

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

By Phil Cutler¹

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I have been a trial and appellate lawyer for over 30 years. Over the last 20 years, service as an arbitrator, special master and *pro tem* judge has become an increasingly important and significant part of my practice. My experience as a lawyer, arbitrator and judge has taught me much, most especially that:

- parties to a dispute, and their lawyers, need and want information about how the decision-maker conducts the dispute resolution process, and
- the decision-maker is best able to carry out his or her role – and the parties and their counsel are most comfortable with the fundamental fairness and integrity of the process – if the decision-maker manages the process fairly and efficiently.

With these principles in mind, and mindful that information about how individual arbitrators conduct proceedings is hard to come by – and in any event generally anecdotal – several years ago I set about to summarize my arbitration philosophy and the principles which govern my management of cases. So that the parties to cases in which I serve as arbitrator are aware of how I conduct arbitrations, I distribute my arbitration policies to them shortly after I accept an appointment.

I follow these policies in AAA arbitrations where I am the sole arbitrator and, with the consent of other members of the Arbitration Panel, in cases where I am the Chair of a 3-arbitrator Panel. While I am flexible and will tailor both pre-hearing and hearing

¹ Phil Cutler is a lawyer-arbitrator with Cutler Nylander & Hayton PS in Seattle,

Washington. Arbitration and mediation comprise about two-thirds of his practice. The balance of his practice includes trial and appellate work and advice and counsel to clients in complex commercial and business matters covering a wide variety of substantive law areas. He can be reached at philcutler@cnhlaw.com.

procedures to suit the needs of a particular case, my written policies give the parties a fair idea of my philosophy toward arbitration and case management. They are designed to ensure that parties obtain the benefits they have bargained for by choosing arbitration over traditional litigation: confidentiality; reduced legal expenses; an early opportunity to present evidence; an expeditious decision; finality. Of course, if the parties' arbitration agreement specifies particular rules or addresses one or more of the subjects discussed below, those rules or their agreement will govern to the extent they are inconsistent with my policies. I encourage the lawyers in a case to share my policies with their clients.

Here they are.

THE ARBITRATION PROCESS

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

Although the arbitration process is similar to a court proceeding – and the hearing similar to a trial – there are several key differences. First, the time from case filing to entry of the arbitration award is generally faster than in court proceedings. Second, the sort of broad, wide-ranging “discovery” common in court proceedings is generally not available unless the parties agree or the arbitrator permits it. Third, the rules of evidence that govern court trials are generally not followed in arbitration hearings: evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs will ordinarily be received, regardless of its admissibility in a court proceeding. Finally, there is, as a practical matter, no appeal from an arbitration award; the grounds for vacation of an arbitration award are generally very limited.

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

DIRECT CONTACTS WITH ME ARE PROHIBITED

Direct contacts with me, other than in a hearing at which all parties are present or represented, concerning any matter involved in your arbitration following confirmation of my appointment as arbitrator are not permitted. *See* Rule R-18, AAA Commercial

Arbitration Rules (July 1, 2003).² **All contact should be with the AAA Case Manager assigned to your case.** He or she functions, in essence as my “bailiff” or “clerk” and will contact me, if appropriate.

The only exceptions to the above rule are communications to which the AAA’s “accelerated exchange” program applies – generally motions, briefs, and other similar matters. A copy of any such paper delivered to me must be contemporaneously served on all other parties and a copy filed with the AAA. Participation in the accelerated exchange program requires the written consent of all parties and the arbitrator.

DISCLOSURES

The integrity of the arbitration process depends in large part on the faith of the parties and counsel in the impartiality of the arbitrator. I take my disclosure obligations seriously (*see* Revised Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA, March 1, 2004) and Section 12 of the Revised Uniform Arbitration Act) and make a good faith effort to make all appropriate disclosures in a timely fashion. Counsel are asked to share my disclosures with their client representatives and to bring to the attention of the Case Manager any concerns they might have with any disclosures I make. ***Do not copy me on any disclosure-related communications you may have with the AAA.***

LIST OF RELATED ENTITIES AND CONFLICT LISTS

To the extent you have not provided the AAA with a list of related entities and key potential witnesses, please do so as soon as possible. These lists are for my use only, to determine whether there are any potential conflicts of interest or appearance of fairness issues. Your lists should be seasonably supplemented as necessary. It is important that I know, at the earliest possible time, whether any additional disclosures need to be made.

PRE-HEARING CONFERENCES

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

² Unless otherwise noted, all references to the AAA’s Commercial Rules are to the July 1, 2003 edition of “Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes).” All of the AAA’s current rules are available on-line at the AAA’s website – www.adr.org.

personalizing your comments; one person speaks at a time.

PRELIMINARY SCHEDULING CONFERENCE

In most cases, particularly those involving numerous parties, substantial sums of money, or complicated legal theories or factual matters, or where the arbitration hearing is expected to run for several days, it is beneficial for us to discuss procedural matters in a preliminary hearing. Most preliminary hearings are satisfactorily handled by telephone conference call; in an appropriate case, an in-person hearing will be arranged. If you feel that a preliminary scheduling hearing would be beneficial, please contact your Case Manager. Conversely, the Case Manager may contact you, at my request, to schedule such a hearing. You may expect that in our initial preliminary hearing I will (1) ask the parties to confirm that all conditions precedent to arbitration have been waived or satisfied, the parties' statements of their claims and defenses are sufficient to enable them to prepare for the hearing on the merits and the claims asserted in the arbitration are arbitrable and (2) cover many of the matters addressed in these policies, including setting a schedule for exchange of documents and lists of witnesses and exhibits, and, if one has not already been set, a date for the Arbitration Hearing. Please be prepared to discuss these matters. I generally enter a "Scheduling Order" following a hearing such as this.

MOTIONS; INTERIM RELIEF

The AAA rules do not expressly provide for the type of broad motions practice common in court proceedings. Nonetheless, I recognize that in appropriate cases the parties may have matters they desire to raise by motion. The parties should be prepared at the preliminary hearing to advise me what (if any) motions, dispositive or otherwise, a party anticipates making and whether a party anticipates seeking any interim relief (*see, e.g.*, Rule R-34, AAA Commercial Rules). If you do have a motion you wish to make, please contact your Case Manager; he or she will contact me and, if appropriate, arrange for a hearing date.

AMENDMENT OF A CLAIM

If the AAA Commercial Rules apply to your case, please bear in mind that once the arbitrator has been appointed, any party wishing to amend its claim to state another or different claim may do so only with the consent of the Arbitrator. *See* Rule R-6, AAA Commercial Rules. If you desire to amend your claim (or counterclaim) to assert another or different claim, please do so by motion served on all other parties and filed with the AAA. Your motion should set forth the nature of the new claim you wish to present and, if appropriate, state why the claim was not put forward in your demand for arbitration or response to the demand. Any such motion, if made, will be heard by me, after a hearing at which all other parties will be given an opportunity to comment and reply. You are

reminded that monetary claims should be quantified at the earliest practicable time and that once a claim has been quantified, payment of the appropriate AAA filing fee for that level of claim is required in order for that party's claim – to the extent it exceeds the amount of the claim originally quantified – to be heard in the arbitration.

DISCOVERY

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

One of the most attractive features of arbitration as a method of dispute resolution is its general economy as compared to traditional litigation. Experience has shown that discovery is ordinarily the single most expensive aspect of litigation. While a limited amount of discovery is generally appropriate in arbitrations (unless the parties have expressly restricted discovery by contractual agreement), the amount and nature of appropriate discovery is dependent upon many factors, including the amount in controversy and the issues and claims presented. I encourage all parties to mutually develop a discovery plan appropriate to the case and to cooperate in its implementation. You may also wish to stipulate with the other parties to your case that the AAA's "Procedures for Large, Complex Commercial Disputes" (particularly Rules L-3 and L-4) will apply to your case. *No party in an arbitration has a **right** to discovery **unless** (1) all parties agree to the discovery, (2) the arbitration agreement, applicable law or applicable AAA rules (e.g., Rule R-21, AAA Commercial Rules) provide such a right, or (3) I enter an order expressly approving or directing discovery. This includes testimony of a witness "perpetuated" by deposition for later presentation at the arbitration hearing.*

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

Documents

I encourage timely mutual exchange of relevant documents, particularly documents upon which a party relies. I encourage you to agree as soon as possible on what types of documents are relevant and will be provided, as well as a schedule for exchanging such documents.

Interrogatories

Lengthy and detailed interrogatories -- on any subject, but particularly about "facts" or "contentions" are generally inappropriate and are discouraged. To the extent you wish to use interrogatories as a discovery device, please discuss the issue with the other parties to your case. I encourage you to limit interrogatories to inquiries regarding

the existence and whereabouts of documents, and witnesses with knowledge or information, relevant to issues in the case.

Potential Fact Witnesses

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

Expert Witnesses

Expert witnesses are not required in every case. Where you anticipate presenting “expert” testimony at the arbitration hearing, I expect you to notify all other parties of the name, address and qualifications of your expert promptly after you have determined that you will present expert testimony – and in any event sufficiently in advance of the discovery cut-off to allow any necessary expert discovery. I also expect that you will promptly provide all other parties with a copy of your expert’s report or analysis and a narrative statement of (1) the subject matter on which your expert is expected to testify, (2) the substance of the facts and opinions to which the expert is expected to testify, and (3) a summary of the grounds for each opinion. I encourage you to mutually agree on a date by which this information will be provided. If a deposition of an expert is to be taken, and the expert has prepared a report for the party retaining him or her, I normally require that a copy of the expert’s report be furnished to all other parties at least one week prior to the deposition.

Depositions

Numerous and/or lengthy depositions are inappropriate in most arbitrations. I encourage you to realistically evaluate both your deposition needs and those of the other parties to this dispute and to work cooperatively to (1) agree on a deposition schedule and (2) utilize less formal – and less expensive – witness interviews when appropriate.

Protective Order

Documents produced for this arbitration and the testimony of witnesses should be

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

Discovery Disputes

If you and the other parties are unable to agree on a discovery plan, the appropriateness of particular discovery devices, or particular discovery requests or responses to same, please contact your Case Manager to schedule a telephone conference call (or, in an appropriate case, an in-person) hearing with me. A formal, written motion is not ordinarily required, nor is a formal, written response or objection, but you should be prepared to succinctly demonstrate to me the necessity of the discovery requested (or, in the case of an objector, the reasons why the requested discovery should not be granted). If particular discovery requests (or responses to same) are at issue, you should probably provide me with a copy of same so that I may place the dispute in context. I will rule promptly on any discovery disputes brought to me for resolution.

WITNESSES AND EXHIBITS

A reasonable time prior to the arbitration hearing, I expect you to exchange lists of witnesses who are expected to or will testify at the hearing and lists (and a copy) of all documents which will be offered or are expected to be offered at the hearing. I encourage you to agree on when the exchange will take place and whether it will be simultaneous or staged. If agreement cannot be reached or a dispute arises, please contact your Case Manager to arrange a telephone conference hearing with me to resolve any problems. I generally require that the parties exchange preliminary witness and exhibit lists at least two weeks prior to the arbitration hearing and final lists (in the form of a joint statement of the evidence) at least one week in advance. Witnesses disclosed *for the first time* on the date set for exchange of preliminary or final witness lists will ordinarily not be permitted to testify over the objection of an opposing party, although I will evaluate prejudice and make my decision on a case-by-case basis. The same is true of exhibits (except for demonstrative or rebuttal exhibits and, in some cases, exhibits prepared especially for the arbitration hearing).

Witnesses

Each party's witness list should identify the witnesses (name, address, phone number) that party expects to testify at the hearing, identify the general nature of their testimony, and indicate how the witness will testify at the hearing (in-person, by telephone, by video deposition, by written deposition or by affidavit or declaration). If

the witness is expected to testify by affidavit or declaration, a copy of the affidavit or declaration should be delivered to all other parties at least one week before the arbitration hearing, unless a different date is established by a scheduling order. A copy of your witness list should be delivered to me and to your Case Manager at the same time as you deliver it to your opponent. In complex cases and cases where the parties expect the hearing to last several days, I may require that party-controlled witnesses' direct testimony be presented in writing; in that event, the offering party will be given an opportunity to conduct reasonable oral direct examination to "introduce" the witness to me and highlight the essence of the witness's testimony. *See* my comments below concerning hearing management procedures.

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

Exhibits

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

Supplementation

I recognize that even the most skilled and diligent among us cannot anticipate every eventuality and that supplementation of witness or exhibit lists may be necessary and appropriate. You are, however, expected to make a good faith effort to timely identify witnesses and exhibits so as to minimize any prejudice to the opposition

generated by late disclosure. I will consider foreseeability and prejudice in deciding whether to allow a late-designated witness or exhibit.

Subpoenas

If you desire me to issue a subpoena to any person to attend the arbitration hearing, or for a deposition (or pre-hearing production of documents), please contact your Case Manager. I will not issue a subpoena for a deposition (or pre-hearing production of documents from a non-party) unless all parties have agreed or I permit the discovery after a hearing. Remember that enforcement of subpoenas to non-parties is for the appropriate court.

CLAIMS AND CONTENTIONS; NARROWING THE ISSUES

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

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

ARBITRATION BRIEFS

No party is required to submit an arbitration brief, although I encourage the submission of *succinct* briefs addressing relevant issues (legal and factual) in the case. Briefs which apply the law to critical factual issues are particularly helpful. Any party desiring to submit an arbitration brief should provide a copy to all other parties and to me directly at least two business days before the arbitration hearing, unless a different date is established by a scheduling order. The original of any brief should be filed with the Case Manager.

String citations to authority (case or otherwise) are discouraged. **Please include with your brief a copy of any key decisional or other authority on which you rely.** You

will aid my understanding of your position and the decision's relevance to it if you highlight pertinent portions of the case or other authority.

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

ARBITRATION HEARING

Hearing Date; Continuances; Cancellation Fee

The Arbitration Hearing Date is commonly set after consultation with the parties and will ordinarily be changed only for good cause shown or if all parties agree to a continuance. *See* Rule R-28, AAA Commercial Rules. If an initial preliminary hearing is held, selection of a date for the hearing will generally be on the agenda. Please confer with the other parties and be prepared to discuss (1) when this case will be ready for hearing, (2) the number of days reasonably anticipated to be necessary for the hearing (including opening statement and closing argument), and (3) your availability for a hearing during the 30 day period surrounding the time when this case is anticipated to be ready for hearing. Counsel should have their calendars readily available at the preliminary hearing.

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

Decorum and Facilities

I generally hold arbitration hearings in the local office of the AAA; occasionally, if the AAA facilities are unavailable, I will hold hearings in my office conference room. The Notice of Arbitration Hearing will identify the location of the arbitration hearing in your case. While the setting is less formal than a courtroom, I expect that counsel, parties, and witnesses will observe proper decorum. Direct your objections and argument to me, not to opposing counsel. Do not use purple prose or engage in *ad hominem* attacks on opposing parties or their counsel; you will not advance your cause by

doing so. Cell phones must be turned off (or the no-ring option selected) when in the hearing room. Please discuss any special hearing needs (*e.g.*, white board, easel and flip chart, overhead projector, video deposition equipment, power point projector, etc.) with your Case Manager as soon as possible so that appropriate arrangements can be made.

The Arbitration “Day”

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

Stenographic Record

If any party desires that a stenographic record be made of the arbitration hearing, that party must make the arrangements for same – and notify the Case Manager and the opposing party. *See* Rule R-26, AAA Commercial Rules.

Exhibits and Use of Exhibits

Please bring with you to the arbitration hearing a full set of your exhibits, appropriately marked, along with a current exhibit “list”, for my use during the hearing. *Please use the form attached to these policies to list your exhibits so you, your opponent, and I can annotate it easily to record the status of exhibits* as offered, admitted, rejected, or withdrawn. You should also have a full set of your exhibits for use by witnesses and another full set for yourself. You will, of course, already have provided opposing counsel/all other parties with a full set of your exhibits. Please use a tabbed 3-ring binder for your exhibits; include a few extra number tabs at the end of the binder to accommodate the inevitable “additional” exhibits. I prefer a consolidated, consecutively numbered set of all (*i.e.*, all parties’) exhibits. If, as inevitably happens, additional exhibits are offered at the hearing, be sure they are side-hole-punched for the exhibit books. You are encouraged to highlight the relevant portions of documents in the arbitrators’ set of exhibits. I encourage the parties to agree on the admissibility of as many exhibits as possible.

Opening Statement

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

Presentation of Evidence

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

Hearing Management Procedures

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

- Use of a “chess clock” to allocate the parties’ time fairly, and/or separate time limits on discrete portions of the hearing (*e.g.*, openings, closings, etc.); or
- A requirement that the direct testimony of all party-controlled witnesses, or perhaps only the expert witnesses, be submitted in writing (and exchanged in advance of the hearing). Where this option is adopted, the party “presenting” the witness will be given an opportunity to “introduce” the witness by a short (*e.g.*, 30 minutes) live direct examination to “introduce” the witness and highlight portions of the witness’s written narrative. Normal cross and re-direct examination then follows.

I generally raise this subject in our initial scheduling hearing. While I encourage the parties themselves to agree upon the hearing management procedures they believe are best suited to their case, I retain the discretion to require the parties to follow such

procedures as I believe are appropriate in the case.

Order of Witnesses

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

Rules of Evidence

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

Cumulative Evidence

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

Use of Depositions

It is the responsibility of the party desiring to offer deposition testimony to provide

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

Use of Technology in the Presentation of Evidence

I prefer that counsel use power-point presentations and overhead projectors sparingly, if at all. I (and the witness) will have a copy of all exhibits before us and can easily read what you direct us to.

The Arbitration Hearing is a “Closed” Proceeding

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

Closing Argument

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

“Close” of the Arbitration Hearing

Ordinarily, I will “close” the arbitration hearing upon completion of the parties' closing argument. *See* Rule R-35, AAA Commercial Rules. This formal “closure” begins the time within which I may make my award. Once closed, the hearing will be reopened only upon good cause shown and in accordance with applicable AAA rules and

policies. *See* Rule R-36, AAA Commercial Rules.

Hearing Record

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

AWARD

As an aid to preparation of the award in your case, I will require that each party provide me, generally on the first day of hearing but in any event prior to closing argument, with the substance of the award (claim-by-claim) the party proposes that I enter.

Most Cases

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

Also, unless your arbitration agreement requires otherwise or all parties have timely requested a “reasoned award” (*see* Rule R-42, AAA Commercial Rules, requiring that such request be made prior to appointment of the arbitrator), my award will be very short and simply make an “award” based on the evidence presented; *I will not make formal findings of fact or conclusions of law, nor will I ordinarily give you reasons for my award.* If your arbitration agreement requires entry of findings of fact and conclusions of law, I will expect each party to provide me with their form of proposed findings and conclusions prior to conclusion of the arbitration hearing. Unnecessarily detailed findings and conclusions will be rejected; findings and conclusions should be *ultimate*, not predicate, findings and conclusions.

If a “reasoned award” has not been timely requested by all parties, but all parties agree that I should provide them with a statement of my reasons for an award, or if, after discussing the issues with the parties, I determine that doing so would be appropriate, I will do so. In this event, my statement of reasons will be in letter form; it is not intended to be a part of my award, but rather a separate, informational communication with the parties. *See Hanson v. Shim*, 87 Wn. App. 538, 943 P.2d 322 (1997).

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

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

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

Richard Roe	125 hrs	\$200/hr	\$25,000
Jane Doe	200 hrs	\$250/hr	\$50,000
	-----		-----
Totals	325 hrs		\$75,000

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

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

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

POST-AWARD PROCEEDINGS

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

MISCELLANEOUS

Settlement/Mediation

I encourage all parties to attempt to resolve the dispute by settlement – either through direct party-to-party (or lawyer-to-lawyer) negotiation or with the assistance of a neutral third-party mediator. The AAA has a panel of experienced, skilled and very well-regarded mediators available to assist in that regard. Your Case Manager can supply you with information about the AAA’s mediation services and mediators. Obviously, if your case is resolved by settlement prior to the arbitration hearing, you should promptly call your Case Manager so that I can be advised and take the hearing date(s) off my calendar.

Service by Fax

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

Service by email

In the absence of an objection by a party, I generally allow documents required to be served or filed (except original process) to be sent by email. Any such documents should be sent in MS Word or PDF format. Please confirm with your opposition and with your Case Manager that they have the capability of opening any documents you send.

Direct Service of Case Papers on Me

Normal procedure in AAA cases is for all case papers to be filed with the AAA, with sufficient copies for the AAA to transmit to the arbitrator. With your agreement and my approval, we will follow the AAA’s “accelerated exchange” protocol: a copy of all case papers may be served on me directly at the same time it is served on other parties. The document must nonetheless be filed with the AAA (with proof of service on all other parties and me noted). Any other *ex parte* contact with me is prohibited.

AAA Rules and Policies

Counsel and unrepresented parties are expected to be familiar and comply with the AAA rules applicable to the case (generally the most recent revision of the AAA Commercial Arbitration Rules) and with applicable AAA policies and procedures. Please contact your Case Manager if you do not have a copy of these documents. You may also find them on the AAA’s website: **www.adr.org**.

Questions?

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

Revised February 1, 2005

