansas** Statutes Annotated Currentness
Chapter 5. Arbitration and Award
Article 5. Dispute Resolution

5-509. Same; cases accepted

(a) Upon finding that alternatives to litigation may provide a more appropriate means to resolve the issues in a case and that the costs of the dispute resolution process are justified relative to the parties' ability to pay such costs, a judge may order the parties to the case to participate in a settlement conference or a non-binding dispute resolution process conducted by: (1) A program or individual approved pursuant to rules of the supreme court adopted pursuant to the dispute resolution act; or (2) an individual licensed to practice law in the state of **Kansas** .

(b) If a court refers a case, information shall be provided to the court as to whether an agreement was reached and, if available, a copy of the signed agreement shall be provided to the court.

(c) Before the dispute resolution process begins, the neutral person conducting the process shall provide the parties with a written statement setting forth the procedures to be followed.

CREDIT(S)

Laws 1994, ch. 217, § 9; Laws 1996, ch. 140, § 9; Laws 2000, ch. 171, § 1; Laws 2001, ch. 173, § 2.

HISTORICAL AND STATUTORY NOTES

For severability provisions of Laws 2000, ch. 171, see K.S.A. 38-1376.

K. S. A. **5-509,** KS ST **5-509**

Current through 2012 regular session.

END OF DOCUMENT

Maine Revised Statutes Annotated Currentness
Maine Rules of Court
Rules of Civil Procedure
III. Pleadings and Motions

Rule 16B. Alternative Dispute Resolution

This rule is applicable to cases filed in the Superior Court and cases removed to the Superior Court from the District Court.

(a) Applicability. All parties to any civil action filed in or removed to the Superior Court, except actions exempt in accordance with subsection (b) of this rule, shall, within 60 days of the date of the Rule 16(a) scheduling order, schedule an alternative dispute resolution conference which conference shall be held and completed within 120 days of the date of the Rule 16(a) scheduling order. By agreement of all parties, reported to the court in writing within 120 days of the date of the Rule 16(a) scheduling order, the time for the completion of the alternative dispute resolution conference shall be extended for a period not to exceed 180 days from the date of the Rule 16(a) scheduling order.

(b) Exemptions. The following categories of cases are exempt from the requirements of this rule:

(1) Actions under Rule 80D, 80L, and Chapter XIII;

(2) Appeals under Rule 80B or Rule 80C;

(3) Appeals under 36 M.R.S.A. § 151;

(4) Actions for recovery of personal injury damages where the plaintiff requests exemption and certifies that the likely recovery of damages will not exceed $30,000.

(5) Actions where the parties have participated in statutory prelitigation screening or dispute resolution processes including medical malpractice and Maine Human Rights Act cases;

(6) Actions where the parties certify that they have engaged in formal alternative dispute resolution before a neutral third party. The certification shall state the name of the neutral and the date(s) on which formal alternative dispute resolution conferences occurred;

(7) Actions for nonpayment of notes in mortgage foreclosures and other secured transactions;

(8) Actions by or against prisoners in state, federal or local facilities; and

(9) Actions exempted by the court on motion by a party and for good cause shown but only where the motion seeking exemption is filed within 30 days of the date of the Rule 16(a) scheduling order.

(c) Motions and Discovery. Motions and discovery practice shall proceed in accordance with these rules while an alternative dispute resolution process is being scheduled and held.

(d) Neutral Selection and Conference Scheduling.

(1) Promptly after the filing of an answer in the Superior Court or removal from the District Court, the parties shall confer and select an alternate dispute resolution process (that is, mediation, early neutral evaluation, or nonbinding **arbitration**) and a neutral third party to conduct the process. If the parties cannot agree on the ADR process, they shall proceed to mediation. If the parties cannot agree on the selection of a neutral, they shall notify the court, which shall designate a neutral third party, with experience appropriate to the nature of the case, from the appropriate roster of court neutrals developed by CADRES;

(2) Unless the court orders or the parties otherwise agree, fees and expenses for the neutral shall be apportioned and paid in equal shares by each party, due and payable according to fee arrangements worked out directly by the parties and the neutral. Fees and expenses paid to the neutral shall be allowed and taxed as costs in accordance with Rule 54(f). If any party is unable to pay its share of the fees and expenses of the neutral, that party may apply for in forma pauperis status pursuant to Rule 91. If granted, the court may allocate the fee among those parties who are not in forma pauperis or ask the selected neutral to undertake the conference on a reduced fee basis. Failing the consent of the selected neutral to the reduced fee, the court will designate an alternate neutral from the roster developed by CADRES who will agree to undertake the assignment on a reduced fee basis or pro bono.

(3) Once the neutral is selected or designated, the parties shall agree with the neutral on a time and place for the conference. The plaintiff shall notify the court of the name of the neutral and the time and place for the conference no later than 60 days after the date of the Rule 16(a) scheduling order. The conference must be held and completed no later than 120 days after the date of the Rule 16(a) scheduling order.

(e) Conference Issues. At the alternative dispute resolution conference, the only required function is to conduct the ADR process selected by the parties. If at the conclusion of that process and, after a serious effort by the parties, agreement is not reached on all issues, then the neutral may proceed to a case management discussion with the parties to try to reach agreement on the following: (i) identification, clarification and limitation of remaining issues; (ii) stipulations; and (iii) discovery-related issues;

The neutral should not address case management issues in cases that are specially assigned or subject to single judge management, except with the approval of the assigned judge. When case management issues are addressed, the neutral may not extend deadlines or otherwise modify directives in the scheduling order set pursuant to M.R. Civ. P. 16(a). An ADR conference need not be reconvened if, after an initial session, the only remaining issues are case management issues.

(f) Conference Attendees.

(1) Conference attendees shall include:

(i) Individual parties;

(ii) A management employee or officer of a corporate party, with appropriate settlement authority, whose interests are not entirely represented by an insurance company;

(iii) A designated representative of a government agency party whose interests are not entirely represented by an insurance company;

(iv) An adjuster for any insurance company providing coverage potentially applicable to the case, provided that the adjuster participate in the conference with appropriate settlement authority;

(v) Counsel for all parties; and

(vi) Nonparties whose participation is essential to settlement discussions-- including lienholders--may be requested to attend the conference.

(2) The court may impose appropriate sanctions on any party or representative required and notified to appear at a conference who fails to attend.

(3) Attendance shall be in person or, in the discretion of the neutral, for good cause shown, by telephone or video conference.

(g) Conference Documents. If requested by the neutral, five days prior to the conference, the plaintiff shall provide to the neutral:

--The complaint;

--The answer or other responsive pleading;

--Any pretrial scheduling statement;

--Any pretrial order that may have issued; and

--Any dispositive motions and memoranda that have been filed in connection with those motions.

(h) Conference Report and Order.

(1) *Settlement*. If the conference results in a settlement, the parties shall, within 10 days after the conference, report that fact to the court and include a proposed order concerning the settlement. The court shall order the appropriate entry to be made on the docket.

(2) *Neutral Report*. If the conference does not result in a settlement, the neutral shall, within 10 days after the conference, file with the court a report and, if appropriate, a proposed order which indicates any agreements of the parties on matters such as stipulations, identification and limitation of issues to be tried, discovery matters and further alternative dispute resolution efforts. If there are no agreements of the parties, the report shall so indicate. If the neutral does not file the report, the parties shall prepare and file the report indicating their points of agreement and disagreement. The parties shall be equally responsible for assuring that the neutral's report is filed in a timely manner and may be subject to appropriate sanctions if filing of the report is filed later than 130 days after the date of the Rule 16(a) scheduling order.

(i) Jury Fee. For cases required to have an alternative dispute resolution conference in accordance with this rule, payment of the civil jury fee required by Rule 38(b) or Rule 76C, shall be deferred until 210 days after the date of the Rule 16(a) scheduling order.

(j) Standards for Alternative Dispute Resolution. No agreement or order to enter into alternative dispute resolution pursuant to this rule may be entered or issued without consideration being given to the needs of indigent or unrepresented parties or parties in situations where there is a potential for violence, abuse, or intimidation.

(k) Confidentiality. A neutral who conducts an alternative dispute resolution conference pursuant to this rule, or an alternative dispute resolution process pursuant to subsection (b)(6), shall not, without the informed written consent of the parties, disclose the outcome or disclose any conduct, statements, or other information acquired at or in connection with the ADR conference. A neutral does not breach confidentiality by making such a disclosure if the disclosure is: (i) necessary in the course of conducting the dispute resolution conference and reporting its result to the Court as required in (h)(2); (ii) information concerning the abuse or neglect of any protected person; (iii) information concerning the intention of one of the parties to commit a crime, or the information necessary to prevent the crime or to avoid subjecting others to the risk of imminent physical harm; or (iv) as otherwise required by statute or court order.

(l) Sanctions. If a party or a party's lawyer fails without good cause to appear at a dispute resolution conference scheduled pursuant to this rule, or fails to comply with any other requirement of this rule or any order made thereunder, the court may, upon motion of a party or its own motion, order the parties to submit to alternative dispute resolution, dismiss the action or any part of the action, render a decision or judgment by default, or impose any other sanction that is just and appropriate in the circumstances. In lieu of or in addition to any other sanction, the court shall require the party or lawyer, or both, to pay the reasonable expenses, including attorney fees, of the opposing party, and any fees and expenses of a neutral, incurred by reason of the nonappearance, unless the judge finds an award would be unjust in the circumstances.

CREDIT(S)

[Adopted effective January 1, 2002. Amended effective July 1, 2004; February 27, 2007, effective April 2, 2007; amended December 12, 2007, effective January 1, 2008; amended June 27, 2008, effective January 1, 2009.]

ADVISORY COMMITTEE'S NOTES--2001

Publisher's Note: Pursuant to order of the Supreme Judicial Court, dated February 8, effective January 1, 2002, the following Advisory Committee's Notes apply to **Rule** 16B of the **Maine Rules** of **Civil Procedure**.

2. Subsection 2 amends the rules to adopt a new Rule 16B generally covering the ADR processes.

Subsection (a) directs all parties to civil actions either filed in the Superior Court or removed from the District Court to the Superior Court, except exempt actions, (i) to schedule an ADR conference within either 60 days of the date of the Rule 16(a) scheduling order; and (ii) to hold that ADR conference within 120 days of the same date.

The time limits in Rule 16B(a) are subject to M.R. Civ. P. 6(b) which allows the court to enlarge a time limit "for cause shown." *See also* M.R. Civ. P. 16(a) (allowing scheduling order modification "for good cause shown").

Subsection (b) exempts from the ADR requirements:

1. Divorce, Forcible Entry and Detainer, [Civil Violations,] and Small Claims Actions.

2. 80B and 80C appeals.

3. State tax assessors appeals. Even though these actions are "de novo," 36 M.R.S.A. § 151, in fact they have been through an extensive discussion process. Further, most of these matters that do get to Superior Court are re-

Effective: June 15, 2009

Maine Revised Statutes Annotated Currentness
Title 4. Judiciary
Chapter 1. Supreme Judicial Court
Subchapter 1-B. Administrative Office of the Courts
§ 18-B. Court Alternative Dispute Resolution Service

1. Court Alternative Dispute Resolution Service. There is established within the Administrative Office of the Courts a Court Alternative Dispute Resolution Service to provide alternative dispute resolution, referred to in this section as "ADR," services in the courts throughout the State.

2. ADR providers. The Judicial Department, through the State Court Administrator or the administrator's designee, shall contract for the services of qualified persons or organizations to serve as providers of ADR services to parties. The ADR providers are not employees of the State for any purpose. The ADR providers are entitled to be paid a reasonable per diem fee plus reimbursement of their actual, necessary and reasonable expenses incurred in the performance of their duties, consistent with policies established by the Administrative Office of the Courts.

3. Immunity from civil liability. A person serving as an ADR provider under contract with the Judicial Department or as the Director of the Court Alternative Dispute Resolution Service is immune from any civil liability, as are employees of governmental entities, under the Maine Tort Claims Act, [FN1] for acts performed within the scope of the provider's or the director's duties.

4. Staff. With the advice and approval of the Court Alternative Dispute Resolution Service Committee, the State Court Administrator shall employ or contract with a person to serve as the Director of the Court Alternative Dispute Resolution Service. The State Court Administrator shall provide other necessary staff and clerical assistance to the Court Alternative Dispute Resolution Service, within the limits of funds available.

5. Facilities. The State Court Administrator shall provide a principal office for the Court Alternative Dispute Resolution Service and shall arrange for facilities throughout the State as necessary and adequate for the conduct of ADR sessions, within the limits of funds available.

6. Court Alternative Dispute Resolution Service Committee. The Court Alternative Dispute Resolution Service Committee, or "committee," is established to set policy for and monitor the Court Alternative Dispute Resolution Service. The committee consists of:

A. The Chief Justice of the Supreme Judicial Court or a designee;

B. The Chief Justice of the Superior Court or a designee;

C. The Chief Judge of the District Court or a designee;

D. The State Court Administrator or a designee;

E. A Justice of the Superior Court, who is appointed by and serves at the pleasure of the Chief Justice of the Supreme Judicial Court;

F. A Judge of the District Court, who is appointed by and serves at the pleasure of the Chief Justice of the Supreme Judicial Court; and

G. Any additional members appointed by the Chief Justice of the Supreme Judicial Court that the Chief Justice considers necessary to the committee's operation.

7. Fees. When a court refers parties to the Court Alternative Dispute Resolution Service, the court shall assess the parties a fee to be apportioned equally among the parties, unless the court otherwise directs. The fee must be deposited in the dedicated account created in subsection 8.

A party may file an in forma pauperis application for waiver of fee. If the court finds that the party does not have sufficient funds to pay the fee, it shall order the fee waived.

8. Court Alternative Dispute Resolution Service Fund. The Court Alternative Dispute Resolution Service Fund is established as a nonlapsing, dedicated fund within the Administrative Office of the Courts. Fees collected for ADR services provided pursuant to this section must be deposited in the fund.

Except as otherwise provided in this section, the Administrative Office of the Courts shall use 100% of the resources in the funds from nondesignated cases to cover the costs of providing ADR services as required under this section. All funds from cases handled by the Court Alternative Dispute Resolution Service pursuant to Title 38, section 347-A, subsection 4, paragraph E must be used for the costs of providing ADR services as required under this section.

9. Rules. The Supreme Judicial Court shall adopt rules to govern the referral of cases to the Court Alternative Dispute Resolution Service.

10. Land use mediation. The land use mediation program is a program within the Court Alternative Dispute Resolution Service.

A. The Director of the Court Alternative Dispute Resolution Service shall administer the land use mediation program established in Title 5, chapter 314, subchapter II.

B. A land use mediation fund is established as a nonlapsing, dedicated fund within the Administrative Office of the Courts. Fees collected for mediation services pursuant to Title 5, chapter 314, subchapter II must be deposited in the fund. The Administrative Office of the Courts shall use the resources in the fund to cover the costs of providing mediation services as required under Title 5, chapter 314, subchapter II. [FN2]

11. Mediation of disputes involving natural gas pipelines. The natural gas pipeline dispute resolution program is a program within the Court Alternative Dispute Resolution Service.

A. The Director of the Court Alternative Dispute Resolution Service shall administer the natural gas pipeline dispute resolution program established in Title 5, chapter 314, subchapter III.

B. A natural gas pipeline dispute resolution fund is established as a nonlapsing, dedicated fund within the Administrative Office of the Courts. Fees collected for mediation services pursuant to Title 5, chapter 314, subchapter III must be deposited in the fund. The Administrative Office of the Courts shall use the resources in the fund to cover the costs of providing mediation services as required under Title 5, chapter 314, subchapter III. [FN2]

12. Mediation involving mortgage foreclosures on owner-occupied residential property. The foreclosure mediation program is a program within the Supreme Judicial Court to provide mediation in the courts throughout the State pursuant to Title 14, section 6321-A.

A. The Supreme Judicial Court, or a person or organization designated by the court, shall administer the foreclosure mediation program.

B. A foreclosure mediation program fund is established as a nonlapsing, dedicated fund within the Administrative Office of the Courts. Fees collected to support mediation services pursuant to Title 14, section 6321-A, subsection 3 must be deposited in the fund. The Administrative Office of the Courts shall use the resources in the fund to cover the costs of providing mediation services as required under Title 14, section 6321-A.

CREDIT(S)

1995, c. 560, § I-3, eff. March 25, 1996; 1997, c. 393, § A-5, eff. June 5, 1997; 1997, c. 643, § EE-1; 1999, c. 346, § 1; 2001, c. 184, § 2; 2009, c. 402, § 1, eff. June 15, 2009.

[FN1] 14 M.R.S.A. § 8101 et seq.

[FN2] 5 M.R.S.A. § 3345 et seq.

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S.J.C.Rule 1:18, Uniform Rules on Dispute Resolution, Questions

Massachusetts General Laws Annotated Currentness
Rules of the Supreme Judicial Court (Refs & Annos)
Chapter One. General Rules
Rule 1:18. Uniform Rules on Dispute Resolution (Refs & Annos)

Frequently Asked Questions Regarding Uniform Rules On Dispute Resolution

PUBLISHER'S NOTE

These questions and answers were compiled and distributed by the Standing Committee on Dispute Resolution, chaired by the Honorable Peter W. Agnes, Jr. and dated May 1, 1998. They are set forth here for convenience of reference only and are not part of the Uniform Rules on Dispute Resolution or the order adopting such rules.

(1) What is the purpose of the Uniform Rules on Dispute Resolution?

Answer: The Uniform Rules are designed to implement the Policy Statement on Dispute Resolution Alternatives adopted in 1993 by the Supreme Judicial Court in consultation with the Chief Justice for Administration and Management (hereafter, "CJAM"). The 1993 Policy Statement states that the court is responsible for ensuring the quality of court connected alternative dispute resolution services, that there should be consistent standards governing these services, that alternative dispute resolution should be available throughout the court system and that access to these services should not depend on the financial resources of the parties.

(2) What activity is covered by the Uniform Rules?

Answer: The Uniform Rules regulate "court connected dispute resolution services." These are dispute resolution services provided as a result of a referral by a court. A court referral takes place whenever a judge or other court employee provides a party to a case with the name of one or more dispute resolution providers or directs a party to a particular dispute resolution provider.

(3) What activities constitute "dispute resolution services"?

Answer: Under the Uniform Rules, "dispute resolution services" refer to processes in which a neutral third party is engaged to assist in settling a case or otherwise disposing of a case without a trial. "Dispute Resolution services" include arbitration, mediation, case evaluation, conciliation, dispute intervention, early neutral evaluation, mini-trial, summary jury trial, any combination of these or any comparable process as determined by the CJAM or the Supreme Judicial Court. The Uniform Rules specifically provide that certain activities are not considered "dispute resolution services." These exempt activities are pretrial conferences, early intervention events, screenings, a trial, and an investigation.

(4) Are judges, other court employees and lawyers considered "neutrals" under the Uniform Rules when they are providing dispute resolution services?

Answer: Under the Uniform Rules, sitting judges are not included in the definition of a "neutral" even when they are engaged in activities that otherwise would be considered court connected dispute resolution services. However, other court employees such as Clerks and their assistants, Registrars and their assistants, Probation Officers including Family Service Officers, and Housing Specialists along with retired judges who are not sit-

ting as recall judges are considered "neutrals" when engaged as impartial third parties to provide dispute resolution services and are regulated by the Uniform Rules when providing court connected dispute resolution services. Likewise, lawyers are considered "neutrals" for purposes of the Uniform Rules when engaged as impartial third parties to provide dispute resolution services, and are regulated by the Uniform Rules when providing court connected dispute resolution services.

(5) What qualifications must a person meet in order to serve as a neutral and perform court connected dispute resolution services?

Answer: The Uniform Rules do not contain Qualification Standards for neutrals. Qualification standards for neutrals are under development, but no recommendation has been made by the Standing Committee to the Supreme Judicial Court and the CJAM. To be eligible to serve as a neutral under the Uniform Rules, a person must be affiliated with a program that is approved to provide dispute resolution services to the Trial Court, must observe the program's requirements, and must observe the Ethical Standards contained in Rule 9 of the Uniform Rules. Each department of the Trial Court may adopt additional requirements so long as they are not inconsistent with the Uniform Rules.

(6) What constitutes a program under the Uniform Rules?

Answer: Under the Uniform Rules, "programs" are defined as organizations with which neutrals are affiliated, through membership on a roster or similar relationship which administers, provides, and monitors dispute resolution services. A program may be operated by a court employee or by an organization independent of the court, including a corporation or governmental agency. A program operated by a court employee may include one or more court employees or non-court employees, or a combination of court employees and non-court employees on its roster.

(7) What requirements must ADR programs meet to be approved under the Uniform Rules?

Answer: The Uniform Rules provide that the Chief Justice of each department of the Trial Court shall approve ADR programs to receive court referrals. Chief Justices are authorized to approve programs which previously have not provided services to the Trial Court, and there is no limit to the number of programs which may be approved. Each department of the Trial Court is responsible for maintaining a list of approved programs. In order to qualify for approval, programs must meet standards of operation set forth in Rule 7 of the Uniform Rules, agree to ensure that neutrals on their roster meet any qualification standards that may be adopted, and comply with the ethical standards contained in Rule 9 of the Uniform Rules. The approval process must be a fair and open one.

(8) How do programs become eligible to receive court referrals?

Answer: Under the Uniform Rules, courts have several choices about how to offer court connected dispute resolution services. First, courts may use programs consisting exclusively of court employees, programs consisting exclusively of non-court employees, or programs containing a combination of both court employees and non-court employees. Second, courts may create lists of approved programs and make ADR referrals on a rotating basis, or courts may enter into contracts or exclusive arrangements with one or more programs to provide court connected dispute resolution services in one or more categories of cases, or courts may develop a system in which some categories of cases are referred to programs on a rotating basis and some categories of cases are referred to a single program under exclusive contract with the court. Under Rule 4(f) of the Uniform Rules, any

M.S.A. § **484.73**

Minnesota Statutes Annotated Currentness
Judiciary (Ch. 480-494)
Chapter 484. District Courts (Refs & Annos)

484.73. Judicial arbitration

Subdivision 1. Authorization. A majority of the judges of a judicial district may authorize the establishment of a system of mandatory, nonbinding arbitration within the district to assist the court in disposing of any controversy existing between two parties which is the subject of a civil action.

Subd. 2. Exclusions. Judicial arbitration may not be used to dispose of matters relating to guardianship, conservatorship, or civil commitment, matters within the juvenile court jurisdiction involving children in need of protection or services or delinquency, matters involving termination of parental rights under sections 260C.301 to 260C.328, or matters arising under sections 518B.01, 626.557, or 144.651 to 144.652.

Subd. 3. Rules. Rules governing pleadings, practice, procedure, jurisdiction, and forms for judicial arbitration shall be promulgated by a majority of the judges in the district, subject to the approval of the Supreme Court. The Uniform Arbitration Act [FN1] shall not be construed to apply to arbitration under this section except as otherwise provided in the rules of the judicial district.

Subd. 4. Fee on request for trial after arbitration. Upon making a request for trial, the moving party shall, unless permitted to proceed in forma pauperis, pay to the court administrator a fee of $100.

CREDIT(S)

Laws 1984, c. 634, § 1. Amended by Laws 1988, c. 673, § 39; Laws 1991, c. 345, art. 1, § 102; Laws 1999, c. 139, art. 4, § 2.

[FN1] Section 572.08 to 572.30.

HISTORICAL AND STATUTORY NOTES

The 1988 amendment in subd. 2 substituted the reference to matters involving children in need of protection or services for a former reference to matters involving neglect or dependency.

The 1991 amendment added subd. 4, setting a fee of $100 for the moving party upon making a request for trial.

Laws 1999, c. 139, art. 4, § 2, par. (b), in part directed the revisor of statutes to correct cross references in **Minnesota** Statutes to sections that were repealed and recodified by Laws 1999, c. 139.

M. S. A. § **484.73,** MN ST § **484.73**

Current through the end of the 2012 First Special Session

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Supreme Court Rule **17.01**

C

Vernon's Annotated **Missouri** Rules Currentness
Supreme Court Rules
Rules Governing the **Missouri** Bar and the Judiciary (Refs & Annos)
Rule 17. Alternative Dispute Resolution (Refs & Annos)

➡17.01. Alternative Dispute Resolution Program--Establishment--Purpose-- Definition

(a) Any judge by order or any judicial circuit by local court rule may establish an alternative dispute resolution program as provided in this Rule 17. It is the purpose of the Court through adoption and implementation of this Rule 17 to provide an alternative mechanism for the resolution of civil disputes, except those subject to Supreme Court Rules 88.02 to 88.08, by means of alternative dispute resolution procedures for disposition before trial of certain civil cases with resultant savings in time and expenses to the litigants and to the court without sacrificing the quality of justice to be rendered or the right of the litigants to jury trial in the event that a settlement satisfactory to the parties is not achieved through alternative dispute resolution.

(b) As used in this Rule 17, alternative dispute resolution programs include but are not limited to:

(1) "Arbitration," a procedure in which neutral persons, typically one person or a panel of three persons, hears both sides and decides the matter. The arbitrator's decision is not binding and simply serves to guide the parties in trying to settle their lawsuit. An arbitration is typically less formal than a trial, is usually shorter, and may be conducted in a private setting at a time mutually agreeable to the parties. The parties, by agreement, select the arbitrator or arbitrators and determine the rules under which the arbitration will be conducted;

(2) "Early neutral evaluation," a process designed to bring together parties to litigation and their counsel in the early pretrial period to present case summaries before and receive a non-binding assessment from an experienced neutral evaluator. The objective is to promote early and meaningful communication concerning disputes, enabling parties to plan their cases effectively and assess realistically the relative strengths and weaknesses of their positions. While this confidential environment provides an opportunity to negotiate a resolution, immediate settlement is not the primary purpose of this process;

(3) "Mediation," a process in which a neutral third party facilitates communication between the parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties;

(4) "Mini-Trial," a process in which each party and counsel present the case before a selected representative for each party and a neutral third party, to define the issues and develop a basis for realistic settlement negotiations. The neutral third party may issue an advisory opinion regarding the merits of the case.

(5) "Summary jury trial," is an informal settlement process in which jurors hear abbreviated case presentations. A judge presides over the hearing, but there are no witnesses, and the rules of evidence are relaxed. After the "trial", the jurors retire to deliberate and then deliver an advisory verdict. The verdict becomes the starting point for settlement negotiations among the parties.

(c) Each circuit is encouraged to develop other alternative dispute resolution programs that will meet the needs of the parties, the circuit and the community.

(d) All alternative dispute resolution processes shall be non-binding unless the parties enter into a written agreement as provided in Rule 17.06(c). A written agreement shall be binding to the extent not prohibited by law.

CREDIT(S)

(Adopted Oct. 22, 1996, eff. July 1, 1997.)

V.A.M.R. Rule **17.01, MO** R BAR Rule **17.01**

Current with amendments received through 3/15/12

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Supreme Court Rule **17.04**

Vernon's Annotated **Missouri** Rules Currentness
Supreme Court Rules
Rules Governing the **Missouri** Bar and the Judiciary (Refs & Annos)
Rule 17. Alternative Dispute Resolution (Refs & Annos)

17.04. Qualification of Individuals and Organizations

Any individual providing alternative dispute resolution services independently or through an organization under this Rule 17 shall have appropriate training or equivalent experience in conducting the type of alternative dispute resolution service the individual or organization provides. Appropriate training for mediators shall include at least sixteen hours of formal training. Appropriate training for individuals providing other services shall include at least four hours of formal training. The **Missouri** Bar shall determine the number of hours of formal training of the individual.

CREDIT(S)

(Adopted Oct. 22, 1996, eff. July 1, 1997.)

V.A.M.R. Rule **17.04, MO** R BAR Rule **17.04**

Current with amendments received through 3/15/12

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N.C.G.S.A. § **7A-37.1**

West's **North Carolina** General Statutes Annotated Currentness
Chapter 7A. Judicial Department (Refs & Annos)
Subchapter II. Appellate Division of the General Court of Justice
Article 5. Jurisdiction (Refs & Annos)

§ 7A-37.1. Statewide court-ordered, nonbinding arbitration in certain civil actions

(a) The General Assembly finds that court-ordered, nonbinding arbitration may be a more economical, efficient and satisfactory procedure to resolve certain civil actions than by traditional civil litigation and therefore authorizes court-ordered nonbinding arbitration as an alternative civil procedure, subject to these provisions.

(b) The Supreme Court of **North Carolina** may adopt rules governing this procedure and may supervise its implementation and operation through the Administrative Office of the Courts. These rules shall ensure that no party is deprived of the right to jury trial and that any party dissatisfied with an arbitration award may have trial de novo.

(c) This procedure may be employed in civil actions where claims do not exceed fifteen thousand dollars ($15,000), except that it shall not be employed in actions in which the sole claim is an action on an account, including appeals from magistrates on such actions.

(c1) In cases referred to nonbinding arbitration as provided in this section, a fee of one hundred dollars ($100.00) shall be assessed per arbitration, to be divided equally among the parties, to cover the cost of providing arbitrators. Fees assessed under this section shall be paid to the clerk of superior court in the county where the case was filed and remitted by the clerk to the State Treasurer.

(d) This procedure may be implemented in a judicial district, in selected counties within a district, or in any court within a district, if the Director of the Administrative Office of the Courts, and the cognizant Senior Resident Superior Court Judge or the Chief District Court Judge of any court selected for this procedure, determine that use of this procedure may assist in the administration of justice toward achieving objectives stated in subsection (a) of this section in a judicial district, county, or court. The Director of the Administrative Office of the Courts, acting upon the recommendation of the cognizant Senior Resident Superior Court Judge or Chief District Court Judge of any court selected for this procedure, may terminate this procedure in any judicial district, county, or court upon a determination that its use has not accomplished objectives stated in subsection (a) of this section.

(e) Arbitrators in this procedure shall have the same immunity as judges from civil liability for their official conduct.

CREDIT(S)

Added by Laws 1989, c. 301. Amended by S.L. 2002-126, § 14.3.(a), eff. Oct. 1, 2002; S.L. 2003-284, § 36A.1, eff. Aug. 1, 2003.

HISTORICAL AND STATUTORY NOTES

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N.C.G.S.A. § **7A-45.2**

West's **North Carolina** General Statutes Annotated Currentness
Chapter 7A. Judicial Department (Refs & Annos)
Subchapter III. Superior Court Division of the General Court of Justice
Article 7. Organization

§ 7A-45.2. Emergency special judges of the superior court; qualifications, appointment, removal, and authority

(a) Any justice or judge of the appellate division of the General Court of Justice who:

(1) Retires under the provisions of the Consolidated Judicial Retirement Act, Article 4 of Chapter 135 of the General Statutes, or who is eligible to receive a retirement allowance under that act;

(2) Has not reached the mandatory retirement age specified in G.S. 7A-4.20;

(3) Has served at least five years as a superior court judge or five years as a justice or judge of the appellate division of the General Court of Justice, or any combination thereof, whether or not eligible to serve as an emergency justice or judge of the appellate division of the General Court of Justice; and

(4) Whose judicial service ended within the preceding 10 years;

may apply to the Governor for appointment as an emergency special superior court judge in the same manner as is provided for application as an emergency superior court judge in G.S. 7A-53. If the Governor is satisfied that the applicant meets the requirements of this section and is physically and mentally able to perform the duties of a superior court judge, the Governor shall issue a commission appointing the applicant as an emergency special superior court judge until the applicant reaches the mandatory retirement age for superior court judges specified in G.S. 7A-4.20.

(b) Any emergency special superior court judge appointed as provided in this section shall:

(1) Have the same powers and duties, when duly assigned to hold court, as provided for an emergency superior court judge by G.S. 7A-48;

(2) Be subject to assignment in the same manner as provided for an emergency superior court judge by G.S. 7A-46;

(3) Receive the same compensation, expenses, and allowances, when assigned to hold court, as an emergency superior court judge as provided by G.S. 7A-52(b);

(4) Be subject to the provisions and requirements of the Canons of Judicial Conduct; and

(5) Not engage in the practice of law during any period for which the emergency special superior court judgeship is commissioned. However, this subdivision shall not be construed to prohibit an emergency special superior court judge appointed pursuant to this section from serving as a referee, arbitrator, or mediator, during service as an emergency special superior court judge when the service does not conflict

with or interfere with the emergency special superior court judge's judicial service in emergency status.

(c) Upon reaching mandatory retirement age for superior court judges as set forth in G.S. 7A-4.20, any emergency special superior court judge appointed pursuant to this section, whose commission has expired, may be recalled as a recalled emergency special superior court judge to preside over any regular or special session of the superior court under the following circumstances:

(1) The judge shall consent to the recall;

(2) The Chief Justice may order the recall;

(3) Prior to ordering recall, the Chief Justice shall be satisfied that the recalled judge is capable of efficiently and promptly discharging the duties of the office to which recalled;

(4) Jurisdiction of a recalled emergency special superior court judge is as set forth in G.S. 7A-48;

(5) Orders of recall and assignment shall be in writing and entered upon the minutes of the court to which assigned; and

(6) Compensation, expenses, and allowances of recalled emergency special superior court judges are the same as for recalled emergency superior court judges under G.S. 7A-52(b).

(d) Any former justice or judge of the appellate division of the General Court of Justice who otherwise meets the requirements of subsection (a) of this section to be appointed an emergency special superior court judge but has already reached the mandatory retirement age for superior court judges set forth in G.S. 7A-4.20 on retirement may, in lieu of serving as an emergency judge of the court from which he retired, apply to the Governor to be appointed as an emergency special superior court judge as provided in this section. If the Governor issues a commission to the applicant, the retired justice or judge is subject to recall as an emergency special superior court judge as provided in subsection (c) of this section.

(e) No justice or judge appointed as an emergency special superior court judge or subject to recall as provided in this section shall, during the period so appointed or subject to recall, contemporaneously serve as an emergency justice or judge of the appellate division of the General Court of Justice.

CREDIT(S)

Added by Laws 1993, c. 321, § 199.

HISTORICAL AND STATUTORY NOTES

Laws 1993, c. 321, §§ 321 and 322, provide:

"Sec. 321. Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium.

"Sec. 322. If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of the act as a whole or any part other than the part so declared to be unconstitutional or inval- id."

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N.C.G.S.A. § **90-21.62**

West's **North Carolina** General Statutes Annotated Currentness
Chapter 90. Medicine and Allied Occupations (Refs & Annos)
Article 1H. Voluntary Arbitration of Negligent Health Care Claims (Refs & Annos)

§ 90-21.62. Selection of arbitrator

(a) Selection by Agreement.--An arbitrator shall be selected by agreement of all the parties no later than 45 days after the date of the filing of the stipulation where the parties agreed to submit the dispute to arbitration under this Article. The parties may agree to select more than one arbitrator to conduct the arbitration. The parties may agree in writing to the selection of a particular arbitrator or particular arbitrators as a precondition for a stipulation to arbitrate.

(b) Selection From List.--If all the parties are unable to agree to an arbitrator by the time specified in subsection (a) of this section, the arbitrator shall be selected from emergency superior court judges who agree to be on a list maintained by the Administrative Office of the Courts. Each party shall alternately strike one name on the list, and the last remaining name on the list shall be the arbitrator. The emergency superior court judge serving as an arbitrator would be compensated at the same rate as an emergency judge serving in superior court.

CREDIT(S)

Added by S.L. 2007-541, § 1, eff. Jan. 1, 2008.

HISTORICAL AND STATUTORY NOTES

2007 Legislation

S.L. 2007-541, § 3, provides:

"This act becomes effective January 1, 2008, and applies to agreements to arbitrate entered into on or after that date."

N.C.G.S.A. § **90-21.62,** NC ST § **90-21.62**

The statutes and Constitution are current through the end of the
2012 Regular Session.

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West's North Dakota Century Code Annotated Currentness
North Dakota State Court Rules
North Dakota Rules of Court (N.D.R.Ct.)
VIII. Provisional and Final Remedies and Special Proceedings

Rule 8.8. Alternative Dispute Resolution

(a) Scope. Parties to civil suits are encouraged to participate in alternative dispute resolution ("ADR") before commencing a case or at an early stage of the case; and all parties in civil cases must discuss early ADR participation and the appropriate timing of such effort.

(1) For the purposes of this rule, the following processes are included as forms of ADR:

(A) mediation is a process in which a nonjudicial neutral mediator facilitates communication between parties to assist the parties in reaching voluntary decisions related to their dispute;

(B) nonbinding arbitration is a process of private adjudication in which parties present their cases to the arbitrator who issues an advisory decision. The parties agree in advance that the decision of the arbitrator is only advisory and will be used by the parties as a tool in attempting to resolve the dispute;

(C) early neutral evaluation is a process during which a content or process expert or attorney provides a neutral and unbiased evaluation of issues related to a dispute between parties. The evaluation might be about a specific question or issue or about how the case may fare at trial;

(D) mini-trial is an advisory process involving the trying of a dispute before a neutral adjudicator in a summary abbreviated fashion; and

(E) summary jury trial is an advisory process involving the trying of a dispute before a jury in a summary abbreviated fashion. The jury is often small in number and sometimes uses expert-jurors.

(2) For purposes of this rule, the following processes are not included as forms of ADR:

(A) Judicial settlement conference is a N.D.R.Civ.P. 16 process involving an informal discussion with a judge who is or is not assigned to the dispute. It can involve a wide array of negotiation and mediation techniques depending on the style of the judge. The purpose is to promote early settlement of cases.

(B) Binding arbitration is a process of adjudication in which the parties are

required by law, contract or other agreement to submit their dispute to an arbitrator who decides the result of a dispute. The resulting decision by the arbitrator is binding upon the parties except under limited circumstances.

(b) Procedure. Within 14 days or such other time the court may direct prior to the initial pretrial conference held under N.D.R.Civ.P. 16, a Rule 8.8 statement to the court must be filed with the district court (in the form shown in appendix F) detailing the ADR participation that has occurred or will occur or if it will not occur. In a divorce, the statement may be incorporated into the joint informational statement under N.D.R.Ct. 8.3(a). The statement must certify that the parties have discussed ADR participation with each other and that the parties' lawyers have discussed ADR with their clients, and, if an ADR process will occur, the time by which it will be completed. The party or parties who do not agree to participate must certify in the statement that they have discussed ADR with counsel or, if not represented, that the party is aware of ADR. If a party or parties choose not to participate in ADR, the statement must contain the reason for not participating. If the parties agree to an ADR process but cannot agree on a neutral, the court may designate a person from the ADR neutral roster maintained by the State Court Administrator's office.

(c) Education. The Joint ADR Committee must make available to parties written and video materials which may be used by the attorneys and parties to fulfill any requirements under this rule for ADR discussion or information.

(d) Confidentiality. The ADR processes are confidential and not open to the public. When persons agree to conduct and participate in ADR processes for the purpose of compromising, settling, or resolving a dispute, evidence of anything said or of any admission made in the course of the ADR processes is inadmissible as evidence and disclosure of confidential ADR communications is prohibited, except as authorized by the court and agreed to by the parties or as permitted under N.D.C.C. §§ 31-04-11 and 14-09.1-06.

(1) Statements made and documents produced in nonbinding ADR processes which are not otherwise discoverable are not subject to discovery or other disclosure and are not admissible into evidence for any purpose at trial.

(2) The neutral conducting an ADR proceeding may not be called to testify in connection with any dispute relating to the ADR proceeding or its result except upon written agreement of the parties and the concurrence of the district court, or when otherwise required by law.

(3) Notes, records, work product, and recollections of the neutral are confidential, which means that they will not be disclosed to the parties, the public, or anyone other than the neutral, unless all parties and the neutral agree to such disclosure or such disclosure is required by law or other applicable professional codes. No record will be made without the agreement of both parties, except for a

memorandum of issues that are resolved.

(e) Administration. Each district court will appoint a judicial officer or employee for its district to serve as program administrator to implement, oversee, and evaluate the district's ADR program.

CREDIT(S)

[Adopted effective March 1, 2001; amended effective October 1, 2006; March 1, 2011.]

EXPLANATORY NOTE

Rule 8.8 was adopted, effective March 1, 2001; and amended effective October 1, 2006; March 1, 2011.

Rule 8.8 is an adaptation of United States District Court, District of North Dakota, Local Rule 16.2.

Subdivision (b) was amended, effective March 1, 2011, to change the time to file a Rule 8.8 statement from 15 to 14 days before the initial pretrial conference.

Sources: Joint Procedure Committee Minutes of April 29-30, 2010, pages 26-27; January 28-29, 1999, pages 7-12; May 6-7, 1999, pages 7-11.

Rules of Court, Rule 8.8, ND R ROC Rule 8.8

State court rules are current with amendments received through January 15, 2012. Local federal district and bankruptcy court rules are current with amendments received through January 1, 2012.

END OF DOCUMENT

West's **North Dakota** Century Code Annotated Currentness
North Dakota State Court Rules
North Dakota Rules of Court (N.D.R.Ct.)
VIII. Provisional and Final Remedies and Special Proceedings

Rule 8.9. Roster of Alternative Dispute Resolution Neutrals

(a) Rosters of Neutrals. The State Court Administrator shall maintain and monitor a roster of neutrals for civil arbitration, civil mediation, and domestic relations/contested child proceedings mediation. Each roster must include the neutral's name, address, and credentials. Each roster must be updated and published on an annual basis and be available for inspection in the clerk of the district court's office. The State Court Administrator may establish a reasonable fee for placement on the roster and a reasonable yearly renewal fee.

(b) Qualifications. To be listed on a roster, a neutral shall provide the State Court Administrator with written credentials indicating the neutral meets the following requirements:

(1) *Civil Arbitrator Roster.* An arbitrator shall complete 30 hours minimum of arbitration training. The training must include the following topics:

(A) Pre-hearing communications between parties and between parties and the neutral;

(B) Components of the hearing process including evidence, presentation of the case, witnesses, exhibits, objectives, awards, and dismissals;

(C) Settlement techniques;

(D) **Rules**, statutes, and practices covering **arbitration**, including these **rules**.

(E) An arbitrator must also complete nine hours of continued arbitration training during each three-year period.

(2) *Civil Mediator Roster.* A mediator shall complete 30 hours minimum of mediation training, including a minimum of 15 hours of role-playing. The training must include the following topics:

(A) Conflict resolution and mediation theory, including causes of conflict and interest-based versus positional bargaining and models of conflict resolution;

(B) Mediation skills and techniques, including information gathering skills, communication skills, problem solving skills, interaction skills, conflict management skills, negotiation techniques, caucusing, cultural and gender issues,

and power balancing;

(C) Components in the mediation process, including an introduction to the mediation process, fact gathering, interest identification, option building, problem solving, agreement building, decision making, closure, drafting agreements, and evaluation of the mediation process;

(D) Mediator conduct, including conflicts of interest, confidentiality, neutrality, ethics, standards of practice, and mediator introduction;

(E) Rules, statutes, and practices governing mediation in the trial court system, including these rules.

(F) A mediator must also complete nine hours of continued mediation training during each three-year period.

(3) *Domestic Relations Mediator/Contested Child Proceedings Mediator Roster.* A domestic relations mediator or a contested child proceedings mediator under N.D.C.C. ch. 14-09.1 shall complete 40 hours minimum of domestic relations mediation training, including two hours minimum of domestic abuse training, and nine hours of continued domestic relations mediation training during each three-year period; and

(A) have a Bachelor's Degree in Behavioral Science with two years of experience in family/child intervention service; or

(B) have a Master's Degree in Behavioral Science with one year of experience in family/child intervention service; or

(C) have a license to practice law supplemented with two years of experience in domestic relations cases.

(4) A qualified neutral may not provide services during a period of suspension of a professional license.

(5) If a neutral is rostered in Minnesota within 60 days of the effective date of this rule, the neutral may be placed on the appropriate **North Dakota** roster within one year of the effective date of this rule as long as the neutral is still in good standing with the Minnesota rostering system.

(c) Selection of Neutral. The parties may select a neutral who is not listed on the State Court Administrator's roster. A court-appointed contested child proceedings mediator under N.D.C.C. § 14-09.1-03 must have the qualifications specified in subdivision (b)(3) of this rule.

(d) Continuing Training. Training requirements may be attained through course work and attendance at state and national ADR conferences. The neutral is responsible for maintaining attendance records and shall disclose the information to

program administrators and the parties to any dispute. The neutral shall submit continuing education credit information to the State Court Administrator's office every three years.

(e) Certification of Training Programs. Neutrals shall attend initial and continuing training programs that are approved by the Joint Committee on Alternative Dispute Resolution.

(f) Disclaimer. Each roster must include the following disclaimer:

The qualifications for listing a neutral on a roster are minimum standards, and the State Court Administrator's listing of a neutral does not imply the neutral has the requisite degree of skill or competency for a particular case. When choosing a neutral, the parties must make further inquiry about the qualifications and experience of the neutral. The rosters are intended to assist people in locating an appropriate neutral by serving as a starting point.

(g) Ethics Enforcement Procedure

(1) *Introduction*

The purpose of the Code of Mediation Ethics, Appendix A, is to provide standards of ethical conduct to guide mediators who provide mediation services, to inform and protect consumers of mediation services, and to ensure the integrity of the mediation process. In order for mediation to be effective, there must be broad public confidence in the integrity of the process. Mediators have a responsibility not only to the parties and the legal system, but also to the continuing improvement of the process. They must observe high standards of ethical conduct. These provisions should be construed to advance these objectives.

Failure to comply with any provision in the Code of Ethics may be the basis for removal from the roster of mediators maintained by the State Court Administrator and for such other action as may be taken by the **North Dakota** Supreme Court or the State Bar Association of **North Dakota**, or other professional organizations. Violation of a provision of the Code should not itself give rise to a cause of action nor should it create any presumption that a legal duty has been breached. Nevertheless, since the rules do establish standards of conduct for mediators, a mediator's violation of a rule may be evidence of breach of the applicable standard of conduct.

(2) *Scope*

This procedure applies to complaints against any individual mediator or mediation organization listed on the statewide mediation roster pursuant to this rule.

Advisory Comment

A mediator is subject to this complaint procedure when providing any mediation services. The complaint procedure applies whether the services are court ordered or not, and whether the services are or are not pursuant to **North Dakota** Rules of Court. The Alternative Dispute Resolution Review Board will consider the full context of the alleged misconduct, including whether the mediator was subject to other applicable codes of ethics, or was representing a mediation organization at the time of the alleged misconduct.

(3) *Board*

The Alternative Dispute Resolution Review Board will consist of three (3) experienced mediators appointed by the Chief Justice of the **North Dakota** Supreme Court after consultation with the President of the State Bar Association of **North Dakota** . At least one member appointed must be a non-lawyer mediator. Each member will serve for a term not to exceed three years; however, at the time of the creation of the Board one member will serve one year before being eligible for reappointment, one member will serve two years before being eligible for reappointment and one member will serve three years before being eligible for reappointment. No member may serve more than two consecutive three year terms. The Chief Justice shall designate a Chair of the Board.

(4) *Procedure*

(A) A complaint must be in writing, signed by the complainant, and mailed or delivered to the Alternative Dispute Resolution Review Board. The complaint must identify the mediator and make a short and plain statement of the conduct forming the basis of the complaint.

(B) The Board shall review the complaint to determine whether the allegations(s), if true, constitute a violation of the Code of Ethics.

(C) If the allegations(s) of the complaint do not constitute a violation of the Code of Ethics, the complaint must be dismissed and the complainant and the mediator must be notified in writing.

(D) If the Board concludes that the allegations of the complaint, if true, constitute a violation of the Code of Ethics, the Board will undertake such review, investigation, and action it deems appropriate. In all such cases, the Board shall send to the mediator, by certified mail, a copy of the complaint, a list identifying the ethical rules that may have been violated, and a request for a written response to the allegations and to any specific questions posed by the Board. It may not be considered a violation of the Code of Ethics for the mediator to disclose notes, records, or recollections of the mediation process complained of as part of the complaint procedure. Confidentiality will be upheld by the Board and only the records and notes relevant to the complaint will be considered in order to protect the parties and the integrity of the mediation process. Except for good cause shown, if the mediator fails to respond to the

complaint in writing within thirty (30) days, the allegations(s) shall will be considered admitted.

(E) The Board, at its discretion, may refer the complainant and mediator to mediation conducted by a neutral and qualified mediator to resolve the issues raised by the complainant. Mediation may proceed only if both the complainant and mediator consent. If the complaint is resolved through mediation, the Board shall dismiss the complaint, unless the resolution includes sanctions to be imposed by the Board. If no agreement is reached in mediation, the Board shall determine whether to proceed further.

(F) After review and investigation, the Board shall advise the complainant and mediator of the Board's action in writing by certified mail sent to their respective last known addresses. Upon request within 14 days from receipt of the Board's action on the complaint, the mediator and the complainant are entitled to a hearing before the Board to contest proposed sanctions or findings, and have the right to bring or defend against all charges, to be represented by an attorney, and to examine and cross-examine witnesses. The Board shall receive evidence that the Board considers necessary to understand and determine the dispute. Relevancy must be liberally construed in favor of admission. The Board shall make an electronic recording of the proceedings. The Board at its own initiative, or by request of the complainant or mediator, may issue subpoenas for the attendance of witnesses and the production of documents and other evidentiary matter. The Board's decision is final.

(5) *Sanctions*

(A) The Board may impose sanctions, including but not limited to:

(i) issuing a private reprimand;

(ii) designating the corrective action necessary for the mediator to remain on the statewide roster;

(iii) notifying the appointing court and any professional licensing authority with which the mediator is affiliated of the complaint and its disposition;

(iv) publishing the mediator's name, a summary of the violation, and any sanctions imposed;

(v) removing the mediator from the roster of qualified mediators and setting conditions for reinstatement; and

(vi) assessing costs and expenses of proceedings against the mediator, including without limitation, the costs of investigations, service of process, witness fees, and a court reporter's services.

(B) Sanctions may only be imposed if supported by clear and convincing evidence.

Conduct considered in previous or concurrent ethical complaints against the mediator is admissible to show a pattern of related conduct, the cumulative effect of which constitutes an ethical violation, and in consideration of appropriate sanctions.

(6) *Confidentiality*

(A) Unless and until sanctions are imposed, all files, records, and proceedings of the Board that relate to or arise out of any complaint shall be confidential, except:

(i) as between Board members and staff;

(ii) on request of the mediator, the file maintained by the Board, excluding its work product, must be provided to the mediator;

(iii) as otherwise required or permitted by rule or statute; and

(iv) to the extent that the mediator and complainant both waive confidentiality.

(B) If sanctions are imposed against any mediator under Section III A (2)-(5), the sanction must be of public record, and the Board file must remain confidential.

(C) Nothing in this rule may be construed to require the disclosure of the mental processes or communications of the Board or staff.

(7) *Privilege; Immunity*

(A) Privilege. A statement made in these proceedings is absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person who made the statement.

(B) Immunity. Board members and staff are immune from suit for any conduct in the course of their official duties.

CREDIT(S)

[Adopted effective March 1, 2001. Amended effective August 1, 2009.]

EXPLANATORY NOTE

Rule 8.9 was adopted, effective March 1, 2002; amended effective August 1, 2009.

A neutral is an individual or an organization offering an alternative dispute resolution process.

Arbitration is the process through which each party presents its case before a

Superior Court Rule 170

Revised Statutes Annotated of the State of New Hampshire Currentness
New Hampshire Court Rules
Rules of the Superior Court of the State of New Hampshire (Refs & Annos)
Alternative Dispute Resolution (ADR)

RULE 170. ALTERNATIVE DISPUTE RESOLUTION (ADR)

(A) Cases for Alternative Dispute Resolution.

(1) All writs of summons, transfers of actions from the district court, and such equity cases as the court may deem or the parties may agree are suitable, shall be assigned to ADR, with the exception of those exempted in paragraph (2).

(2) The following categories of civil and equity actions are exempt from the requirements of this rule.

(a) Actions where the parties represent by joint motion that they have engaged in formal ADR before a neutral third party prior to suit being filed.

(b) Actions exempted by the court on motion and for good cause, but only when said motion is filed within 180 days of the return date.

(B) Election of Specific Alternative Dispute Resolution Procedure and Selection of a Neutral.

(1) Unless the context of the rule indicates otherwise, the term "neutral" shall include any mediator, arbitrator or neutral evaluator who is selected from the court's lists of approved neutrals, and any mediator, arbitrator or neutral evaluator who is not on the court's approved lists but who is agreed upon by the parties.

(2) Promptly after the filing of an answer or appearance in the superior court or upon removal from the district court, the parties shall confer and select an ADR process (that is, mediation, neutral evaluation, or arbitration) and a neutral third party to conduct the process. If the parties cannot agree on the ADR process, they will be required to submit to mediation.

(3) The parties shall select a neutral third party to conduct the dispute resolution process from the court lists of approved neutrals. Prior to making such a selection, the parties shall determine whether they wish to select a neutral from the list of approved volunteer neutrals, or from the list of approved paid neutrals.

(a) If the parties choose a neutral from the list of approved paid neutrals, the parties shall notify the neutral and request that the neutral provide the parties with a schedule of fees and expenses.

(b) Unless the court orders or the parties otherwise agree, the neutral's fees and expenses shall be apportioned and paid in equal shares by each party, and shall be due and payable according to fee arrangements agreed to directly by the parties and the neutral. Fees and expenses paid to the neutral shall be allowed and taxed as costs in accordance with Superior Court Rule 87(a).

(c) If the parties choose a neutral from the list of approved volunteer neutrals, the parties shall be subject to

a one-time administrative fee of $50.00 per party, which shall be paid to the court at the time the Stipulation for ADR is filed with the court. This is an administrative fee which will be designated for use by the Office of Mediation and Arbitration and is not refundable. Parties who are indigent may petition the court for waiver of the $50.00 administrative fee.

(d) Parties may select a neutral who is not on the court's lists of approved neutrals if the parties agree on the choice of the neutral.

(4) If the parties cannot agree on the selection of a neutral, they shall so indicate in their Stipulation. The court shall designate a neutral at the structuring conference. If the parties have not selected an ADR method and neutrals by the time the structuring conference occurs, the court shall, at the structuring conference, set a date certain by which ADR shall have occurred.

(C) Stipulation and Court Order for Alternative Dispute Resolution.

(1) No later than ten days prior to the initial structuring conference provided for in Rule 62(I), the parties must file with the court a comprehensive written stipulation, signed by all counsel, or by parties if unrepresented, containing:

(a) An agreement to seek resolution of the issues involved in the action by designating one or more of the following alternative dispute resolution methods to be carried out as provided in this rule:

i. Mediation;

ii. Neutral Evaluation;

iii. Binding Arbitration; or

iv. Any other method of dispute resolution agreed upon by the parties.

(b) The designation of a Rule 170 neutral, to serve in the agreed-upon process, or an agreement to accept a neutral chosen by the court from a list provided by the clerk. However, prior to the designation of a Rule 170 neutral to serve in the agreed upon process, the parties or counsel (if parties are represented) shall contact each other in the first instance and agree upon a neutral and two alternates. They shall appoint one person to contact the neutral, or if need be, the alternates, to determine if the neutral is willing and able to serve and whether it will be on a volunteer or a paid basis.

(c) A schedule for the completion of the agreed-upon ADR process including the filing of case statements and the completion of any necessary discovery, or including the agreement to accept the assistance of the neutral designated under subparagraph (C)(1)(b) in setting a schedule for completion of the process. The schedule must provide for completion of the process within the shortest possible time after filing of the Stipulation, consistent with completion of the minimum amount of discovery necessary to make the process meaningful, but in any event not more than eight months after the date of the Stipulation.

(d) The location of the session and a date by which the session shall have occurred.

(2) The court may waive the initial structuring conference if, prior to the structuring conference, the court has received a completed and signed Rule 170 stipulation and a completed and signed Structuring Conference Or-

der. If the court has not received either or both of these documents, then at the initial structuring conference, after consultation with counsel, or with parties if unrepresented, the court shall issue an order stating: (a) the specific ADR procedure to be used; (b) the identity of, and contact information for, the neutral; (c) the date by which the ADR procedure must be completed; (d) whether the ADR shall be at the courthouse or off-site; and (e) the anticipated time needed for the ADR method chosen. If the court chooses a neutral from the volunteer list, the court shall order the parties to pay a one-time administrative fee of $50.00 per party.

The court has discretion to waive this fee if the parties are indigent. At the request of the parties for good cause, the court may also permit an individual $50.00 fee to apply to multiple plaintiffs or defendants, if under the circumstances of the case, the court determines that the per party fee would cause undue hardship if it were applied to individual parties, or if one fee for multiple parties on the same side is deemed equitable by the court.

If the neutral is chosen at the structuring conference either by the parties and counsel or by the court, the parties and counsel shall, within 10 days after the date of the structuring conference, contact the neutral or the alternates, if necessary, and schedule the ADR session with their choice of neutral.

Except for the date by which the ADR procedure must be completed, the structuring conference order regarding ADR may thereafter be amended by agreement of the parties by filing an amended Stipulation with the court. The court may permit an extension of the date by which the ADR procedure must be completed on the motion of either party for good cause shown.

(3) Upon receipt of notice of appointment in a case, the neutral shall disclose any circumstances likely to create a conflict of interest, the appearance of a conflict of interest, a reasonable inference of bias, or prevent the process from proceeding as scheduled. If the neutral withdraws, has a conflict of interest, or is otherwise unavailable, another shall be agreed to by the parties or appointed by the court.

(D) Alternative Dispute Resolution Proceeding.

(1) Upon receipt of the structuring conference order, the parties or their counsel shall confirm the date, time and location for the ADR to take place and the neutral shall advise the parties in writing of the schedule for submission and exchange of summaries. Unless the neutral advises otherwise, each party shall exchange a summary, not to exceed five pages, of the significant aspects of their case. The parties may also attach to the summary copies of pertinent documents. Upon receipt of a party's submission, any party may send additional information responding to that submission. Unless the neutral advises otherwise, all submissions shall be exchanged with opposing counsel and shall contain a statement of compliance with the exchange requirement.

(2) Thirty days before the date of the first scheduled ADR session, each party must certify to the neutral that party's readiness to proceed on the scheduled date or request that the neutral reschedule the ADR session. At any time, upon written request of a party for good cause shown, the neutral may reschedule the ADR session for a date prior to the date set forth in the structuring conference order for completion of the ADR proceeding.

(3) All parties and their counsel must attend a scheduled ADR session, unless the court, for good cause, excuses an individual from participation or authorizes an individual to participate by speaker telephone. A corporation, partnership, or other entity that is a party, and a liability insurer that is defending the action, must each be represented by a person, other than outside counsel, who has settlement authority and authority to enter into stipulations. With the agreement of all parties and the neutral, any person having an interest that

may be materially affected by the outcome of the proceeding may be invited to attend the session in person or by counsel.

(4) Within 15 days after the conclusion of an ADR proceeding, other than binding arbitration, the plaintiff(s) or plaintiff(s)' counsel (unless otherwise agreed) must report the results of the process to the court in writing. The report may not disclose the neutral's assessment of any aspect of the case or substantive matters discussed during the session or sessions except as is required to report the information required by this paragraph. The report (form No. NHJB-2488-S) contains the following items:

(a) The date on which the session or sessions were held including the starting and finishing times;

(b) The names and addresses of all persons attending, showing their role in the session and specifically identifying the representative of each party who had decision-making authority;

(c) A summary of any substitute arrangement made regarding attendance at the session;

(d) The results of the session, stating whether full or partial settlement was reached and appending any agreement of the parties.

COMMENT

Form No. NHJB-2488-S is available on-line at www.courts.state.nh.us/forms/nhjb-2488-s.pdf

(5) In any action in which ADR does not result in a settlement, the action will proceed in accordance with any agreement reached in the ADR process, or in the absence of an agreement, as ordered by the court.

(6) ADR proceedings shall not stay, alter, suspend, or delay pretrial discovery, motions, hearings, or conferences nor the requirements and time deadlines of New Hampshire Superior Court Rules 62 and 63. However, regardless of whether the neutral was selected from the court's approved lists or not, a copy of the ADR report must be filed by the plaintiff(s) or plaintiff(s)' counsel (unless otherwise agreed): (1) within 15 days of the ADR session; (2) as an exhibit to the final pretrial statement if the case did not resolve through ADR; or (3) as an exhibit to the docket markings. If the ADR report is not timely filed, the court may schedule a show-cause hearing to determine the status of the ADR process and to impose sanctions appropriate to the circumstances, if necessary.

(E) Inadmissibility of Alternative Dispute Resolution Proceedings.

(1) ADR proceedings and information relating to those proceedings shall be confidential. Information, evidence, or the admission of any party or the valuation placed on the case by any neutral shall not be disclosed or used in any subsequent proceeding. Statements made and documents prepared by a party, attorney, or other participant in aid of such proceeding shall be privileged and shall not be disclosed to any court or arbitrator or construed for any purpose as an admission against interest. All non-binding ADR proceedings are deemed settlement conferences consistent with the Superior Court Rules and Rules of Evidence. In addition, the parties shall not introduce into evidence in any subsequent proceeding, the fact that there was an ADR proceeding or any other matter concerning the conduct of the ADR proceedings except as required by the Rules of Professional Conduct or the Mediator Standards of Conduct.

(2) Evidence that would otherwise be admissible at trial shall not be rendered inadmissible as a result of its

use in an ADR proceeding.

(F) Sanctions.

If a party or a party's counsel fails without good cause to appear at an ADR session scheduled pursuant to this rule, or fails to comply with any order made hereunder, the court may, on its own or upon motion of a party, impose any sanction that is just under the circumstances.

(G) Qualifications of and Approval Process for Neutrals.

(1) Qualifications of Neutrals

(a) Good standing. All neutrals (neutral evaluators, mediators, arbitrators) must be attorneys admitted to practice in New Hampshire who are in good standing.

(b) Moral character. Neutrals must be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court.

(c) Disclosures. Applicants must disclose criminal convictions or findings of professional misconduct, which have not been annulled. The Administrative Council may refuse to approve an applicant who has been convicted of a criminal offense or has been found to have committed professional misconduct. Failure to disclose complete and accurate information may constitute grounds for decertification.

(d) Specific Requirements.

(i) Mediators--All Rule 170 mediators must have at least 20 hours of training in civil mediation. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in mediating case(s) with an approved Rule 170 mediator/mentor. The 20-hour training requirement may be satisfied by way of training provided by the Office of Mediation and Arbitration for a fee, or the mediator may provide to the Office of Mediation and Arbitration documentation of equivalent training, subject to its approval. A mediator/mentor must be approved as a mediator/mentor by the Administrative Council before serving as a mentor.

New Rule 170 mediators shall be subject to the 20-hour training requirement. All mediators who were on the court's approved list of Rule 170 mediators prior to January 1, 2008, will not be subject to the 20-hour training requirement; they will, however, be subject to a biennial 8-hour refresher-training requirement. The 8-hour refresher training must be completed by January 1, 2009. The refresher training requirement may be satisfied by way of court-sponsored training, which shall be provided without charge to mediators, or a mediator may provide to the Office of Mediation and Arbitration documentation of equivalent training, subject to its approval.

(ii) Neutral Evaluators--Neutral evaluators must be attorneys who have a minimum of 10 years experience in litigation in the subject matter areas to which they may be assigned as neutral evaluators. All neutral evaluators must have at least 20 hours of training in ADR and an additional 4 hours of training in neutral evaluation. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in neutral evaluation of case(s) with an approved Rule 170 neutral evaluator/mentor. The neutral evaluator/

mentor must be approved by the Administrative Council before serving as a neutral evaluator/mentor.

(iii) Arbitrators--Arbitrators must be attorneys who have a minimum of 10 years of experience in litigation in the subject matter areas which they may be assigned as arbitrators. All arbitrators must have a minimum of 20 hours of training in ADR and an additional 8 hours of training in arbitration under this rule. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in actual arbitration of case(s) with an approved Rule 170 arbitrator/mentor. The arbitrator/mentor must be approved by the Administrative Council before serving as an arbitrator/mentor. Arbitrators shall adhere to all codes of conduct generally applicable to both commercial and private arbitrations.

(2) Application and Approval Process

(a) In order to serve as a neutral, an attorney must apply and be approved by the Administrative Council. In approving neutrals, the Administrative Council may consider the applicant's alternative dispute resolution experience or other relevant factors, such as length of practice or trial experience.

(b) Neutrals may choose to be listed on the volunteer list, the paid list, or both. Neutrals shall pay an annual rostering fee pursuant to a fee schedule established by supreme court order. The amount of the fee may vary depending upon which list the neutral chooses to be included. The fee will be used to support the Office of Mediation and Arbitration. The neutral may provide biographical information for inclusion on the list, as well a description of those areas of the law in which the neutral has enhanced knowledge. All neutrals, regardless of whether they are on the paid or volunteer list, shall agree to act as a volunteer neutral for a minimum of at least two days but not more than four days annually. Neutrals in these volunteer cases must also agree to travel to the courthouse in which the case is located if the parties and counsel have chosen to have the ADR proceeding there.

(c) Neutrals shall apply for inclusion on the court's lists by submitting an application, the applicable rostering fee, and three letters of reference as set forth in this rule to the Office of Mediation/Arbitration. Inclusion on the court's list of approved neutrals remains valid for a one year period from July 1 through June 30 of each year. To request continued inclusion on the court's list or lists, a neutral, prior to June 1 of each year, shall:

(i) File a statement that there have been no material changes in his or her initial application for inclusion, or if there have been material changes, list and explain them.

(ii) File documentation that the neutral has completed required refresher training in the field of alternative dispute resolution in accordance with section (G)(1)(c).

(iii) Pay the rostering fee set for inclusion on the court's list of approved neutrals.

(d) All neutrals agree that as a condition of inclusion on the Court's list of approved neutrals, they may be required to provide at least two days but no more than four days of volunteer ADR sessions each year.

(H) Immunity for Rule 170 Neutral.

A "Neutral" (defined as a Neutral Evaluator, Mediator or Arbitrator) selected to serve and serving under Superior Court Rule 170 or Rule 170-A shall have immunity consistent with RSA 490-E:5.

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N.J.S.A. 2A:23A-22

Effective: [See Text Amendments]

New Jersey Statutes Annotated Currentness
Title 2A. Administration of Civil and Criminal Justice (Refs & Annos)
Subtitle 6. Specific Civil Actions
Chapter 23A. Alternative Procedure for Dispute Resolution (Refs & Annos)
Personal Injury Actions

2A:23A-22. Arbitrators number or selection; mutual consent of parties; judicial selection

a. The number or selection of arbitrators may be stipulated by mutual consent of all of the parties to the action, which stipulation shall be made in writing prior to or at the time notice is given that the controversy is to be submitted to arbitration. The assignment judge shall approve the arbitrators agreed to by the parties, whether or not the designated arbitrators satisfy the requirements of subsection b. of this section, upon a finding that the designees are qualified and their serving would not prejudice the interest of any of the parties.

b. If the parties fail to stipulate the number or names of the arbitrators, the arbitrators shall be selected, in accordance with rules of court adopted by the Supreme Court of New Jersey, from a list of arbitrators compiled by the assignment judge, to be comprised of retired judges and qualified attorneys in this State with at least seven years' negligence experience and recommended by the county or State bar association.

CREDIT(S)

L.1987, c. 329, § 3, eff. Dec. 22, 1987.

HISTORICAL AND STATUTORY NOTES

Application to causes of action arising on or after Dec. 22, 1987, see Historical and Statutory Notes under N.J.S.A. § 2A:23A-20.

Statements:

Committee statement to Assembly, No. 2709--L.1987, c. 329, see N.J.S.A. § 2A:23A-20.

N. J. S. A. 2A:23A-22, NJ ST 2A:23A-22

Current with laws effective through L.2012, c. 78 and J.R. No. 5.

END OF DOCUMENT

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N.J.S.A. 2A:23A-28

Effective: [See Text Amendments]

New Jersey Statutes Annotated Currentness
Title 2A. Administration of Civil and Criminal Justice (Refs & Annos)
Subtitle 6. Specific Civil Actions
Chapter 23A. Alternative Procedure for Dispute Resolution (Refs & Annos)
Personal Injury Actions

2A:23A-28. Evidence at trial de novo; exception for reduction of assessment

No statements, admissions or testimony made at the arbitration proceedings, nor the arbitration decision, as confirmed or modified by the court, shall be used or referred to at the trial de novo by any of the parties, except that the court may consider any of those matters in determining the amount of any reduction in assessments made pursuant to section 10 of this act. [FN1]

CREDIT(S)

L.1987, c. 329, § 9, eff. Dec. 22, 1987.

[FN1] N.J.S.A. § 2A:23A-29.

HISTORICAL AND STATUTORY NOTES

Application to causes of action arising on or after Dec. 22, 1987, see Historical and Statutory Notes under N.J.S.A. § 2A:23A-20.

Statements:

Committee statement to Assembly, No. 2709--L.1987, c. 329, see N.J.S.A. § 2A:23A-20.

N. J. S. A. 2A:23A-28, NJ ST 2A:23A-28

Current with laws effective through L.2012, c. 78 and J.R. No. 5.

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N.J.S.A. **39:6A-27**

Effective: [See Text Amendments]

New Jersey Statutes Annotated Currentness
Title 39. Motor Vehicles and Traffic Regulation
Subtitle 2. Other Laws Regulating Motor Vehicles
Chapter 6A. Compulsory Automobile Liability Insurance--No Fault Provisions (Refs & Annos)

39:6A-27. Selection of arbitrators

a. The number or selection of arbitrators may be stipulated by mutual consent of all of the parties to the action, which stipulation shall be made in writing prior to or at the time notice is given that the controversy is to be submitted to arbitration. The assignment judge shall approve the arbitrators agreed to by the parties, whether or not the designated arbitrators satisfy the requirements of subsection b. of this section, upon a finding that the designees are qualified and their serving would not prejudice the interest of any of the parties.

b. If the parties fail to stipulate the number or names of the arbitrators, the arbitrators shall be selected, in accordance with the rules of court adopted by the Supreme Court of **New Jersey**, from a list of arbitrators compiled by the assignment judge, to be comprised of retired judges and qualified attorneys in this State with at least seven years' negligence experience and recommended by the county or State bar association.

CREDIT(S)

L.1983, c. 358, § 4.

HISTORICAL AND STATUTORY NOTES

Operative date of L.1983, c. 358, see Historical and Statutory Notes under N.J.S.A. § 39:6A-24.

N. J. S. A. **39:6A-27,** NJ ST **39:6A-27**

Current with laws effective through L.2012, c. 78 and J.R. No. 5.

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N.J.S.A. **39:6A-31**

Effective: [See Text Amendments]

New Jersey Statutes Annotated Currentness
Title 39. Motor Vehicles and Traffic Regulation
Subtitle 2. Other Laws Regulating Motor Vehicles
Chapter 6A. Compulsory Automobile Liability Insurance--No Fault Provisions (Refs & Annos)

39:6A-31. Confirming arbitration decision

Unless one of the parties to the arbitration petitions the court, within 30 days of the filing of the arbitration decision with the court, a. for a trial de novo, or b. for the modification or vacation of the arbitration decision for any of the reasons set forth in chapter 24 of Title 2A of the **New Jersey** Statutes, or an error of law or factual inconsistencies in the arbitration findings, the court shall, upon motion of any of the parties, confirm the arbitration decision, and the action of the court shall have the same effect and be enforceable as a judgment in any other action.

CREDIT(S)

L.1983, c. 358, § 8.

HISTORICAL AND STATUTORY NOTES

Operative date of L.1983, c. 358, see Historical and Statutory Notes under N.J.S.A. § 39:6A-24.

N. J. S. A. **39:6A-31,** NJ ST **39:6A-31**

Current with laws effective through L.2012, c. 78 and J.R. No. 5.

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West's New Mexico Statutes Annotated Currentness
State Court Rules
Rules of the District Court of the Second Judicial District
Part VI. Court Alternatives

LR2-601. COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION PROGRAMS GENERALLY

A. Purpose. The purpose of this district's court-annexed alternative dispute resolution programs is the early, fair, efficient, cost-effective and informal resolution of disputes. Nothing in the rules governing these programs shall be construed to discourage or prohibit parties from stipulating to private alternative dispute resolution.

B. Administration. These programs shall be administered by a court alternatives director appointed by the court. The court may appoint standing committees of judges, lawyers and others to provide guidance and assistance.

C. Order Required. All referrals to these programs require the filing of a written court order.

D. Limitation. The number of cases referred to these programs shall necessarily be limited by the number of attorneys and other professionals available to provide alternative dispute resolution services under court-appointment, and the sufficiency of court resources to administer the programs.

E. Immunity. Attorneys and other persons appointed by the court to serve as settlement facilitators, arbitrators, mediators or in other such roles pursuant to the rules governing this district's court-annexed alternative dispute resolution programs, are appointed to serve as arms of the court and as such are immune from liability for conduct within the scope of their appointment.

F. Forms. When available, applicable court forms shall be used. Forms shall be available through the court alternatives director.

LR2-602. SETTLEMENT FACILITATION PROGRAM

A. Scope. The court may, pursuant to Rule 1-016 NMRA, refer cases to settlement conferences conducted by court-appointed settlement facilitators on an ad hoc basis throughout the year and during periodic "settlement weeks" scheduled by the court. The court will generally hold a "settlement week" during September every year.

B. Application. This rule applies to civil cases, whether jury or non-jury, except for cases within the following categories:

Appeals Extraordinary writs Court-annexed arbitration program, pending cases

Adoption Commitment Conservatorship Guardianship Student Loan Election Tax

This rule does not apply to disputes where a law suit has not yet been filed.

C. Referral Upon Request. Any party at any time may request referral to a settlement conference by motion or letter directed to the assigned judge. The letter may be ex parte. The letter should include the following:

(1) Case number and caption;

(2) Estimated time required for conference;

(3) Whether other parties know request is being made;

(4) Whether other parties agree conference is appropriate;

(5) Brief list of pending issues;

(6) Type of facilitator or facilitator team preferred, e.g., judge, attorney, psychologist or other professional, judge/attorney, judge/psychologist, attorney/psychologist, attorney/attorney; and

(7) Names of all parties entitled to notice and any other persons who should be present at the conference, along with law firm, address, telephone number and capacity, e.g., attorney for petitioner, witness for respondent.

The assigned judge will determine whether to grant the request for referral. The assigned judge may refuse to grant a request even if all parties agree to a settlement conference.

D. Referral Upon Judge's Own Motion. The assigned judge at any time and without agreement of the parties may refer a case to a settlement conference.

E. Referral Order. In all cases to be referred, whether upon party's request or judge's motion, the court will complete and file an order requiring a settlement conference, appointing a settlement facilitator or facilitators, and setting a deadline for the conference, and will mail or deliver endorsed copies to the facilitator(s) and all parties entitled to notice. The order shall not indicate whether the referral was made upon a party's request or the judge's motion. The order may be modified only by subsequent written court order.

F. Time, Place and Deadline for Settlement Conference. Unless set by the referral order, the time(s) and place(s) of the settlement conference shall be set by the settlement facilitator(s) within a deadline set by the court. Any party or facilitator may request an extension of the deadline by motion directed to the assigned judge.

G. Attendance. The following shall attend and be present in person during the entire conference: each party of record including parties represented by counsel; each counsel of record who will be trying the case; and, for each party, the person or persons with complete authority to settle the case including but not limited to insurance company representatives and guardians ad litem. This provision may be waived only by written order of the assigned judge. The court may refuse to grant a motion to waive attendance even if all parties agree to the motion. Upon motion of any party or its own motion, the court shall impose sanctions for failure to attend the settlement conference or have present all necessary parties or their representatives with settlement authority, except upon a showing of good cause.

H. Settlement Conference Information. At least five (5) days prior to the conference, all parties shall provide the facilitator(s) with the information listed below. This information shall not be filed with the court nor in any way be made part of the court record, and at the providing party's discretion, need not be produced to other parties. Upon motion of any party or its own motion, the court may impose sanctions for failure to provide the information to the facilitator(s).

(1) Case number and caption;

(2) Brief description of the case; in domestic relations cases include date of marriage, separation and divorce, names, ages, occupations and current annual incomes of parties, and names and ages of children;

(3) Description of the relief sought;

(4) List of pending factual issues;

(5) List of pending legal issues;

(6) List of all remaining discovery;

(7) List of any pending dispositive motions;

(8) Estimate of costs and attorney fees through trial;

(9) The last offer made to other parties; and

(10) Copies of case law, statutes, pleadings, exhibits, orders and any other information which would be helpful to the facilitator(s).

I. Good Faith Participation. Parties shall participate in good faith in settlement conferences. Good faith participation includes but is not limited to sufficiently preparing for the conference and engaging in meaningful negotiations during the conference. Upon motion of any party or its own motion, the court may award attorney fees and costs for failure to participate in good faith.

J. Cancelling Conferences. Settlement conferences may be cancelled only by written court order. By motion, any party may request that a settlement conference be cancelled. By letter to the assigned judge, the facilitator may request that a conference be cancelled.

K. Choice of Settlement Facilitator. The court will choose the settlement facilitator from a list of facilitators maintained by the court. The court will consider any recommendations made by the parties. The parties may present to the assigned judge a stipulated order appointing any licensed attorney or other qualified person as facilitator. Judges shall not act as facilitators in their own cases.

L. Replacement of Settlement Facilitator. By letter to the assigned judge with a copy to all parties and facilitators, any party or facilitator may request that the facilitator be replaced. The party or the facilitator requesting replacement need not provide an explanation. Upon approval of the assigned judge, the facilitator will be replaced; the court will choose the replacement facilitator from the court's list and will complete and file an amended referral order and mail or deliver endorsed copies to all parties entitled to notice; or, the parties may present to the assigned judge a stipulated order appointing any licensed attorney or other qualified person.

M. Compensation to Settlement Facilitator. Compensation shall not be required for any settlement facilitator for a settlement conference conducted as part of a settlement week. The court may order the parties to pay reasonable compensation to the facilitator for a settlement conference not conducted as part of a settlement week. Judges shall not receive compensation for serving as settlement facilitators.

LR2-603. COURT-ANNEXED ARBITRATION

SECTION I: GENERAL PROVISIONS

A. *Application.* This rule applies to civil cases, whether jury or non-jury, except for cases within the following categories:

Appeals

Uniform Arbitration Act

Extraordinary writs

Adoption

Commitment

Conservatorship

Guardianship

Probate

Children's Code

Domestic relations

Workers' compensation

Student loan

Driver's license

Election

Tax

B. *Court Hearings.* If a court hearing is required regarding any aspect of arbitration prior to referral or any matter during referral, the court shall set and hear the matter promptly after the matter is brought to the attention of the assigned judge by request for hearing or by the court alternatives director.

C. *"At Issue" Required.* All cases referred to arbitration must be "at issue" prior to referral. For purposes of this rule, a case is "at issue" when at least one answer to the complaint has been filed. Answers to cross-claims, counterclaims and third-party complaints need not have been filed. Service on all parties need not have been made.

SECTION II: MANDATORY REFERRAL

A. *Types of Cases for Mandatory Referral.* All cases, jury and non-jury, shall be referred to arbitration where no party seeks relief other than a money judgment and no party seeks an amount in excess of twenty-five thousand dollars ($25,000.00) from any party or combination of parties, exclusive of punitive damages, interest, costs and attorney fees.

B. *Mandatory Certification* In all cases filed on or after the effective date of this rule, any party filing a complaint, counterclaim, cross-claim, third-party complaint or any other pleading, in which affirmative relief is requested, shall file and serve concurrently with the pleading for affirmative relief, a separate certification indicating whether the party is or is not seeking relief other than a money judgment and whether the amount sought exceeds or does not exceed twenty-five thousand dollars ($25,000.00) exclusive of punitive damages, interest, costs and attorney fees. The certification shall be a good faith attempt to state the type and amount of relief to be sought at trial and shall not act as a limitation on relief.

C. *Review of Certification; Referral Order.* Within thirty (30) days after a case is at issue, the court will review the court file, including the certifications filed, to determine whether referral to arbitration is mandated by Section II(A) of this rule. If so mandated, the court will prepare and file an order referring the case to arbitration, and mail or deliver endorsed copies of the order to all parties entitled to notice. The court on its own motion may postpone filing a referral order if it appears from the court file that the case may be resolved upon a pending motion for judgment on the pleadings or other pending dispositive motion. If referral is not mandated, no order will be entered.

D. *Failure to File Certification.* If a party fails to file a certification, the court after written notice may impose an appropriate sanction including but not limited to dismissing the party's complaint without prejudice. The court in its discretion may impose such sanction without hearing.

E. *Referral Upon Motion.* At any time after a case is at issue and notwithstanding any certifications filed, upon a party's motion or the court's own motion, the court may enter an order referring the case to arbitration provided the court finds that the requirements of Section II(A) are met. The court in its discretion may enter such an order without hearing.

F. *Denial of Referral.* Notwithstanding a finding that the requirements of Section II(A) have been met, at any time prior to referral, upon a party's or the court's own motion, the court for good cause may deny referral to arbitration. The court in its discretion may enter such an order without hearing.

SECTION III: PERMISSIVE REFERRAL

Any case may be referred to arbitration where the parties stipulate to arbitration. The court may require the parties to stipulate to an arbitrator as set forth in Subsection IV(C)(3) of this rule.

SECTION IV: ARBITRATORS

A. *Arbitrator Pool.* The court will maintain a pool from which arbitrators will be appointed. The pool shall include all active members of the State Bar of New Mexico who have been licensed to practice law for five (5) or more years and who are residents of or have an office in Bernalillo County. Other attorneys licensed for five or more years, including inactive attorneys, out-of-Bernalillo County attorneys and out-of-state attorneys, may be included in the pool upon written request to the court alternatives director. The chief judge for good cause may remove an attorney from the arbitrator pool either temporarily or permanently. Such removal may be upon the court's own motion and without notice to the attorney, or upon written request to the court alternatives director. The court will periodically review the pool of arbitrators for completeness and accuracy, and may require any member of the State Bar of New Mexico to submit information necessary for this purpose. The court will provide written notice to attorneys as they are added to

the pool, either by letter or notice published in the Bar Bulletin.

B. *Training.* The court may require any attorney who is part of the arbitrator pool to attend arbitrator training.

C. *Appointment to Case.* After a case is referred to arbitration, an attorney shall be appointed as arbitrator by the filing of a court order upon either random selection, court selection or stipulation. With appointments upon random or court selection, the court will file an order appointing the arbitrator and mail or deliver endorsed copies to the arbitrator and all parties entitled to notice. With stipulations, the parties shall file the order of appointment.

(1) Random selection.

(a) Notice of Choices. Within ten (10) days after a case is referred to arbitration, the court alternatives director will mail to all parties a notice listing three (3) attorneys as choices for arbitrator. The three attorneys shall be selected at random from the arbitrator pool except that none of the three may be employed by the same law firm as any of the other three or as any counsel in the case. The notice of choices shall not be filed with the clerk.

(b) Peremptory Strikes. Within seven (7) days after the notice of choices is mailed, each party may peremptorily strike one attorney by written notice to the court alternatives director. A maximum of two strikes will be counted altogether; a maximum of one strike will be counted for each side, e.g., all plaintiffs or defendants or third-party defendants; strikes will be counted in the order received. The first attorney remaining after strikes are counted shall be appointed. The period for making strikes shall not be extended. The notice of strikes shall not be filed with the clerk.

(2) Court Selection. For good cause, the court may select an arbitrator rather than provide the parties with a notice of choices.

(3) Stipulation. The parties may stipulate to the appointment of any licensed attorney, whether or not part of the pool and with any length of experience, by stipulated order filed within seven (7) days after the notice of choices is mailed, or within seven days after a vacancy is created by order of excusal or otherwise. The stipulated order must be approved by all parties and by the proposed arbitrator. Approval of counsel and the proposed arbitrator may be telephonic; approval of parties pro se must be by signature. The court or the proposed arbitrator may require the parties to pay compensation at the arbitrator's usual hourly fee.

(4) Excusal; Conflicts Check. Promptly upon appointment, the arbitrator shall attempt to discern any conflicts of interest in hearing the case and shall notify the parties thereof. Upon discovery of a conflict of interest in hearing a case, an arbitrator shall file a motion for excusal. Upon a party's, the arbit-

rator's or the court's own motion, the court for good cause may order that the arbitrator be excused from appointment to the case. The court in its discretion may enter such an order without hearing.

(5) Vacancy. Vacancies caused by excusal or otherwise shall be filled by appointment of the first of the remaining three choices or if none remains, by appointment of an attorney selected by the court, or the parties may stipulate to a replacement as provided in Subsection IV(C)(3).

D. *Compensation.* The court shall compensate arbitrators in the amount of one hundred dollars ($100.00) per case. An arbitrator is entitled to compensation when the arbitrator files an award or the arbitration proceedings are otherwise concluded or when the arbitrator is excused from appointment. The arbitrator shall submit a written request for compensation to the court alternatives director within thirty (30) days after the arbitrator is entitled to compensation. Failure to submit a request shall be deemed a waiver of compensation. Arbitrators compensated by the parties pursuant to Subsection IV(C)(3) shall not be compensated by the court.

SECTION V: PROCEDURES DURING REFERRAL

A. *General.*

(1) Court Jurisdiction. The assigned judge continues to have jurisdiction over a case during referral to arbitration. In general, however, the assigned judge should not hear any matters after an arbitrator is appointed except the judge may hear the following:

Motions to excuse the arbitrator

Motions to withdraw referral to arbitration

Motions for sanctions pursuant to Subsection V(A)(5)

Motions for free process

Motions regarding attorney representation

Motions to add new parties

Motions to set aside default or any other judgment

Motions to compel settlement

Any post-judgment enforcement and execution matters

Requests for settlement conference pursuant to Second Judicial District Local Rules, Rule LR2-602 NMRA.

After a case is referred to arbitration and before an arbitrator is appointed, the court in its discretion may vacate any pending hearings on matters which may be heard by the arbitrator, and may set hearings on matters needing immediate consideration.

(2) Arbitrator Jurisdiction, Powers, Duties. The arbitrator's jurisdiction begins when the order of appointment is filed and continues until the arbitrator is excused or until ten (10) days after an award is filed or until the arbitration proceedings are otherwise concluded, whichever period is shorter. While the arbitrator has jurisdiction, the arbitrator's decisions shall be considered equivalent to court orders. The arbitrator may decide all issues of fact and law unless specifically prohibited by this rule or court order. The arbitrator shall consider the efficient, cost-effective and informal resolution of the case as a factor in all the arbitrator's decisions and in all aspects of the arbitrator's management of the case. The arbitrator may limit discovery whenever appropriate. The arbitrator may administer oaths. With the exception of contempt, the arbitrator may enter appropriate sanctions including sanctions pursuant to Rules 1-016, 1-030 and 1-037 NMRA, or any other Supreme Court rule, sanctions for failure to comply with any of the provisions of this rule, and sanctions for failure to comply with any of the arbitrator's decisions. Upon agreement of the parties, the arbitrator may serve as a mediator or settlement facilitator. The arbitrator's jurisdiction, powers and duties may not be delegated. The arbitrator must personally conduct the hearings and trial, and must personally sign decisions and the award.

(3) Supreme Court and Local Rules. All Supreme Court rules including rules of civil procedure (including Rule 1-006(D) NMRA) and rules of evidence, and all second judicial district local rules, apply during referral to arbitration unless specifically waived by written court order or the arbitrator. The arbitrator may waive rules of evidence only upon agreement of the parties.

(4) Good Faith Participation. All parties shall participate in good faith in the arbitration proceedings. The arbitrator may enter an award of default or of dismissal against any party failing to participate in good faith or reflect the failure in the award. In any such award, the arbitrator shall include a certification that the party failed to participate in good faith. The court shall consider such certification when deciding attorney fees, costs and interest on appeal, or when considering whether to set aside the default.

(5) 120-Day Deadline; Sanction. Within one hundred twenty (120) days after the arbitrator is appointed, the arbitrator shall file an award unless the arbitration proceedings have otherwise been concluded. Upon a party's, the arbitrator's or the court's own motion, the court for good cause may extend the one hundred twenty (120) day period. The court in its discretion may enter such an order without hearing. If the arbitrator or a party fails to comply with this provision, the court after written notice may impose an appropriate sanction in-

cluding but not limited to requiring the arbitrator or party to pay a penalty into the second judicial district arbitration fund.

(6) Filing Papers. Any motion or other paper to be heard or otherwise considered by the arbitrator shall not be filed with the court. The arbitrator shall not file any decisions except for the award. Upon a party's or the court's own motion, the court may order that an inappropriately filed paper be stricken. The court in its discretion may enter such an order without hearing. Failure to submit a motion to strike shall be deemed waiver of any prejudice caused by a paper inappropriately filed.

(7) Court File: Review, Copy. The arbitrator may review the court file at any time during regular court hours. The court shall provide the arbitrator a copy of the file or portions of the file at no cost upon request; requests shall be made to the court alternatives director.

(8) Summonses; Subpoenae. The clerk shall issue summonses and subpoenae in cases referred to arbitration in the same manner as with other civil cases. Such summonses and subpoenae shall be served and enforceable as provided by law.

(9) Record of Proceeding. Any party to an arbitration proceeding, at the party's own expense, may engage a certified court reporter to make a record of testimony given at an arbitration proceeding for use as allowed by the New Mexico Rules of Evidence. A copy of the record may be obtained by any other party to the arbitration proceeding in the same manner that deposition copies are obtained. Costs associated with making the record or obtaining a copy of it shall not be recoverable.

(10) Withdrawal of Referral. At any time after a case is referred to arbitration, upon a party's, the arbitrator's or the court's own motion, the court for good cause may order that the referral to arbitration be withdrawn and the case be returned to the court's docket. The court in its discretion may enter such an order without hearing.

B. *Hearings; Trial.*

(1) Place, Date and Time. The arbitrator shall set an appropriate place, date and time for all hearings and trial. Hearings shall be set during regular business hours except upon agreement of the parties. The arbitrator may conduct hearings by telephone.

(2) Notice. The arbitrator shall provide twenty (20) days written notice of trial. The arbitrator shall provide five (5) days notice, in writing or by telephone, of all other hearings. Notice of trial or hearings may be waived by the parties.

(3) Requests for Hearing. Unless otherwise directed by the arbitrator, parties

may request hearings informally, by letter or telephone, provided the requesting party notifies all other parties as well as the arbitrator. The arbitrator may decide motions and other preliminary matters on written submissions.

(4) Statement of Witnesses, Exhibits. No later than ten (10) days prior to trial, each party shall serve upon all other parties a statement listing all the exhibits and witnesses the party may use and briefly describing the matters about which each witness will be called to testify. The arbitrator may waive this provision.

(5) Return of Exhibits and Depositions. After an award is filed or the arbitration proceedings are otherwise concluded, the arbitrator shall return all exhibits and depositions to the submitting party.

C. *Evidentiary Exceptions.* The following exceptions apply during referral to arbitration.

(1) Depositions. The arbitrator may hear testimony by deposition.

(2) Documentary Evidence. The following documents, if relevant, shall be admitted in evidence without further proof provided a copy of said documents is served upon all parties no later than ten (10) days prior to the hearing or trial:

(a) Estimates and bills for services and products, if dated and itemized.

(b) Reports of experts, if dated and signed.

(c) Records and reports as described in Rule 11-803 NMRA, Paragraphs (F), (H), (I), (K), (L), and (N) through (R) NMRA.

D. *Award.*

(1) Final Decision; Scope. The arbitrator's final decision shall be called an "award." The award shall clearly set forth the amount awarded to each party and address all pending claims, attorney fees, costs and interest as allowed by law, including any required award of costs pursuant to Rule 1-068 NMRA. The award may be an award of default, dismissal, summary judgment or money damages.

(2) Amount. The amount of the award shall be limited only by the evidence and shall not be limited by the circumstances under which the case was referred to arbitration.

(3) Filing. Unless the parties agree otherwise, within ten (10) days after the last hearing, the arbitrator shall file an award with the clerk and serve copies on all parties entitled to notice. If an arbitrator fails to comply with this provision, the court after written notice may impose an appropriate sanction including but not limited to requiring the arbitrator to pay a penalty into the

second judicial district's arbitration fund.

(4) Amended Award. Within ten (10) days after an award is filed, the arbitrator may file an amended award. Copies shall be served on all parties entitled to notice.

(5) Binding Award. At any time before the award is filed, the parties may file with the clerk a stipulation that the award will be binding and that the right to appeal the award is waived.

(6) Judgment on Award. If no appeal is taken and the time for appeal has expired or the right to appeal has been waived or the appeal has been voluntarily dismissed, the court shall prepare and file a judgment or final order adopting that part of the award not appealed as a judgment or final order of the court, and mail or deliver endorsed copies to all parties entitled to notice. Such judgment or final order shall be enforceable and binding as any other judgment or final order.

SECTION VI: APPEAL

A. ***Right to Appeal.*** Any party of record at the time the arbitrator's award is filed may appeal the award, except that a party may not appeal an award of default, including an award of default entered pursuant to Section V(A)(4) of this rule. An award of default shall only be set aside pursuant to Rules 1- 055 and 1-060 NMRA.

B. ***Procedures to Appeal.***

(1) Notice of Appeal. To exercise the right to appeal, a party must file a "notice of appeal from arbitration" with the clerk within fifteen (15) days after the award or an amended award, is filed. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fifteen (15) days after the date on which the first notice of appeal was served. The period for filing the notice shall not be extended. A copy of the notice of appeal shall be served on all parties entitled to notice. Cross-appeals are not required.

(2) Voluntary Dismissal. At any time after filing a notice of appeal and before trial before the assigned judge, a party may withdraw the appeal by filing a notice of voluntary appeal dismissal. A copy of the notice shall be served on all parties.

C. ***Procedures on Appeal.***

(1) Docket Status. After a notice of appeal is filed, the case shall be returned to the same status on the assigned judge's docket that it had prior to referral to arbitration. Requests for trial must be submitted as required by local rule.

(2) De Novo Proceedings. All appeals shall be in the form of de novo proceedings before the assigned judge. No reference shall be made to any of the arbitrator's decisions including the award. Neither the arbitrator nor the court alternatives director shall be permitted to testify about the arbitration proceedings. Promptly after the notice of appeal is filed and until disposition of the appeal, the court shall seal the award.

(3) Discovery. Any discovery obtained while the case was referred to arbitration may be used in the de novo proceedings.

D. ***Award of Fees, Costs and Interest Against Appellant.*** If the court makes a decision on the merits which is the same as or less favorable to the appellant than the arbitrator's award, the court shall order that the appellant pay all other parties' expenses incurred during the appeal including but not limited to reasonable attorney fees, costs and pre-judgment interest dating from the arbitration award. The court for good cause shown may waive this provision; the court shall state the basis for its good cause finding on the record.

State court rules are current with amendments received through 7/15/2012.
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Westlaw

N.R.S. **38.250**

West's **Nevada** Revised Statutes Annotated Currentness
Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)
Chapter 38. Mediation and Arbitration (Refs & Annos)
Arbitration of Actions in District Courts and Justice Courts

➡38.250. Nonbinding arbitration of certain civil actions filed in district court required; nonbinding arbitration of certain civil actions filed in justice court authorized; effect of certain agreements by parties to use other alternative methods of resolving disputes

1. Except as otherwise provided in NRS 38.310:

(a) All civil actions filed in district court for damages, if the cause of action arises in the State of **Nevada** and the amount in issue does not exceed $50,000 per plaintiff, exclusive of attorney's fees, interest and court costs, must be submitted to nonbinding arbitration in accordance with the provisions of NRS **38.250** to 38.259, inclusive, unless the parties have agreed or are otherwise required to submit the action to an alternative method of resolving disputes established by the Supreme Court pursuant to NRS 38.258, including, without limitation, a settlement conference, mediation or a short trial.

(b) A civil action for damages filed in justice court may be submitted to binding arbitration or to an alternative method of resolving disputes, including, without limitation, a settlement conference or mediation, if the parties agree to the submission.

2. An agreement entered into pursuant to this section must be:

(a) Entered into at the time of the dispute and not be a part of any previous agreement between the parties;

(b) In writing; and

(c) Entered into knowingly and voluntarily.

An agreement entered into pursuant to this section that does not comply with the requirements set forth in this subsection is void.

3. As used in this section, "short trial" means a trial that is conducted, with the consent of the parties to the action, in accordance with procedures designed to limit the length of the trial, including, without limitation, restrictions on the amount of discovery requested by each party, the use of a jury composed of not more than eight persons and a specified limit on the amount of time each party may use to present the party's case.

CREDIT(S)

Added by Laws 1991, p. 1343. Amended by Laws 1993, pp. 556, 1024; Laws 1995, pp. 1419, 2537, 2538; Laws 1999, pp. 852, 1379; Laws 2003, c. 160, § 4, eff. Jan. 1, 2005; Laws 2005, c. 122, § 2, eff. May 18, 2005.

HISTORICAL AND STATUTORY NOTES

Mckinney's New York Rules of Court Currentness
State Rules of Court
Standards and Administrative Policies
Rules of the Chief Judge
Part 28. Alternative Method of Dispute Resolution by Arbitration

§ 28.1. Definitions

(a) The words "panel of arbitrators" or "panel" in this Part shall mean: (1) a group of three attorneys chosen to serve as arbitrators by the arbitration commissioner pursuant to section 28.4 of this Part; or (2) a single attorney assigned by the arbitration commissioner, as the Chief Administrator of the Courts, (hereinafter denominated the Chief Administrator), shall designate from time to time in a particular county or court; or (3) a single arbitrator in the event the parties, by stipulation, provide for arbitration before a single arbitrator in those cases where a panel of three arbitrators otherwise is required.

(b) The term "chairperson" shall mean the attorney so designated by the arbitration commissioner pursuant to section 28.4 of this Part, or the single arbitrator assigned by the arbitration commissioner.

§ 28.2. Mandatory Submission of Actions to Arbitration

(a) The Chief Administrator may establish in any trial court in any county the arbitration program authorized by this Part.

(b) In each county where an arbitration program is established by order of the Chief Administrator, all civil actions for a sum of money only, except those commenced in small claims parts and not subsequently transferred to a regular part of court, that are noticed for trial or commenced in the Supreme Court, County Court, the Civil Court of the City of New York, a District Court or a City Court, on or after the effective date of the order where recovery sought for each cause of action is $6,000 or less, or $10,000 or less in the Civil Court of the City of New York, or such other sum as may be authorized by law, exclusive of costs and interest, shall be heard and decided by a panel of arbitrators. The Chief Administrator may also, at any time, upon the establishment of the program in any particular court or county or thereafter, provide for the submission to arbitration of actions seeking recovery of such sums, that are pending for trial in those courts on the effective date of the order.

(c) In addition, upon stipulation filed with the clerk of the court where the action was commenced or, if the case was transferred, the clerk of the court to which it has been transferred, any civil action for a sum of money only, pending or thereafter commenced in such courts, including actions removed to a court of limited jurisdiction from the Supreme Court pursuant to CPLR 325(d), regardless of the amount in controversy, shall be arbitrated, and in any such action the arbitration award shall not be limited to the amounts provided in subdivision (b) of this section, or to the monetary jurisdiction of the court. Any stipulation pursuant to this section may set forth agreed facts, defenses waived or similar terms, and to that extent shall replace the pleadings.

(d) In any action subject to arbitration under these rules or submitted to arbitration by stipulation, the arbitration panel shall have jurisdiction of any counter-claim or crossclaim for a sum of money only that has been interposed, without regard to amount.

(e) All actions subject to arbitration shall be placed on a separate calendar known as the arbitration calendar, in the order of filing of the note of issue, notice of trial or stipulation of submission, except that where a defendant is in default, the plaintiff may seek a default judgment pursuant to the provisions of CPLR 3215.

(f) The appropriate administrative judge, with the approval of the Deputy Chief Administrator, may direct a pre-trial calendar hearing by the court of actions pending on the arbitration calendar. If an action is not settled or dismissed, or judgment by default is not directed upon the hearing, it shall be processed thereafter in accordance with the provisions of this Part.

§ 28.3. Arbitration Commissioner

(a) The Chief Administrator shall designate, in each county where arbitration is established pursuant to this Part, an arbitration commissioner. The compensation, if any, payable to a commissioner, other than a full time public official or employee who shall receive no compensation as such commissioner, shall be determined by the Chief Administrator within the appropriation made available for that purpose.

(b) The commissioner shall maintain complete and current records of all cases subject to arbitration under this Part and a current list of attorneys consenting to act as arbitrators.

§ 28.4. Selection of Panels of Arbitrators

(a) The members of each panel of arbitrators shall be appointed by the commissioner from the list established by the Chief Administrator of the Courts of attorneys-at-law admitted to practice in the State of New York. The Chief Administrator may establish procedures to evaluate the qualifications of applicants for placement on the list. No attorney shall be appointed unless he or she shall have filed with the commissioner a consent to act and an oath or affirmation equitably and justly to try all actions coming before him or her. An attorney may be removed from the list in the discretion of the commissioner upon approval of the Chief Administrator.

(b) Names of attorneys shall be drawn at random from the list. Where a three-arbitrator panel is utilized, the first name drawn for each three-arbitrator panel shall be the chairperson thereof. The chairperson of each panel shall have been admitted to practice in New York State as an attorney for at least five years; and the second and third members must be admitted to practice but not for any specified period of time, unless the Chief Administrator shall, by order, otherwise determine. Not more than one member or employee of a partnership or firm shall be appointed to any panel.

(c) No attorney who has served as an arbitrator shall be eligible to serve again until all other attorneys on the current list have had an opportunity to serve.

(d) An arbitrator who is related by blood, marriage or professional ties to a party or his counsel shall be disqualified for cause. An arbitrator may disqualify himself upon his own application, or by application of a party made within five days of the receipt of the notice of the hearing as provided by section 28.6 of this Part. Should a party object to the arbitrator's refusal to disqualify himself or herself for cause, the party may apply to the arbitration commissioner for a ruling. The commissioner's ruling shall be binding on all parties. If an arbitrator is disqualified, the commissioner shall select another arbitrator in the manner authorized by this section.

§ 28.5. Assignment of Actions to Panel

(a) The commissioner shall assign to each panel at least the first three, but no more than six, actions pending on

the arbitration calendar.

(b) If an action is settled or discontinued before the hearing, the attorney for the plaintiff shall immediately notify the chairperson and the commissioner. If the plaintiff is not represented by an attorney, the chairperson, upon receiving notice of such settlement or discontinuance, shall immediately notify the commissioner. The commissioner, upon receiving such notice, shall assign the next available action to the panel.

§ 28.6. Scheduling of Arbitration Hearings

(a) The hearing shall be held in a place provided by the court, by the commissioner, by the chairperson of the panel or, at the request of the chairperson, by a member of the panel. Unless otherwise agreed by the panel, parties and counsel, such place shall be within the county.

(b) The chairperson shall fix a hearing date and time, not less than 15 nor more than 30 days after the case is assigned, and shall give written notice to the members of the panel and the parties or their counsel at least 10 days before the date set. The commissioner may, on good cause shown, extend for a reasonable period the time within which the hearing shall be commenced. Such date and time shall not be a Saturday, Sunday, legal holiday or during evening hours except by agreement of the panel, parties and counsel. Adjournments may be granted at the discretion of the chairperson only upon good cause shown.

(c) If the chairperson is unable to schedule a hearing within 30 days after the case is assigned, or within such further period as the commissioner may set, he shall notify the commissioner in writing of the reasons for such inability. The commissioner shall mark the action "continued" and place it on the arbitration calendar, and shall assign another action to the panel.

(d) Any action which is continued twice, after assignment to two panels, shall be referred by the commissioner to the court where the action was commenced or, if the action was transferred, to the court to which it was transferred, for a hearing on the cause of the inability to hold an arbitration hearing. The court, upon such hearing, may order a dismissal, or authorize the entry of judgment by default pursuant to CPLR 3215, or refer the action to the commissioner for assignment to another panel.

§ 28.7. Defaults

(a) Where a party fails to appear at the hearing, the panel shall nonetheless proceed with the hearing and shall make an award and decision, as may be just and proper under the facts and circumstances of the action, which may be entered as a judgment forthwith pursuant to section 28.11(b) of this Part. The judgment, if any, the default and the award may be vacated and the action may be restored to the arbitration calendar only upon order of the court where the action was commenced or, if the action was transferred, the court to which it was transferred, upon good cause shown. Such order of restoration shall be upon condition that the moving party pay into the court an amount equal to the total fees payable by the administrative office for the courts to the panel.

(b) Should all parties fail to appear at the hearing, the panel must file a report and award dismissing the action. The action may be restored to the arbitration calendar only upon order of the court where the action was commenced or, if the action was transferred, the court to which it was transferred, upon good cause shown. Such order or restoration may provide for the payment by any party into the court of such part of the panel fees payable by the administrative office for the courts to the panel as the court may determine to be just and proper.

§ 28.8. Conduct of Hearings

(a) The panel shall conduct the hearing with due regard to the law and established rules of evidence, which shall be liberally construed to promote justice. In personal injury cases, medical proof may be established by the submission into evidence of medical reports of attending or examining physicians upon stipulation of all parties.

(b) The panel shall have the general powers of a court, including but not limited to:

(1) subpoenaing witnesses to appear;

(2) subpoenaing books, papers, documents and other items of evidence;

(3) administering oaths or affirmations;

(4) determining the admissibility of evidence and the form in which it is to be offered;

(5) deciding questions of law and facts in the actions submitted to them.

§ 28.9. Costs of Hearings; Stenographic Record

(a) Witness fees shall be the same as in the court in which the action was commenced or, if the action was transferred, the court to which the action was transferred and the costs shall be borne by the same parties as in court.

(b) The panel shall not be required to cause a stenographic record to be made, but if any party, at least five days before the hearing, requests such record be kept and deposits $50 or such additional sum as the panel may fix to secure payment therefor, the panel shall provide a stenographer. Any surplus deposited shall be returned to the party depositing it. The cost of the stenographer shall not be a taxable disbursement.

§ 28.10. Compensation of Arbitrators

(a) [FN1] The Chief Administrator shall provide for the compensation, including expenses, payable to each arbitrator to the extent of money available to the administrative office for the courts for this purpose. Claims for such compensation shall be made to the commissioner after entry of the award on forms prescribed by the Chief Administrator, except that a claim for compensation of the chairperson of a panel also may be made where the action is settled or withdrawn after a panel hearing date has been scheduled but before the hearing is commenced, and a claim for compensation of an arbitrator other than a chairperson may be made where the action is settled or withdrawn within three days of the date scheduled for the hearing. The commissioner shall forward all claims approved by him to the Chief Administrator. Any arbitrator may apply to the commissioner for reimbursement of extraordinary expenses necessarily incurred by him in the same manner as provided for application for ordinary compensation.

[FN1] So in original. No subd. (b) was promulgated.

§ 28.11. Award

(a) The award shall be signed by the panel of arbitrators or at least a majority of them. The chairperson shall file a report and the award with the commissioner within 20 days after the hearing, and mail or deliver copies thereof to the parties or their counsel. The commissioner shall mark his files accordingly, file the original with the clerk of the court where the action was commenced or, if the action was transferred, the court to which it was

transferred, and notify the parties of such filing.

(b) Unless a demand is made for trial de novo, or the award vacated, the award shall be final and judgment shall be entered thereon by the clerk of the court where the action was commenced or, if the action was transferred, the clerk of the court to which it was transferred, with costs and disbursements taxed in accordance with the Civil Practice Law and Rules, the Uniform City Court Act, the New York City Civil Court Act, or the Uniform District Court Act, as the case may be.

§ 28.12. Trial De Novo

(a) Demand may be made by any party not in default for a trial de novo in the court where the action was commenced or, if the action was transferred, the court to which it was transferred, with or without a jury. Any party who is not in default, within 30 days after service upon such party of the notice of filing of the award with the appropriate court clerk, or if service is by mail, within 35 days of such service, may file with the clerk of the court where the award was filed and serve upon all adverse parties a demand for a trial de novo.

(b) If the demandant either serves or files a timely demand for a trial de novo but neglects through mistake or excusable neglect to do one of those two acts within the time limited, the court where the action was commenced or, if the action was transferred, the court to which it was transferred, may grant an extension of time for curing the omission.

(c) The demandant shall also, concurrently with the filing of the demand, pay to the court clerk where the award was filed the amount of the fees payable to the panel by the administrative office for the courts pursuant to section 28.10 of this Part. Where a judicial hearing officer has heard and determined the arbitration, the amount payable shall be the same as would have been payable to a single arbitrator or a panel of three arbitrators, as the case may be, if such judicial hearing officer had not been assigned. Such sum shall not be recoverable by the demandant upon a trial de novo or in any other proceeding.

(d) The arbitrators shall not be called as witnesses nor shall the report or award of the arbitrators be admitted in evidence at the trial de novo.

(e) If the judgment upon the trial de novo is not more favorable than the arbitration award in the amount of damages awarded or the type of relief granted to the demandant, the demandant shall not recover interest or statutory costs and disbursements from the time of the award, but shall pay such statutory costs and disbursements to the other party or parties from the time of the filing of the demand for the trial de novo.

(f) If a judicial hearing officer has heard and determined an arbitration, the trial de novo may not be presided over by a judicial hearing officer, except upon consent of the parties.

§ 28.13. Motion to Vacate Award

(a) Any party, except one who has demanded a trial de novo, within 30 days after the award is filed, may serve upon all other parties who have appeared and file with the appropriate court clerk a motion to vacate the award on only the grounds that the rights of the moving party were prejudiced because:

(1) there was corruption, fraud or misconduct in procuring the award;

(2) the panel making the award exceeded its power or so imperfectly executed it that a final and definite award

was not made; or

(3) there was a substantial failure to follow the procedures established by or pursuant to these rules;

unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

(b) Copies of the motion papers shall be served upon the commissioner within two days after filing. If the motion to vacate is granted, the case shall be returned to the top of the arbitration calendar and submitted to a new panel.

§ 28.14. General Power of Court

The court where the action was commenced or, if the action was transferred, the court to which it was transferred, shall hear and determine all collateral motions relating to arbitration proceedings.

§ 28.15. Training Courses

The Chief Administrator of the Courts may provide for such orientation courses, training courses and continuing education courses for attorneys applying to be arbitrators and for arbitrators as the Chief Administrator may deem necessary and desirable.

§ 28.16. Judicial Hearing Officers and Court Attorney Referees

(a) An arbitration under this Part may be heard and determined by a judicial hearing officer or a court attorney referee instead of a panel of arbitrators, without regard for whether the arbitration otherwise would be triable before a single arbitrator or a panel of three arbitrators. The judicial hearing officer or court attorney referee shall be assigned by the commissioner, with the approval of the appropriate administrative judge, to hear and determine such proceedings as shall be assigned by the commissioner. When a judicial hearing officer or a court attorney referee presides over an arbitration, the procedures followed shall be as set forth in the provisions of the Part.

(b) Judicial hearing officers serving as arbitrators pursuant to this Part shall receive compensation as provided in section 122.8 of the Rules of the Chief Administrator. A location in which a hearing of the arbitration is held shall be deemed a "facility designated for court appearances" within the meaning of that section. Court attorney referees shall receive no additional compensation for service as arbitrators pursuant to this Part.

Current with amendments received through 9/15/12
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NY **Commercial Division New York County Alternative Dispute Resolution Rule 6**

Mckinney's New York Rules of Court Currentness
Local Rules of Court
Commercial Division Rules
New York County
Alternate Dispute Resolution
Rules

Rule 6. Confidentiality of Mediation and Neutral Evaluation

(a) The ADR proceeding, other than a binding arbitration, shall be confidential and nothing that occurs during the proceeding shall be disclosed outside thereof, except as provided otherwise hereafter. Therefore, without limitation of the foregoing, none of the following shall be summarized, described, reported, or submitted to the court or revealed to others by the Neutral, the parties, or their counsel: any documents prepared by, or communications made by, parties or their counsel for, during, or in connection with, the ADR proceeding, and any communications made by, or any notes or other writings prepared by, the Neutral for, during, or in connection with the proceeding. No party to the proceeding shall, during the action referred to ADR or in any other legal proceeding, seek to compel production of documents, notes, or other writings prepared for or generated in connection with the ADR proceeding, or the testimony of any other party or the Neutral concerning communications made during the proceeding or any other aspect of the substance of the proceeding, including whether or not the parties agreed to settle the matter. Any settlement, in whole or in part, reached during the ADR proceeding shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. The terms of such an agreement shall be kept confidential unless the parties agree otherwise, except that any party thereto may thereafter commence an action for breach of the agreement and may refer to the terms thereof to the extent necessary to prosecute such an action. Documents and information otherwise discoverable under the Civil Practice Law and Rules shall not be shielded from disclosure merely because they are submitted or referred to in the ADR proceeding.

(b) In the event that, notwithstanding subdivision (a) hereof, a party to an action that had or has been referred to the Program attempts in any legal action to compel the testimony of the Neutral concerning the substance of the ADR proceeding, that party shall hold the Neutral harmless against any resulting expenses, including reasonable legal fees incurred by the Neutral or the reasonable value of time spent by the Neutral in representing himself or herself in connection therewith.

(c) Notwithstanding the foregoing:

(i) A Neutral shall disclose to a proper authority information obtained in mediation if required to do so by law or if the Neutral has a reasonable belief that such disclosure will prevent a participant from engaging in an illegal act, including one likely to inflict death or serious physical injury.

(ii) A party or the Program Coordinator may report to a proper authority any unethical conduct engaged in by the Neutral and the Neutral may make such a report with respect to any such conduct engaged in by counsel to a party.

(iii) The parties may include confidential information in a written settlement agreement; the Neutral and the parties may communicate with the Program Coordinator about administrative details of the proceeding, includ-

ing as provided in Rule 8 (g); the Program Coordinator may communicate with the assigned Justice in accordance with Rule 8 (h); and the Neutral may make general reference to the fact of services rendered in any action to collect an unpaid fee for services performed under these Rules.

NY Commercial Division NY County ADR Rule 6, NY R COM NY ADR Rule 6

Current with amendments received through 9/1/2012

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Westlaw

O.R.S. § **1.300**

West's **Oregon** Revised Statutes Annotated Currentness
Title 1. Courts of Record; Court Officers; Juries
Chapter 1. Courts and Judicial Officers Generally (Refs & Annos)
Judicial Officers in General

1.300. Senior judges; designation, certification, and assignment; powers and duties; compensa- tion

(1) A judge who retires from the circuit court, **Oregon** Tax Court, Court of Appeals or Supreme Court, except a judge retired under the provisions of ORS 1.310, may be designated a senior judge of the State of **Oregon** by the Supreme Court and, if so designated, shall be so certified by the Secretary of State.

(2) Upon filing with the Secretary of State an oath of office as a senior judge as prescribed in ORS 1.212, a senior judge is eligible for temporary assignment, with the consent of the senior judge, by the Supreme Court to a state court as provided in this subsection, whenever the Supreme Court determines that the assignment is reasonably necessary and will promote the more efficient administration of justice. A senior judge who retired from the Supreme Court may be assigned to any state court. A senior judge who retired from a court other than the Supreme Court may be assigned to any state court other than the Supreme Court.

(3) The assignment of a senior judge shall be made by an order which shall designate the court to which the judge is assigned and the duration of the assignment. Promptly after assignment of a senior judge under this section, the Supreme Court shall cause a certified copy of the order to be sent to the senior judge and another certified copy to the court to which the judge is assigned.

(4) Each senior judge assigned as provided in this section has all the judicial powers and duties, while serving under the assignment, of a regularly elected and qualified judge of the court to which the senior judge is assigned. The powers, jurisdiction and judicial authority of the senior judge in respect to any case or matter tried or heard by the senior judge while serving under the assignment shall continue beyond the expiration of the assignment so far as may be necessary to:

(a) Decide and dispose of any case or matter on trial or held under advisement.

(b) Hear and decide any motion for a new trial or for a judgment notwithstanding a verdict, or objections to any cost bill, that may be filed in the case.

(c) Settle a transcript for appeal and grant extensions of time therefor.

(5) A senior judge assigned as provided in this section shall receive as compensation for each day the senior judge is actually engaged in the performance of duties under the assignment an amount equal to five percent of the gross monthly salary of a regularly elected and qualified judge of the court to which the senior judge is assigned, or one-half of that daily compensation for services of one-half day or less. However, a retired judge shall not receive for services as a senior judge during any calendar year a sum of money which when added to the amount of any judicial retirement pay received by the senior judge for the year exceeds the annual salary of a judge of the court from which the senior judge retired. The compensation shall be paid upon the certificate of the

senior judge that the services were performed for the number of days shown in the certificate. Services by a senior judge under an assignment and receipt of compensation for services shall not reduce or otherwise affect the amount of any retirement pay to which the senior judge otherwise would be entitled.

(6) A senior judge assigned to a court located outside the county in **Oregon** in which the senior judge regularly resides shall receive, in addition to daily compensation, reimbursement for hotel bills and traveling expenses necessarily incurred in the performance of duties under the assignment. The expenses shall be paid upon presentation of an itemized statement of the expenses, certified by the senior judge to be correct.

CREDIT(S)

Laws 1973, c. 452, § 2; Laws 1975, c. 706, § 9; Laws 1979, c. 56, § 1; Laws 1983, c. 628, § 1; Laws 1987, c. 762, § 2; Laws 2003, c. 518, § 7, eff. July 1, 2003.

O. R. S. § **1.300,** OR ST § **1.300**

Current with 2012 Reg. Sess. legislation effective through 7/1/12 and ballot measures on the 11/6/12 ballot. Revisions to Acts made by the Oregon Reviser were unavailable at the time of publication.

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West's **Oregon** Revised Statutes Annotated Currentness
Uniform Trial Court Rules
Chapter 13. Arbitration

UTCR 13.090. Arbitrators

(1) Unless otherwise ordered or stipulated, an arbitrator must be an active member in good standing of the **Oregon** State Bar, who has been admitted to any Bar for a minimum of five years, or a retired or senior judge. The parties may stipulate to a nonlawyer arbitrator.

(2) An arbitrator who is not a retired or senior judge or stipulated nonlawyer arbitrator must be an active member in good standing of the **Oregon** State Bar at the time of each appointment. During any period of suspension from the practice of law or in the event of disbarment, an arbitrator will be removed from the court's list of arbitrators and may reapply when the attorney is reinstated or readmitted to the bar.

(3) Arbitrators will conduct themselves in the manner prescribed by the Code of Judicial Conduct.

CREDIT(S)

[Effective August 1, 2000; amended effective August 1, 2006; August 1, 2011.]

Uniform Trial Court Rules, UTCR **13.090,** OR R UNIF TRIAL CT UTCR **13.090**

Current with amendments received through 6/15/2012.

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West's Oregon Revised Statutes Annotated Currentness
Uniform Trial Court Rules
Chapter 13. Arbitration

UTCR 13.250 Request for trial *de novo*

(1) A party who qualifies under ORS 36.425(2) may obtain a trial *de novo* on the case determined by completing the service, filing, payment of trial or jury fee and deposit as required under ORS 36.425(2).

(2) In addition to the provisions under ORS 36.425 relating to a trial *de novo*, the following provisions apply:

(a) In addition to filing a written notice of appeal and request for trial *de novo* with the trial court administrator, the party must serve on the parties a copy of the written notice of appeal and request for a trial *de novo* filed with the trial court administrator, and proof of such service must be filed with the trial court administrator.

(b) When cases are consolidated for arbitration and a party has filed an appeal from the arbitration award in one or more of the consolidated cases, any other party who otherwise qualifies under ORS 36.425(2) may serve and file with the trial court administrator a request for trial *de novo*, with proof of service on all other parties, within 20 days from the filing of the arbitration award or within two judicial days after the service of the initial written request for trial *de novo*, notwithstanding the lapse of 20 days from the filing of the arbitration award.

(c) If the trial *de novo* request is withdrawn, or abandoned, such appealing party must obtain permission of the court or there must be a stipulation of all parties to the abandonment of the appeal and the terms thereof.

(d) Cross appeal is not necessary to preserve issues raised in a counterclaim, because the trial *de novo* encompasses all claims raised by any party in the particular case appealed.

(e) The court may assess statutory costs against a party who withdraws a request for trial *de novo*.

CREDIT(S)

[Effective August 1, 2000; amended effective August 1, 2006.]

West's Oregon Revised Statutes Annotated Currentness
Title 3. Remedies and Special Actions and Proceedings
Chapter 36. Mediation and Arbitration (Refs & Annos)
Mandatory Court Arbitration Program (Refs & Annos)

36.400. Mandatory court arbitration program

(1) A mandatory arbitration program is established in each circuit court.

(2) Rules consistent with ORS 36.400 to 36.425 to govern the operation and procedure of an arbitration program established under this section may be made in the same manner as other rules applicable to the court and are subject to the approval of the Chief Justice of the Supreme Court.

(3) Each circuit court shall require arbitration under ORS 36.400 to 36.425 in matters involving $50,000 or less.

(4) ORS 36.400 to 36.425 do not apply to appeals from a county, justice or municipal court or actions in the small claims department of a circuit court. Actions transferred from the small claims department of a circuit court by reason of a request for a jury trial under ORS 46.455, by reason of the filing of a counterclaim in excess of the jurisdiction of the small claims department under ORS 46.461, or for any other reason, shall be subject to ORS 36.400 to 36.425 to the same extent and subject to the same conditions as a case initially filed in circuit court. The arbitrator shall not allow any party to appear or participate in the arbitration proceeding after the transfer unless the party pays the arbitrator fee established by court rule or the party obtains a waiver or deferral of the fee from the court and provides a copy of the waiver or deferral to the arbitrator. The failure of a party to appear or participate in the arbitration proceeding by reason of failing to pay the arbitrator fee or obtain a waiver or deferral of the fee does not affect the ability of the party to appeal the arbitrator's decision and award in the manner provided by ORS 36.425.

36.405. Referral to mandatory arbitration; exemptions

(1) Except as provided in ORS 30.136, in a civil action in a circuit court where all parties have appeared, the court shall refer the action to arbitration under ORS 36.400 to 36.425 if either of the following applies:

(a) The only relief claimed is recovery of money or damages, and no party asserts a claim for money or general and special damages in an amount exceeding $50,000, exclusive of attorney fees, costs and disbursements and interest on judgment.

(b) The action is a domestic relations suit, as defined in ORS 107.510, in which

the only contested issue is the division or other disposition of property between the parties.

(2) The presiding judge for a judicial district may do either of the following:

(a) Exempt from arbitration under ORS 36.400 to 36.425 a civil action that otherwise would be referred to arbitration under this section.

(b) Remove from further arbitration proceedings a civil action that has been referred to arbitration under this section, when, in the opinion of the judge, good cause exists for that exemption or removal.

(3) If a court has established a mediation program that is available for a civil action that would otherwise be subject to arbitration under ORS 36.400 to 36.425, the court shall not assign the proceeding to arbitration if the proceeding is assigned to mediation pursuant to the agreement of the parties. Notwithstanding any other provision of ORS 36.400 to 36.425, a party who completes a mediation program offered by a court shall not be required to participate in arbitration under ORS 36.400 to 36.425.

36.410. Agreement to arbitration; stipulation by parties; conditions

(1) In a civil action in a circuit court where all parties have appeared and agreed to arbitration by stipulation, the court shall refer the action to arbitration under ORS 36.400 to 36.425 if:

(a) The relief claimed is more than or other than recovery of money or damages.

(b) The only relief claimed is recovery of money or damages and a party asserts a claim for money or general and special damages in an amount exceeding $50,000, exclusive of attorney fees, costs and disbursements and interest on judgment.

(2) If a civil action is referred to arbitration under this section, the arbitrator may grant any relief that could have been granted if the action were determined by a judge of the court.

36.415. Minimum arbitration amounts; waiver; motion for referral to arbitration

(1) In a civil action in a circuit court where all parties have appeared, where the only relief claimed is recovery of money or damages, where a party asserts a claim for money or general and special damages in an amount exceeding $50,000, exclusive of attorney fees, costs and disbursements and interest on judgment, and where all parties asserting those claims waive the amounts of those claims that exceed $50,000, the court shall refer the action to arbitration under ORS 36.400 to 36.425. A waiver of an amount of a claim under this section shall be for the purpose of arbitration under ORS 36.400 to 36.425 only and shall not restrict assertion of a larger claim in a trial de novo under ORS 36.425.

(2) In a civil action in a circuit court where all parties have appeared, where the only relief claimed is recovery of money or damages and where a party asserts a claim for money or general and special damages in an amount exceeding $50,000, exclusive of attorney fees, costs and disbursements and interest on judgment, any party against whom the claim is made may file a motion with the court requesting that the matter be referred to arbitration. After hearing upon the motion, the court shall refer the matter to arbitration under ORS 36.400 to 36.425 if the defendant establishes by affidavits and other documentation that no objectively reasonable juror could return a verdict in favor of the claimant in excess of $50,000, exclusive of attorney fees, costs and disbursements and interest on judgment.

36.420. Arbitration hearing; notice; compensation and expenses of arbitrator

(1) At least five days before the date set for an arbitration hearing, the arbitrator shall notify the clerk of the court of the time and place of the hearing. The clerk shall post a notice of the time and place of the hearing in a conspicuous place for trial notices at the principal location for the sitting of the court in the county in which the action was commenced.

(2) The arbitration proceeding and the records thereof shall be open to the public to the same extent as would a trial of the action in the court and the records thereof.

(3) The compensation of the arbitrator and other expenses of the arbitration proceeding shall be the obligation of the parties or any of them as provided by rules made under ORS 36.400. However, if those rules require the parties or any of them to pay any of those expenses in advance, in the form of fees or otherwise, as a condition of arbitration, the rules shall also provide for the waiver in whole or in part, deferral in whole or in part, or both, of that payment by a party whom the court finds is then unable to pay all or any part of those advance expenses. Expenses so waived shall be paid by the state from funds available for the purpose. Expenses so deferred shall be paid, if necessary, by the state from funds available for the purpose, and the state shall be reimbursed according to the terms of the deferral.

36.425. Final decision and award; filing; notice of appeal

(1) At the conclusion of arbitration under ORS 36.400 to 36.425 of a civil action, the arbitrator shall file the decision and award with the clerk of the court that referred the action to arbitration, together with proof of service of a copy of the decision and award upon each party. If the decision and award require the payment of money, including payment of costs or attorney fees, the decision and award must be substantially in the form prescribed by ORS 18.042.

(2)(a) Within 20 days after the filing of a decision and award with the clerk of the court under subsection (1) of this section, a party against whom relief is

granted by the decision and award or a party whose claim for relief was greater than the relief granted to the party by the decision and award, but no other party, may file with the clerk a written notice of appeal and request for a trial de novo of the action in the court on all issues of law and fact. A copy of the notice of appeal and request for a trial de novo must be served on all other parties to the proceeding. After the filing of the written notice a trial de novo of the action shall be held. If the action is triable by right to a jury and a jury is demanded by a party having the right of trial by jury, the trial de novo shall include a jury.

(b) If a party files a written notice under paragraph (a) of this subsection, a trial fee or jury trial fee, as applicable, shall be collected as provided in ORS 21.275.

(c) A party filing a written notice under paragraph (a) of this subsection shall deposit with the clerk of the court the sum of $150. If the position under the arbitration decision and award of the party filing the written notice is not improved as a result of a judgment in the action on the trial de novo, the clerk shall dispose of the sum deposited in the same manner as a fee collected by the clerk. If the position of the party is improved as a result of a judgment, the clerk shall return the sum deposited to the party. If the court finds that the party filing the written notice is then unable to pay all or any part of the sum to be deposited, the court may waive in whole or in part, defer in whole or in part, or both, the sum. If the sum or any part thereof is so deferred and the position of the party is not improved as a result of a judgment, the deferred amount shall be paid by the party according to the terms of the deferral.

(3) If a written notice is not filed under subsection (2)(a) of this section within the 20 days prescribed, the court shall cause to be prepared and entered a judgment based on the arbitration decision and award. A judgment entered under this subsection may not be appealed.

(4) Notwithstanding any other provision of law or the Oregon Rules of Civil Procedure:

(a) If a party requests a trial de novo under the provisions of this section, the action is subject to arbitration under the provisions of ORS 36.405 (1)(a), the party is entitled to attorney fees by law or contract, and the position of the party is not improved after judgment on the trial de novo, the party shall not be entitled to an award of attorney fees or costs and disbursements incurred by the party before the filing of the decision and award of the arbitrator, and shall be taxed the reasonable attorney fees and costs and disbursements incurred by the other parties to the action on the trial de novo after the filing of the decision and award of the arbitrator.

(b) If a party requests a trial de novo under the provisions of this section,

the action is subject to arbitration under ORS 36.405 (1)(a), the party is not entitled to attorney fees by law or contract, and the position of the party is not improved after judgment on the trial de novo, pursuant to subsection (5) of this section the party shall be taxed the reasonable attorney fees and costs and disbursements of the other parties to the action on the trial de novo incurred by the other parties after the filing of the decision and award of the arbitrator.

(c) If a party requests a trial de novo under the provisions of this section, the action is subject to arbitration under ORS 36.405 (1)(b), and the position of the party is not improved after judgment on the trial de novo, the party shall not be entitled to an award of attorney fees or costs and disbursements and shall be taxed the costs and disbursements incurred by the other parties after the filing of the decision and award of the arbitrator.

(5) If a party is entitled to an award of attorney fees under subsection (4) of this section, but is also entitled to an award of attorney fees under contract or another provision of law, the court shall award reasonable attorney fees pursuant to the contract or other provision of law. If a party is entitled to an award of attorney fees solely by reason of subsection (4) of this section, the court shall award reasonable attorney fees not to exceed the following amounts:

(a) Twenty percent of the judgment, if the defendant requests the trial de novo but the position of the defendant is not improved after the trial de novo; or

(b) Ten percent of the amount claimed in the complaint, if the plaintiff requests the trial de novo but the position of the plaintiff is not improved after the trial de novo.

(6) Within seven days after the filing of a decision and award under subsection (1) of this section, a party may file with the court and serve on the other parties to the arbitration written exceptions directed solely to the award or denial of attorney fees or costs. Exceptions under this subsection may be directed to the legal grounds for an award or denial of attorney fees or costs, or to the amount of the award. Any party opposing the exceptions must file a written response with the court and serve a copy of the response on the party filing the exceptions. Filing and service of the response must be made within seven days after the service of the exceptions on the responding party. A judge of the court shall decide the issue and enter a decision on the award of attorney fees and costs. If the judge fails to enter a decision on the award within 20 days after the filing of the exceptions, the award of attorney fees and costs shall be considered affirmed. The filing of exceptions under this subsection does not constitute an appeal under subsection (2) of this section and does not affect the finality of the award in any way other than as specifically provided in this subsection.

(7) For the purpose of determining whether the position of a party has improved

after a trial de novo under the provisions of this section, the court shall not consider any money award or other relief granted on claims asserted by amendments to the pleadings made after the filing of the decision and award of the arbitrator.

Current with 2012 Reg. Sess. legislation effective through 7/1/12 and ballot measures on the 11/6/12 ballot. Revisions to Acts made by the Oregon Reviser were unavailable at the time of publication.
END OF DOCUMENT

West's Oregon Revised Statutes Annotated Currentness
Title 3. Remedies and Special Actions and Proceedings
Chapter 36. Mediation and Arbitration (Refs & Annos)
Mandatory Court Arbitration Program (Refs & Annos)

36.400. Mandatory court arbitration program

(1) A mandatory arbitration program is established in each circuit court.

(2) Rules consistent with ORS 36.400 to 36.425 to govern the operation and procedure of an arbitration program established under this section may be made in the same manner as other rules applicable to the court and are subject to the approval of the Chief Justice of the Supreme Court.

(3) Each circuit court shall require arbitration under ORS 36.400 to 36.425 in matters involving $50,000 or less.

(4) ORS 36.400 to 36.425 do not apply to appeals from a county, justice or municipal court or actions in the small claims department of a circuit court. Actions transferred from the small claims department of a circuit court by reason of a request for a jury trial under ORS 46.455, by reason of the filing of a counterclaim in excess of the jurisdiction of the small claims department under ORS 46.461, or for any other reason, shall be subject to ORS 36.400 to 36.425 to the same extent and subject to the same conditions as a case initially filed in circuit court. The arbitrator shall not allow any party to appear or participate in the arbitration proceeding after the transfer unless the party pays the arbitrator fee established by court rule or the party obtains a waiver or deferral of the fee from the court and provides a copy of the waiver or deferral to the arbitrator. The failure of a party to appear or participate in the arbitration proceeding by reason of failing to pay the arbitrator fee or obtain a waiver or deferral of the fee does not affect the ability of the party to appeal the arbitrator's decision and award in the manner provided by ORS 36.425.

36.405. Referral to mandatory arbitration; exemptions

(1) Except as provided in ORS 30.136, in a civil action in a circuit court where all parties have appeared, the court shall refer the action to arbitration under ORS 36.400 to 36.425 if either of the following applies:

(a) The only relief claimed is recovery of money or damages, and no party asserts a claim for money or general and special damages in an amount exceeding $50,000, exclusive of attorney fees, costs and disbursements and interest on judgment.

(b) The action is a domestic relations suit, as defined in ORS 107.510, in which

the only contested issue is the division or other disposition of property between the parties.

(2) The presiding judge for a judicial district may do either of the following:

(a) Exempt from arbitration under ORS 36.400 to 36.425 a civil action that otherwise would be referred to arbitration under this section.

(b) Remove from further arbitration proceedings a civil action that has been referred to arbitration under this section, when, in the opinion of the judge, good cause exists for that exemption or removal.

(3) If a court has established a mediation program that is available for a civil action that would otherwise be subject to arbitration under ORS 36.400 to 36.425, the court shall not assign the proceeding to arbitration if the proceeding is assigned to mediation pursuant to the agreement of the parties. Notwithstanding any other provision of ORS 36.400 to 36.425, a party who completes a mediation program offered by a court shall not be required to participate in arbitration under ORS 36.400 to 36.425.

36.410. Agreement to arbitration; stipulation by parties; conditions

(1) In a civil action in a circuit court where all parties have appeared and agreed to arbitration by stipulation, the court shall refer the action to arbitration under ORS 36.400 to 36.425 if:

(a) The relief claimed is more than or other than recovery of money or damages.

(b) The only relief claimed is recovery of money or damages and a party asserts a claim for money or general and special damages in an amount exceeding $50,000, exclusive of attorney fees, costs and disbursements and interest on judgment.

(2) If a civil action is referred to arbitration under this section, the arbitrator may grant any relief that could have been granted if the action were determined by a judge of the court.

36.415. Minimum arbitration amounts; waiver; motion for referral to arbitration

(1) In a civil action in a circuit court where all parties have appeared, where the only relief claimed is recovery of money or damages, where a party asserts a claim for money or general and special damages in an amount exceeding $50,000, exclusive of attorney fees, costs and disbursements and interest on judgment, and where all parties asserting those claims waive the amounts of those claims that exceed $50,000, the court shall refer the action to arbitration under ORS 36.400 to 36.425. A waiver of an amount of a claim under this section shall be for the purpose of arbitration under ORS 36.400 to 36.425 only and shall not restrict assertion of a larger claim in a trial de novo under ORS 36.425.

(2) In a civil action in a circuit court where all parties have appeared, where the only relief claimed is recovery of money or damages and where a party asserts a claim for money or general and special damages in an amount exceeding $50,000, exclusive of attorney fees, costs and disbursements and interest on judgment, any party against whom the claim is made may file a motion with the court requesting that the matter be referred to arbitration. After hearing upon the motion, the court shall refer the matter to arbitration under ORS 36.400 to 36.425 if the defendant establishes by affidavits and other documentation that no objectively reasonable juror could return a verdict in favor of the claimant in excess of $50,000, exclusive of attorney fees, costs and disbursements and interest on judgment.

36.420. Arbitration hearing; notice; compensation and expenses of arbitrator

(1) At least five days before the date set for an arbitration hearing, the arbitrator shall notify the clerk of the court of the time and place of the hearing. The clerk shall post a notice of the time and place of the hearing in a conspicuous place for trial notices at the principal location for the sitting of the court in the county in which the action was commenced.

(2) The arbitration proceeding and the records thereof shall be open to the public to the same extent as would a trial of the action in the court and the records thereof.

(3) The compensation of the arbitrator and other expenses of the arbitration proceeding shall be the obligation of the parties or any of them as provided by rules made under ORS 36.400. However, if those rules require the parties or any of them to pay any of those expenses in advance, in the form of fees or otherwise, as a condition of arbitration, the rules shall also provide for the waiver in whole or in part, deferral in whole or in part, or both, of that payment by a party whom the court finds is then unable to pay all or any part of those advance expenses. Expenses so waived shall be paid by the state from funds available for the purpose. Expenses so deferred shall be paid, if necessary, by the state from funds available for the purpose, and the state shall be reimbursed according to the terms of the deferral.

36.425. Final decision and award; filing; notice of appeal

(1) At the conclusion of arbitration under ORS 36.400 to 36.425 of a civil action, the arbitrator shall file the decision and award with the clerk of the court that referred the action to arbitration, together with proof of service of a copy of the decision and award upon each party. If the decision and award require the payment of money, including payment of costs or attorney fees, the decision and award must be substantially in the form prescribed by ORS 18.042.

(2)(a) Within 20 days after the filing of a decision and award with the clerk of the court under subsection (1) of this section, a party against whom relief is

granted by the decision and award or a party whose claim for relief was greater than the relief granted to the party by the decision and award, but no other party, may file with the clerk a written notice of appeal and request for a trial de novo of the action in the court on all issues of law and fact. A copy of the notice of appeal and request for a trial de novo must be served on all other parties to the proceeding. After the filing of the written notice a trial de novo of the action shall be held. If the action is triable by right to a jury and a jury is demanded by a party having the right of trial by jury, the trial de novo shall include a jury.

(b) If a party files a written notice under paragraph (a) of this subsection, a trial fee or jury trial fee, as applicable, shall be collected as provided in ORS 21.275.

(c) A party filing a written notice under paragraph (a) of this subsection shall deposit with the clerk of the court the sum of $150. If the position under the arbitration decision and award of the party filing the written notice is not improved as a result of a judgment in the action on the trial de novo, the clerk shall dispose of the sum deposited in the same manner as a fee collected by the clerk. If the position of the party is improved as a result of a judgment, the clerk shall return the sum deposited to the party. If the court finds that the party filing the written notice is then unable to pay all or any part of the sum to be deposited, the court may waive in whole or in part, defer in whole or in part, or both, the sum. If the sum or any part thereof is so deferred and the position of the party is not improved as a result of a judgment, the deferred amount shall be paid by the party according to the terms of the deferral.

(3) If a written notice is not filed under subsection (2)(a) of this section within the 20 days prescribed, the court shall cause to be prepared and entered a judgment based on the arbitration decision and award. A judgment entered under this subsection may not be appealed.

(4) Notwithstanding any other provision of law or the Oregon Rules of Civil Procedure:

(a) If a party requests a trial de novo under the provisions of this section, the action is subject to arbitration under the provisions of ORS 36.405 (1)(a), the party is entitled to attorney fees by law or contract, and the position of the party is not improved after judgment on the trial de novo, the party shall not be entitled to an award of attorney fees or costs and disbursements incurred by the party before the filing of the decision and award of the arbitrator, and shall be taxed the reasonable attorney fees and costs and disbursements incurred by the other parties to the action on the trial de novo after the filing of the decision and award of the arbitrator.

(b) If a party requests a trial de novo under the provisions of this section,

the action is subject to arbitration under ORS 36.405 (1)(a), the party is not entitled to attorney fees by law or contract, and the position of the party is not improved after judgment on the trial de novo, pursuant to subsection (5) of this section the party shall be taxed the reasonable attorney fees and costs and disbursements of the other parties to the action on the trial de novo incurred by the other parties after the filing of the decision and award of the arbitrator.

(c) If a party requests a trial de novo under the provisions of this section, the action is subject to arbitration under ORS 36.405 (1)(b), and the position of the party is not improved after judgment on the trial de novo, the party shall not be entitled to an award of attorney fees or costs and disbursements and shall be taxed the costs and disbursements incurred by the other parties after the filing of the decision and award of the arbitrator.

(5) If a party is entitled to an award of attorney fees under subsection (4) of this section, but is also entitled to an award of attorney fees under contract or another provision of law, the court shall award reasonable attorney fees pursuant to the contract or other provision of law. If a party is entitled to an award of attorney fees solely by reason of subsection (4) of this section, the court shall award reasonable attorney fees not to exceed the following amounts:

(a) Twenty percent of the judgment, if the defendant requests the trial de novo but the position of the defendant is not improved after the trial de novo; or

(b) Ten percent of the amount claimed in the complaint, if the plaintiff requests the trial de novo but the position of the plaintiff is not improved after the trial de novo.

(6) Within seven days after the filing of a decision and award under subsection (1) of this section, a party may file with the court and serve on the other parties to the arbitration written exceptions directed solely to the award or denial of attorney fees or costs. Exceptions under this subsection may be directed to the legal grounds for an award or denial of attorney fees or costs, or to the amount of the award. Any party opposing the exceptions must file a written response with the court and serve a copy of the response on the party filing the exceptions. Filing and service of the response must be made within seven days after the service of the exceptions on the responding party. A judge of the court shall decide the issue and enter a decision on the award of attorney fees and costs. If the judge fails to enter a decision on the award within 20 days after the filing of the exceptions, the award of attorney fees and costs shall be considered affirmed. The filing of exceptions under this subsection does not constitute an appeal under subsection (2) of this section and does not affect the finality of the award in any way other than as specifically provided in this subsection.

(7) For the purpose of determining whether the position of a party has improved

after a trial de novo under the provisions of this section, the court shall not consider any money award or other relief granted on claims asserted by amendments to the pleadings made after the filing of the decision and award of the arbitrator.

Current with 2012 Reg. Sess. legislation effective through 7/1/12 and ballot measures on the 11/6/12 ballot. Revisions to Acts made by the Oregon Reviser were unavailable at the time of publication.
END OF DOCUMENT

CHAPTER 1300. ARBITRATION

Subchap. **Rule**

Source

The provisions of this Chapter 1300 adopted March 16, 1981, effective May 15, 1981, 11 Pa.B. 1078, unless otherwise noted.

(*Editor's Note*: Chapter 1300 reorganized at 36 Pa.B. 693 (February 11, 2006).)

Subchapter A. COMPULSORY ARBITRATION

Rule

Rule 1301. Scope.

These rules apply to actions which are submitted to compulsory arbitration pursuant to local rule under Section 7361 of the Judicial Code, 42 Pa.C.S. § 7361.

Official Note

This continues the existing practice under which in the absence of a rule of the Supreme Court each common pleas court may determine whether there shall be arbitration in its judicial district, the kind of cases to be arbitrated and the jurisdictional amount within the limits fixed by Section 7361(b) of the Judicial Code.

Rule 1302. List of Arbitrators. Appointment to Board. Oath.

(a) A list of available arbitrators shall be prepared in the manner prescribed by local rule. The list shall consist of a sufficient number of members of the bar actively engaged in the practice of law primarily in the judicial district in which the court is situated so as to be fairly representative thereof.

(b) The board of arbitrators shall consist of three members of the bar appointed from the list of available arbitrators as prescribed by local rule.

(c) The board shall be chaired by a member of the bar admitted to the practice of law for at least three years.

(d) Not more than one member or associate of a firm or association of attorneys shall be appointed to the same board.

(e) A member of a board who would be disqualified for any reason that would disqualify a judge under the Code of Judicial Conduct shall immediately withdraw as an arbitrator.

(f) Each arbitrator shall take an oath of office in conformity with Section 3151 of the Judicial Code.

Official Note

Arbitrators shall be compensated pursuant to Section 3544(a)(1) of the Judicial Code.

Rule 1303. Hearing. Notice.

(a) (1) The procedure for fixing the date, time and place of hearing before a board of arbitrators shall be prescribed by local rule, provided that not less than thirty days' notice in writing shall be given to the parties or their attorneys of record.

Official Note

See Rule 248 as to shortening or extending the time for the giving of notice.

(2) The local rule may provide that the written notice required by subdivision (a)(1) include the following statement:

''This matter will be heard by a board of arbitrators at the time, date and place specified

(c) The appellant shall not be required to post any bond, recognizance or other security or to pay any record costs which have accrued in the action. All record costs shall abide the event.

Source

The provisions of this Rule 1308 amended November 28, 2000, effective January 1, 2001, 30 Pa.B. 6423. Immediately preceding text appears at serial page (255248).

Rule 1309. Parties to Appeal.

An appeal by any party shall be deemed an appeal by all parties as to all issues unless otherwise stipulated in writing by all parties.

Rule 1310. Discontinuance.

No appeal may be discontinued except by leave of court after notice to all parties or upon the filing of the written consent of all parties.

Rule 1311. Procedure on Appeal.

(a) The trial shall be de novo.

Official Note

Except as otherwise provided by Rule 1311.1, the provisions of Rule 1305 governing conduct of hearing shall not apply on appeal.

(b) An arbitrator may not be called to testify as to what transpired before the arbitrators.

Source

The provisions of this Rule 1311 amended April 30, 2003, effective September 1, 2003, 33 Pa.B. 2359. Immediately preceding text appears at serial pages (271790) to (271791).

Rule 1311.1. Procedure on Appeal. Admission of Documentary Evidence.

(a) The plaintiff may stipulate to $25,000.00 as the maximum amount of damages recoverable upon the trial of an appeal from the award of arbitrators. The stipulation shall be filed and served upon every other party at least thirty days from the date the appeal is first listed for trial.

(b) If the plaintiff has filed and served a stipulation as provided in subdivision (a), any party may offer at trial the documents set forth in Rule 1305(b)(1). The documents offered shall be admitted if the party offering them has provided written notice to every other party of the intention to offer the documents at trial at least twenty days from the date the appeal is first listed for trial. The written notice shall be accompanied by a copy of each document to be offered.

Official Note

West's General Laws of **Rhode Island** Annotated Currentness
Title 8. Courts and Civil Procedure--Courts
Chapter 6. General Powers of Supreme and Superior Courts

§ 8-6-5. Arbitration of civil actions

The presiding justice of the superior court may promulgate rules and regulations providing for compulsory and/or noncompulsory nonbinding arbitration of such category or categories of civil actions filed in or appealed to the superior court as he or she shall determine. The matter shall be heard by a single arbitrator who shall be selected by mutual agreement of the plaintiff(s) and defendant(s). If after thirty (30) days the plaintiff(s) and defendant(s) are unable to agree upon the selection of an arbitrator, a justice of the superior court shall select the arbitrator upon request in writing from either party. The costs of arbitration shall be borne by the **Rhode Island** state court system and a reasonable cost of the arbitration not to exceed three hundred dollars ($300) per case may be assessed and apportioned to each of the parties by the superior court pursuant to rules and regulations promulgated by the presiding justice of the superior court consistent with § 8-6-6. The assessed costs received from the parties shall be deposited into the general fund. Any party dissatisfied with the decision of the arbitrator may demand a trial by jury if one was timely claimed in the complaint or answer, or a trial by judge if no jury trial was claimed. The decision of the arbitrator shall not be admissible at the trial. The court may require a party who rejects an arbitrator's award and demands a trial to post a two hundred dollar ($200) filing fee. The filing fee shall be posted with the superior court clerk and deposited into an arbitration fund restricted receipt account established under the control of the state court director of finance. The arbitration funds shall not be subject to the indirect cost recoveries provisions set forth in § 35-4-27. If more than one party rejects the arbitrator's award and demands a trial, the filing fee shall be apportioned amongst them. Should the verdict at trial be more favorable to the party than the arbitrator's award, the filing fee shall be reimbursed to that party. Should the verdict be equal to or less favorable to the party than the arbitrator's award, the filing fee posted shall be forfeited as a sanction. If forfeited as a sanction the fee shall remain available for program expenses from the arbitration fund restricted receipt account. The presiding justice of the superior court shall be authorized to retain the services of qualified arbitrators and to direct payment for such services and other related expenses from the arbitration fund restricted receipt account and may appoint an administrator of the arbitration program for a ten (10) year term and until a successor is appointed and qualified.

CREDIT(S)

P.L. 1988, ch. 522, § 1; P.L. 1990, ch. 429, § 1; P.L. 1991, ch. 365, § 1; P.L. 1992, ch. 188, § 1; P.L. 1994, ch. 70, art. 35, § 2; P.L. 2008, ch. 119, § 4, eff. July 1, 2008; P.L. 2009, ch. 68, art. 10, § 1, eff. July 1, 2009.

Gen. Laws, 1956, § **8-6-5,** RI ST § **8-6-5**

Current with amendments through chapter 491 of 2012 Regular Session.
For research tips related to newly added material, see Scope.

END OF DOCUMENT

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Code of Laws of **South Carolina** 1976 Annotated Currentness
Court-Annexed **Alternative Dispute Resolution** (ADR) **Rules**

➡RULE 19. CERTIFICATION OF COURT-APPOINTED NEUTRALS

The Board of Arbitrator and Mediator Certification ("Board") shall receive and approve applications for certifications of persons to be appointed as mediators or arbitrators. The application shall be on a form approved by the Supreme Court or the Board. Recertification of a neutral who, by virtue of current job restrictions is prohibited from serving under these rules, is allowed if the neutral submits the appropriate recertification paperwork, pays the applicable fee and agrees upon termination of the prohibiting employment to promptly supplement the application to list at least one county for court appointments.

(a) Circuit Court Certification. For circuit court certification, a person must:

(1) Either:

(A) Be admitted to practice law in this State for at least three (3) years and be a member in good standing of the South Carolina Bar; or

(B) Be admitted to practice law in the highest court of another state or the District of Columbia for at least three (3) years and:

(i) Be at least 21 years old;

(ii) Have received a juris doctorate degree or its equivalent from a law school approved by the American Bar Association;

(iii) Be a member in good standing in each jurisdiction where he or she is admitted to practice law; and

(iv) Agree to be subject to the Rules of Professional Conduct, Rule 407, SCACR, and the Rule on Disciplinary Procedure, Rule 413, SCACR, to the same extent as an active member of the South Carolina Bar.

(2) Be of good moral character;

(3) Have not, within the last five (5) years, been:

(A) Disbarred or suspended from the practice of law;

(B) Denied admission to a bar for character or ethical reasons; or

(C) Publicly reprimanded or publicly disciplined for professional conduct;

(4) Pay all administrative fees and comply with all procedures established by the Supreme Court, the Board and the Commission on Alternative Dispute Resolution; and

(5) Agree to provide mediation/arbitration to indigents without pay.

(6) To be certified as a Mediator, a person must also:

(A) Have completed a minimum of forty (40) hours in a civil mediation training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board; and

(B) Demonstrate familiarity with the statutes, rules and practice governing mediation settlement conferences in South Carolina.

(7) To be certified as an Arbitrator, a person must also:

(A) Have served as a Master-in-Equity, Circuit or Appellate Court Judge; or

(B) Have completed a minimum of six (6) hours in a civil arbitration training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board; and

(C) Demonstrate familiarity with the statutes, rules and practice governing arbitration hearings in South Caro- lina;

(b) Family Court Mediator Certification. For family court mediator certification, a person must:

(1) Either:

(A) Be admitted to practice law in this State for at least three (3) years and be a member in good standing of the South Carolina Bar;

(B) Be admitted to practice law in the highest court of another state or the District of Columbia for at least three (3) years and:

(i) Be at least 21 years old;

(ii) Have received a juris doctorate degree or its equivalent from a law school approved by the American Bar Association;

(iii) Be a member in good standing in each jurisdiction where he or she is admitted to practice law; and

(iv) Agree to be subject to the Rules of Professional Conduct, Rule 407, SCACR, and the Rule on Disciplinary Procedure, Rule 413, SCACR, to the same extent as an active member of the South Carolina Bar; or,

(C) Be a psychologist, master social worker, independent social worker, professional counselor, licensed professional counselor intern, associate counselor, marital and family therapist, or physician specializing in psychiatry, licensed for at least three (3) years under Title 40 of the 1976 Code of Laws, as amended.

(2) Have completed a minimum of forty (40) hours in a family court mediation training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board;

(3) Demonstrate familiarity with the statutes, rules and practice governing mediation settlement conferences in

South Carolina;

(4) Be of good moral character;

(5) Have not, within the last five (5) years, been:

(A) Disbarred or suspended from the practice of law or a profession set forth in Rule 15(b)(1)(C);

(B) Denied admission to a bar or denied a professional license for character or ethical reasons; or

(C) Publicly reprimanded or publicly disciplined for professional conduct;

(6) Pay all administrative fees and comply with all procedures established by the Supreme Court, the Board and the Commission on Alternative Dispute Resolution; and

(7) Agree to provide mediation to indigents without pay.

CREDIT(S)

[Adopted effective May 3, 2006. Renumbered and amended effective April 30, 2012.]

ADR, Rule 19, SC R ADR Rule 19

Current with amendments received through 11/1/2012

END OF DOCUMENT

C

West's **Tennessee** Code Annotated Currentness
State and Local Rules Selected from West's **Tennessee** Rules of Court
Rules of the Supreme Court of the State of **Tennessee**
Rule 31. Alternative Dispute Resolution
General Provisions

➡**Section 2. Definitions**

(a) "Alternative Dispute Resolution Commission" or "ADRC" is the Alternative Dispute Commission established by the Supreme Court pursuant to this Rule.

(b) "Baccalaureate degree" and "graduate degree" are only those degrees awarded by an institution of higher education accredited by an agency recognized by the Council for Higher Education (CHEA) and approved or listed by the United States Department of Education as a recognized accrediting agency. A law degree from an educational institution recognized by the Tennessee Board of Law Examiners for the purpose of allowing its graduates to be eligible to take the Tennessee bar examination shall be deemed a graduate degree for the purpose of this rule. Degrees earned outside the United States shall be evaluated on a case by case basis by the Commission in order to determine whether the degree is substantially equal to a like and similar degree earned in this country and which degree if earned in this country would have been subject to the standards and academic quality which would be mandated by the foregoing accreditation process and procedure in this country.

(c) "Case Evaluation", as set forth in sections 16 and 22 herein, is a process in which a neutral person or three-person panel, called an evaluator or evaluation panel, after receiving brief presentations by the parties summarizing their positions, identifies the central issues in dispute, as well as areas of agreement, provides the parties with an assessment of the relative strengths and weaknesses of their case, and may offer an evaluation of the case.

(d) "Court" includes the Tennessee Supreme Court, the Tennessee Court of Appeals, Circuit, Chancery, Law & Equity and Probate Courts, General Sessions Courts, Juvenile Courts, and Municipal Courts.

(e) "Days," for purposes of the deadlines imposed by this Rule, means calendar days.

(f) "Eligible Civil Action" includes all civil actions except forfeitures of seized property, civil commitments, adoption proceedings, habeas corpus and extraordinary writs, or juvenile delinquency cases. The term "Extraordinary writs" does not encompass claims or applications for injunctive relief.

(g) "Judicial Settlement Conference" is a mediation conducted by a judicial of-

ficer as set forth in section 20 herein.

(h) "Mediator" is a neutral person who conducts discussions among disputing parties to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute.

(i) "Mediation" is an informal process in which a neutral person conducts discussions among the disputing parties designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute.

(j) "Mini-Trial", as set forth in sections 15 and 23 herein, is a settlement process in which each side presents an abbreviated summary of its case to the parties or representatives of the parties who are authorized to settle the case. A neutral person may preside over the proceeding. Following the presentation, the parties or their representatives seek a negotiated settlement of the dispute.

(k) "Neutral" is an impartial person who presides over alternative dispute resolution proceedings as defined in this Rule.

(l) "Non-Binding Arbitration" is a process in which a neutral person or a panel, called an arbitrator or an arbitration panel, considers the facts and arguments presented by the parties and renders a decision which is non-binding as set forth in sections 14 and 21 herein.

(m) "Order of Reference" is an order of a court entered in an eligible civil action in accordance with Section 3 (Initiation), directing the parties to participate in a Rule 31 ADR Proceeding.

(n) "Rule 31 ADR Proceedings" are proceedings initiated by the court pursuant to this Rule, including "Case Evaluations," "Mediations," "Judicial Settlement Conferences," "Non-Binding Arbitrations," "Summary Jury Trials," "Mini-Trials," or other similar proceedings. In the context of mediations, a "Rule 31 ADR Proceeding" is any mediation of an Eligible Civil Action conducted by a Rule 31 Mediator.

(o) A "Rule 31 Mediator" is any person listed by the ADRC as a mediator pursuant to section 17 herein.

(p) A "Rule 31 Neutral" is any person who acts as a Neutral in a Mediation, Case Evaluation, Mini-Trial, Non-Binding Arbitration, Summary Jury Trial, or any other similar proceeding initiated by the court pursuant to this Rule. Rule 31 Neutrals, other than Rule 31 Mediators, are required to be licensed attorneys.

(q) A "Summary Jury Trial" as set forth in section 24 herein, is an abbreviated trial with a jury in which litigants present their evidence in an expedited fashion. The litigants and the jury are guided by a presiding neutral person. After an advisory verdict from the jury, the presiding neutral person may assist the litigants in a negotiated settlement of their controversy.

West's **Tennessee** Code Annotated Currentness
State and Local Rules Selected from West's **Tennessee** Rules of Court
Rules of the Supreme Court of the State of **Tennessee**
Rule 31. Alternative Dispute Resolution
General Provisions Applicable to All **Rule 31** Proceedings

Section 3. Initiation/Order of Reference

(a) Rule 31 ADR Proceedings may be initiated by the entry of an Order of Reference.

(b) Upon motion of either party, or upon its own initiative, a court, by Order of Reference, may order the parties to an Eligible Civil Action to participate in a Judicial Settlement Conference or Mediation. With the consent of the parties, trial courts are also authorized to order the parties to participate in a Case Evaluation.

(c) Any Order of Reference made on the court's own initiative shall be subject to review on motion by any party and shall be vacated should the court determine in its sound discretion that the referred case is not appropriate for ADR or is not likely to benefit from submission to ADR. Pending disposition of any such motion, the ADR proceeding shall be stayed without the need for a court order.

(d) Upon motion of a party, or upon its own initiative and with the consent of all parties, a court, by Order of Reference, may order the parties to participate in Non-Binding Arbitration, Mini-Trial, Summary Jury Trial, or other appropriate alternative dispute resolution proceedings.

(e) The Order of Reference shall direct that all Rule 31 ADR Proceedings be concluded as efficiently and expeditiously as possible given the circumstances of the case.

CREDIT(S)

[Adopted December 18, 1995. Amended September 26, 1996; December 17, 1996; July 7, 1997; July 28, 1997; September 4, 2001; October 31, 2001; August 27, 2002, effective March 1, 2003; January 2, 2007; amended December 17, 2009, effective January 1, 2010 ; March 10, 2011, effective April 1, 2011.]

Sup. Ct. Rules, Rule 31, § 3, TN R S CT Rule 31, § 3

Current with amendments received through 7/15/2012.

West's Tennessee Code Annotated Currentness
State and Local Rules Selected from West's Tennessee Rules of Court
Rules of the Supreme Court of the State of Tennessee
Rule 31. Alternative Dispute Resolution
Provisions Regarding Qualifications and Training of Neutrals
Section 14. Rule 31 Neutrals in Rule 31 Non-Binding Arbitration

(a) The Parties may select any lawyer in good standing to act as an arbitrator in a non-binding arbitration.

(b) Where the court, pursuant to Section 4, appoints a Rule 31 Neutral to act as an arbitrator in a general civil case, the person appointed shall be a lawyer in good standing and shall have been admitted to practice for at least ten years.

(c) Where the court, pursuant to Section 4, appoints a Rule 31 Neutral to act as an arbitrator in a family case, the person appointed shall be a lawyer in good standing and shall have been admitted to practice for at least ten years, during which time a substantial portion of the lawyer's practice shall have been family cases.

CREDIT(S)

[Adopted December 18, 1995. Amended September 26, 1996; December 17, 1996; July 7, 1997; July 28, 1997; September 4, 2001; October 31, 2001; August 27, 2002, effective March 1, 2003; January 2, 2007.]

Sup. Ct. Rules, Rule 31, § 14, TN R S CT Rule 31, § 14

Current with amendments received through 7/15/2012.

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