ELEVENTH JUDICIAL CIRCUIT
COURT-ANNEXED MANDATORY ARBITRATION PROGRAM

AN ARBITRATOR'S GUIDE TO COURT-ANNEXED MANDATORY ARBITRATION HEARING PROCEDURES IN ILLINOIS

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TABLE OF CONTENTS

AN ARBITRATOR'S GUIDE TO
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A. INTRODUCTION

1. Overview of Court-Annexed Mandatory Arbitration

Illinois's system of mandatory court-annexed arbitration is derived both from an act passed by the General Assembly (Public Act 84-844; 735 ILCS 5/2-1001A et. seq.) and from rules adopted by the Illinois Supreme Court (Illinois Supreme Court Rules 86-95). While the process of arbitration itself is not new or unique in the private sector, the court-annexed model is notably different in that it is mandatory for certain classes of cases, but the outcome is non-binding. When utilized in the private sector, arbitration tends to be entered voluntarily by the disputing parties usually with an agreement that the decision will be binding and conclusive. In Illinois and elsewhere, policy makers have determined that courts should require arbitration for some types of civil disputes because it can contribute to a reduction of court congestion, costs and delay as well as help diminish the financial and emotional costs of litigation for parties. The goal of the process, therefore, is to deliver a high quality, low cost, expeditious hearing in eligible cases, resulting in an award that will enable, but not mandate, parties to resolve their dispute without resorting to a form trial.

Cases eligible for the arbitration process are defined by Illinois Supreme Court Rule 86 as civil actions in which each claim is exclusively for money damages not exceeding the monetary limit authorized by the Supreme Court of Illinois. Each circuit has been granted the authority to focus its arbitration program on particular types of cases within this general classification. Please consult the local rules of the circuit for this information.

The objective of the program and the program rules is to submit modest-sized claims to arbitration because such claims tend to be amenable to closer management and faster resolution in an informal alternative process. These are safeguards designed to insure the fairness of the process. These safeguards include the right to petition the court for an order transferring the case out of arbitration before the arbitration hearing takes place and the right to reject an award believed unacceptable.

Many of the prehearing procedures that pertain to this class of lawsuits generally still apply. Illinois Supreme Court Rule 86(e) states that the Code of Civil Procedure applies to arbitration cases unless otherwise stated in the arbitration rules. For example, prehearing motions are raised and decided in much the same way that they are raised and decided in non-arbitration cases. However, discovery is limited in arbitration cases, and Rule 89 states that all discovery must be completed prior to the arbitration hearing. Rule 89 also allows circuits to shorten the timelines for discovery discussed in Illinois Supreme Court Rule 222.

The time-span between the date of filing to hearing before an arbitration panel is intended to be tightly controlled by the court, and Supreme Court Rule 88 provides that all arbitration cases shall have a hearing within one year of the date of filing. Faster dispositions are possible in this system because the parties are assured when the lawsuit commences that a

hearing date will be set quickly and will be adhered to except in unusual circumstances. As a result, attorneys familiar with the program approach their arbitration cases with an expectation that the process will be expedited and that a disposition will occur in a relatively short period of time.

The essence of the process is, of course, the arbitration hearing. This hearing is conducted in a fair and dignified, yet less formal fashion, by a panel of three specially trained attorneys. The attorney-arbitrators and empowered not as judges, but as adjuncts of the court with authority to administer oaths, rule on the admissibility of evidence, and decide questions of fact and law in reaching an award in the case. While the rules of evidence apply in arbitration hearings, Illinois Supreme Court Rule 90(c) makes certain types of documents presumptively admissible. By taking advantage of the streamlined mechanism available for using documentary evidence in an arbitration hearing, presentations of evidence typically can be abbreviated to meet the objective of completing hearings in about two hours. The arbitrators conduct their deliberations in private but must announce their award on the same day the hearing occurred. An award requires the concurrence of at least two arbitrators.

An award can be a finding in favor of either party in an arbitration case and the Supreme Court Rules extend the right of rejection to all parties. However, four conditions attach to the exercise of this right to reject the award. First, the party who desires to reject the award must have been present at the arbitration hearing in order to preserve that right. Second, that party must have participated in the arbitration process in good faith. Third, the party wanting to reject the award must file a rejection notice with the court within thirty days of the date the award was filed. And fourth, except for indigent parties, the party who initiates the rejection must pay a fee to the clerk of the court of either $200 for cases with an award of up to $30,000 or $500 for those cases with an award of over $30,000. If no rejection is filed within the time allowed, the arbitration award may be entered as a judgment of the circuit court on the motion of any party.

2. Outline of the Order of Proceedings

The chairperson will normally conduct arbitration proceedings in the following order:

A. INTRODUCTIONS

1. Introduce the panel members

2. Ask counsel to introduce themselves and their clients

3. Briefly explain that the case is being heard pursuant to court order in accordance with Illinois Supreme Court Rules 86-95 and that the Code of Civil Procedure and rules of evidence will be observed as in any other judicial proceeding

B. ADMINISTER OATHS OR AFFIRMATIONS TO THE WITNESESS

1. Swear witnesses who will be testifying:

"Do you solemnly swear or affirm that the testimony you are about to give in this proceeding will be the truth, the whole truth, and nothing but the truth?"

2. Swear interpreters:

"Do you solemnly swear or affirm that throughout your service in this matter, you will interpret accurately, impartially and to the best of your ability?"

C. PRELIMINARY MATTERS

1. Ask counsel to estimate the number of witnesses and the time for the presentation of their case. Remind the parties they have a total of 2 hours for the presentation of the case, unless a request for additional time has been previously made to the arbitration administrator or presiding judge.

The chairperson of the panel is charged with the expeditious conduct of the hearing. Parties should be allowed to develop testimony of the issues of the controversy. However, direct and cross-examination should be circumscribed if it becomes redundant, irrelevant, or excessive and time consuming.

2. In order to determine which issues are in dispute, ask for any stipulations as to the facts, liability and/or damages.

D. THE HEARING

1. Plaintiff's opening statement

2. Defendant's opening statement

3. Plaintiff's case-in-chief

(a) Direct examination
(b) Cross-examination
(c) Redirect
(d) Offer of evidence
(e) Plaintiff rests

4. Defendant's case-in-chief

(a) Direct examination
(b) Cross-examination
(c) Redirect
(d) Offer of evidence
(e) Defendant rests

5. Plaintiff's rebuttal and closing arguments

6. Defendant's closing arguments

7. Plaintiff's rebuttal argument

E. ABSENCE OF A PARTY AT THE HEARING

The arbitration hearing shall proceed in the absence of a party who, after due notice, fails to be present. The panel shall require the present party to submit such evidence as the panel may require for the making of an award. *Illinois Supreme Court Rule 91(a)*.

F. SETTLEMENT OF A CASE AT TIME OF THE HEARING

If an attorney for a party appears at the arbitration hearing and represents that the case has been settled, the panel may enter an award which reflects the attorney's name and the representation of the settlement. The failure of any party to appear in person or by counsel should be noted on the award.

G. CONCLUDING THE HEARING

1. Thank counsel and parties for their participation. Indicate that the panel will deliberate and make an award and that a written copy of the award will be sent to the parties by the circuit clerk.

2. Adjourn the hearing.

3. Decide the issues of liability and damages.

H. MAKING THE AWARD

1. The arbitration award should identify the parties by name as well as their designation as plaintiff of defendant.

   Example: "Award in favor of defendant, XYZ Company."

Ensure that <u>all</u> claims, including attorney's fees (if prayed for) and costs of suit, have been addressed in the award.

Example: "Award in favor of the plaintiff, John Doe, and against the defendant, XYZ Company, in the amount of four thousand dollars ($4,000) plus costs."

2. In the event of consolidated cases, indicate the award entered on each of the cases.

3. If the award is being made ex parte, indicate on the award form that plaintiff or defendant did not appear in person or by counsel.

I. RETURN FILE, EXHIBITS AND COMPLETED AWARD FORM TO THE ARBITRATION ADMINISTRATOR.

3. Arbitrator Recusal Checklist

The following checklist is helpful in determining whether an arbitrator should hear a case or recuse her/himself:

- Are you prejudiced or do you have a bias for or against a party or attorney to the dispute?

- Do you have personal knowledge of an evidentiary fact?

- Have you or a member of your firm previously been involved in the case as counsel?

- Have you been associated with an attorney or firm who has filed as appearance in this case within the last three years?

- Have you represented any party in the case within the last seven years?

- Do you or a member of your household have a substantial financial interest in the subject matter in controversy?

- Do you or a member of your household have any other interest that could be substantially affected by the outcome of the proceeding?

- Are you and another member of your current firm assigned to the same panel?

If the answer to any of these questions is yes, the arbitrator should recuse her or himself from hearing the case. If a potential minor conflict is disclosed to the parties and both parties consent to have the case heard by the arbitrator, that consent should be committed to writing or annotation made on the award.

B. ARBITRATOR APPOINTMENT, QUALIFICATION, AND COMPENSATION

1. Arbitrator Qualifications

Arbitrator qualifications are discussed in Illinois Supreme Court Rule 87. Each circuit may also establish additional qualifications within the guidelines set forth in Illinois Supreme Court Rule 87. Most circuit rules provide that a licensed attorney in good standing or retired judge is eligible for appointment as an arbitrator.

Arbitrator candidates must file an application with the Arbitration Administrator certifying that she or he has engaged in the active practice of law for the minimum number of years mandated by local rules and that she/he has read the Illinois Supreme Court Rules relating to arbitration.

Arbitrators must complete a court-approved training in arbitration practices and procedures prior to serving on the arbitration panel. Each circuit may also require that the attorney maintain an office and/or law practice within the circuit to be eligible to serve as an arbitrator.

2. Oath of Office and Arbitrator Indemnification

Keeping with the principle that arbitrators are serving in a quasi-judicial capacity, an oath of office is administered by the Supervising Judge for Arbitration or Arbitration Administrator. *Illinois Supreme Court Rule 87(d).* Furthermore, the arbitrators are required to sign a written oath of office. The State of Illinois representation and indemnification statutes apply to attorneys acting as arbitrators in a court-annexed mandatory arbitration program.

3. Compensation

Each arbitrator is compensated in the amount of $100 per hearing. *Illinois Supreme Court Rule 87(e).*

Upon completion of each day's arbitration proceedings, the Arbitration Administrator will process the necessary voucher through the Administrative Office of the Illinois Courts for payment of arbitrators.

4. Obligations of the Arbitrator

Arbitrators should be familiar with pertinent statutory provisions, rules, and case law concerning arbitration. Arbitrators should also consider volunteering to serve on short notice as emergency arbitrators. In the event an arbitrator cannot serve on the assigned date, notice should be given to the Arbitration Administrator as soon as possible so that arrangements for a substitute arbitrator can be made. Arbitrators are expected to serve the entire morning and hear as many cases as possible.

C. ARBITRATOR DISQUALIFICATION, RECUSAL AND CHALLENGE

1. Arbitrator Recusal and Disqualification

The cornerstone of the arbitration process is the ability to provide a fair and impartial hearing. Consequently, one of the most important and often difficult decisions an arbitrator must make is whether or not to recuse her/himself from hearing a case. This decision should not be taken lightly.

The threshold question is whether the arbitrator has any contact or relationship with anyone connected with the case which would diminish the arbitrator's ability to be impartial and render a fair decision. The arbitrator should review the names of all parties, witnesses, and attorneys in order to make this determination. The arbitrator may recuse herself or himself if the arbitrator feels there may be a conflict. She or he may withdraw if grounds appear to exist for disqualification pursuant to the Code of Judicial Conduct.

An arbitrator must disqualify herself or himself if, within the previous 7 years, the arbitrator has represented a party, or within the previous 3 years associated with any representative of a party in the controversy that she or he will hear as an arbitrator. Likewise, an arbitrator must withdraw from hearing a case if she or he was associated or ever served as an attorney in the matter to be heard.

The fact that the arbitrator knows one of the attorneys involved in the case being heard is not, in itself, grounds for recusal. Arbitrators must use their conscience and discretion when making the decision whether or not to recuse themselves. They must ask themselves whether their impartiality could reasonably be questioned and whether they can honestly give the parties a fair hearing.

The only restriction upon the composition of the panel is that one member must be a qualified chairperson and no two attorneys from the same law firm may serve on the same panel.

2. Change of Venue from the Arbitration Panel

An arbitrator may recuse himself or herself if the arbitrator feels there may be a conflict, or withdraw if grounds appear to exist for disqualification pursuant to the Code of Judicial Conduct. *Illinois Supreme Court Rule 87(c).* There is no provision in the rules which allows for a substitution of arbitrators or change of venue from the panel or any of its members. The only remedy to perceived bias or prejudice on the part of any member of the panel or error by the panel in the determination of its award is to reject the award and proceed to trial. *See Committee Comments to Supreme Court Rule 87(c).*

In the event that an arbitrator must recuse himself or herself after a hearing has started, an arbitration hearing can continue before two panelists if all the parties consent in writing. *Illinois Supreme Court Rule 87(b).* Otherwise, an emergency arbitrator will be called in by the Arbitration Administrator from a list of attorneys who have volunteered to be called on short notice to act as emergency arbitrators.

3. Ex Parte Communications

Arbitrators are subject to the provisions of the Code of Judicial Conduct and therefore may not discuss pending litigation with the parties until a final order has been entered in the case and the time for appeal has expired. Consequently, communications between the parties and the arbitrators after a hearing is prohibited. The rationale behind this rule is that the arbitration hearing should not be treated as a practice run for trial, nor should the arbitrators be allowed to coach the parties on the presentation of their case.

4. Arbitrators May Not Testify

Arbitrators may not be called to testify as to what transpired before the arbitrators, and no reference to the arbitration hearing may be made at trial. *Illinois Supreme Court Rule 93(b).* In the event an arbitrator is subpoenaed to testify, the Arbitration Administrator should be notified immediately so that the Illinois Attorney General's Office can be informed and take any appropriate actions.

D. CASE JURISDICTION

1. Eligible Actions

The question of whether a panel has jurisdiction to hear a case rarely occurs since that issue is normally disposed of by the court before the case is assigned to arbitration. On occasion, the issue of jurisdiction does arise. When this happens, it is important to remember that the panel has the authority to hear cases exclusively for money damages and may not make an award exceeding the monetary limit authorized by the Supreme Court for the arbitration program, exclusive of interest and costs. *Illinois Supreme Court Rules 86(b) and 92(b).*

2. Law Division Cases

Law Division cases may be ordered to arbitration at a status call or pre-trial 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 irrespective of defenses. *Illinois Supreme Court Rule 86(d).*

It is also possible to file a case in the Law Division and then seek to amend the damages to under the monetary limit authorized by the Supreme Court to qualify for arbitration. An appropriate motion to amend damages and to transfer an assigned "L" case to the arbitration calendar must be made before the Law Division judge in accordance with local circuit court rules.

If an action is filed as an arbitration case but appears to be appropriately a Law Division case, the case pending in arbitration may be transferred to the "L" calendar by filing an appropriate motion with the Supervising Judge for Arbitration in accordance with local circuit court rules. The arbitration panel does not have the authority to enter an order transferring the case and will be limited to making an award not exceeding the monetary limit authorized by the Supreme Court, exclusive of interest and costs.

3. Chancery Cases

All civil actions where the claim is exclusively for money damages in an amount exceeding $10,000 but not exceeding the monetary limit authorized by the Supreme Court for arbitration, exclusive of interest and costs, are subject to mandatory arbitration. *Illinois Supreme Court Rule 86(b).* (Recently, some jurisdictions have begun funneling small claims cases in which a jury demand has been made into their arbitration programs. When this practice has been approved by the Supreme Court, local rules will reflect such. Please consult the local rules of your jurisdiction).

Cases which contain a prayer for relief other than money damages are not assigned to arbitration. They include forcible entry and detainer, confession of judgment, detinue, ejectment, replevin, trover, and registration of foreign judgment. However, a chancery case may be reassigned to the arbitration calendar if a judge has disposed of the equitable relief sought and refers the money damages issue under the monetary limit authorized for arbitration.

E. AUTHORITY OF THE ARBITRATION PANEL

1. Powers of the Arbitrators

Illinois Supreme Court Rule 90(a) provides that the arbitrators shall have the power to administer oaths and affirmations to witnesses, to determine the admissibility of evidence, to decide the law and facts of the case and to enter an award not exceeding the monetary limit authorized by the Supreme Court, exclusive of interest and costs.

The authority and power of the arbitrators exists only in relation to the conduct of the hearing at the time it is held. Issues that may arise in the proceeding of a case prior, ancillary, or subsequent to the hearing must be resolved by the court. *See Committee Comments to Supreme Court Rule 90(b).* Therefore, any motion involving the issuance of an order must be made before the Supervising Judge for Arbitration in advance of the arbitration hearing date.

2. Province of the Arbitration Panel

Arbitration hearings are conducted by a panel of three attorney-arbitrators. The chairperson of the panel rules on objections to evidence or other issues which arise during the hearing. The chairperson must have a minimum of three years of trial practice or be a retired judge. *Illinois Supreme Court Rule 87(b).* The qualification of three years of trial practice was intended to be a minimal standard, and each circuit may establish additional qualifications for chairpersons and other members of the panel.

3. Role of the Chairperson

Each circuit will determine how the chairperson is selected. The Arbitration Administrator will designate the arbitrator who will serve as chairperson of the panel. It is possible to have more than one person who is qualified be a chairperson serving on a panel. However, only the designated chairperson of the panel rules on the admissibility of evidence.

The only restriction upon the composition of the panel is that at least one member must be a qualified chairperson and no two attorneys from the same law firm may serve on the same panel.

4. Questioning Witnesses and Assistance of Counsel

Because arbitrators serve as finders of fact and law, and not as advocates, arbitrators are discouraged from taking an active role in the questioning of parties or witnesses other than for purposes of clarification. Arbitrators are required to follow the applicable law and follow the rules of evidence when ruling. The members of the panel must remain impartial at all times and not advocate for one side or the other. Pro se parties should be treated with respect and courtesy but should be held to the rules of procedure.

E. CONDUCT OF THE ARBITRATION HEARING

To eliminate any doubts as to the standards to be applied by the arbitrators during the course of the arbitration hearing, Illinois Supreme Court Rules 86(e) and 90(b) specifically provide that the Code of Civil Procedure, Illinois Supreme Court Rules, and established rules of evidence shall apply to the proceeding.

The chairperson will rule on all matters arising during the hearing, but is not authorized to enter an order of any kind. In unusual circumstances requiring judicial intervention, the Arbitration Administrator may contact the Supervising Judge for Arbitration.

1. Time Management

Arbitration hearings are scheduled for a concise presentation of the controversy (a maximum of 2 hours). Many circuit rules provide that the plaintiff contact all parties to determine the approximate time required for hearing. Parties requiring more time should file a motion requesting additional time before the Supervising Judge for Arbitration or make arrangements with the Arbitration Administrator in writing in advance of the hearing date. A case requesting more than 2 hours will be set on the 8:30 a.m. hearing schedule.

The chairperson of the panel is charged with the expeditious conduct of the hearing. Parties should be allowed to develop testimony on the issues of the controversy. However, direct and cross-examination may be circumscribed if it becomes redundant, irrelevant, or excessively time consuming.

2. Court Reporters and Record of the Proceedings

Arbitration hearings are open to the public. However, a record is not made of the proceedings. Many circuit rules allow for a stenographic record of the hearing to be made at the party's own expense. If a party has a stenographic record made, a copy must be furnished to any other party requesting it, upon payment of a proportionate share of the total cost of making the record.

3. Translators and Interpreters for the Deaf

Translators are required to be provided by the parties with the exception of interpreters for the deaf. In the event an interpreter for the deaf is required, notice must be given to the Arbitration Administrator at least two weeks in advance of the hearing.

4. Established Rules of Evidence

The Code of Civil Procedure and Rules of Evidence are applicable to the arbitration hearing. One rule unique to arbitration is Illinois Supreme Court Rule 90(c), which allows for the presumptive admissibility of many documentary forms of evidence without the formalities of foundation and authentication. This rule promotes the policy of "paper not people" at the arbitration hearing so as to facilitate a quick and efficient hearing of the issues.

5. Documents Presumptively Admissible

Illinois Supreme Court Rule 90(c) provides that certain documents are presumptively admissible. These include hospital bills, hospital reports, doctors' reports, drug bills, and other medical bills as well as bills for property damage, estimates of repair, written estimates of value, earnings reports, reports of opinion witnesses and depositions of witnesses.

Under the rule, these documents are admissible without the maker being present or the need to prove foundation. In order to take advantage of the presumptive admissibility of these documents, at least thirty-day written notice of the intention to offer the documents into evidence must be provided to every other party, accompanied by a copy of the document. However, notwithstanding the proper exchange of documents, the documents offered under Rule 90 must still be admissible under the rules of evidence.

Committee Comments to this rule indicate that the emphasis should be placed on the integrity of evidence rather than its formal method of introduction. However, regardless of the presumptive admissibility of the documents, the arbitrators will be required to apply the test under established rules of evidence otherwise relating to credibility and to determine the weight to be given such evidence. Consequently, even though some documents may be admitted as presumptively admissible under Rule 90, counsel is not precluded from objecting to their introduction on other grounds under the established rules of evidence.

6. The Introduction of Non-timely Rule 90 Documents

In the event that the documentary evidence offered under Rule 90 has not been submitted in a timely manner, the documents may be offered into evidence with the proper foundation. Due to time limitations and the desire to make the arbitration hearing a meaningful proceeding, stipulations to evidence are encouraged if a party has not complied with the thirty-day requirement.

7. The Submission of Voluminous Documents or Depositions

Committee Comments to the Illinois Supreme Court Rule 90(c) indicate that the blanket submission of voluminous records or depositions will not be tolerated. The panel will not be expected to pore over these documents to attempt to sort out relevant or material issues. In the event of a voluminous document is submitted to the panel, the chairperson should instruct counsel to stipulate to the relevant portion they wish the panel to consider.

8. Opinion Witnesses

Written opinions or testimony of an opinion witness at the arbitration hearing will be admitted into evidence provided written notice is given thirty days prior to the date of the hearing, accompanied by a statement containing the identity of the opinion witness, his/her qualifications, the subject matter, the basis of his/her conclusions, and his/her opinion as well as any other information required by Rule 222 (d)(6).

9. Right to Subpoena Maker of the Document

Subpoena practice in arbitration cases is conducted in essentially the same manner as that followed in non-arbitration cases. *Illinois Supreme Court Rule 90(e).* Any other party may subpoena the author or maker of a document admissible under this rule at the 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, 735 ILCS 5/2-1101, apply to arbitration, and it is 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, date and place set for the hearing. Witness fees and costs shall be in the same amount and shall be paid by the same party or parties as provided for in trial in the circuit court.

10. Adverse Examination of Parties or Agents

An adverse party or agent may be called and examined as if under cross-examination at the instance of an adverse party. The custom is to arrange for appearance of such witnesses by agreement. *Illinois Supreme Court Rule 90(f).*

11. Compelling Appearance of Parties or Witness at Hearing

The provisions of Illinois Supreme Court Rule 237 concerning the service of subpoenas and notice to parties of the appearance of witnesses are applicable to an arbitration hearing. 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. *Illinois Supreme Court Rule 90(g).*

12. Failure of a Party to Comply with a Subpoena or Rule 237 Notice

A party who fails to comply with an Illinois Supreme Court Rule 237(b) notice to appear at an arbitration hearing is subject to sanctions by the court pursuant to Illinois Supreme Court Rule 219(c). Those sanctions may include an order debarring that party from maintaining a claim, counterclaim, etc. The 1993 amendment to Rule 90(g) clarified that Rule 237(b) notice to appear at an arbitration hearing carries equivalent importance to one requiring an appearance at trial such that a court may, in an appropriate case, debar a party who fails to comply from rejecting the award.

The amendment also allows a party who received a notice to appear an opportunity to be excused in advance from appearing for good cause or by stipulation. For example, in a case where the party is willing to stipulate to the issue of liability and the only question which remains is damages, the party served with a Rule 237 notice may be excused by stipulation of the parties. If a party fails to appear pursuant to a Rule 237 notice, the panel may note the fact on the award form.

13. Motions at the Arbitration Hearing

Illinois Supreme Court Rules make a broad grant of power to the arbitrators over the conduct of the hearing including the authority to rule on the admissibility of evidence as well as decide the law and facts of the case. This authority implies that the arbitrators may exclude witnesses upon request of counsel and rule on motions concerning the admissibility of evidence for purposes of the arbitration hearing only. The arbitrators do not have the authority to issue an order of any kind. They cannot hear motions for dismissal, summary judgment, sanctions, default judgments, continuance, amendment to the complaint or transfer of a case. Issues that may arise in the proceeding of a case prior, ancillary or subsequent to the hearing must be resolved by the court. *See Committee Comments to Supreme Court Rule 90(a).* Therefore, any motion involving the issuance of an order must be made before the Supervising Judge for Arbitration in advance of the arbitration hearing date.

14. Exhibits

The offering of exhibits is conducted much in the same manner as in a trial. However, counsel should remember that it may be helpful to the panel if three sets of exhibit materials are prepared so that each member of the panel has a copy. Most circuits have rules concerning the recovery of exhibits.

15. Memorandum of Law

A short, written memorandum of law on any complex or unsettled point of law should be prepared in triplicate so that it may be presented to the panel at the hearing. In addition, copies of the cases cited should be attached since the arbitrators may not have access to a law library at the Arbitration Center.

Because the arbitration hearings are set for a concise presentation, any memorandum of law should be brief (1 to 3 pages) and to the point so as to minimize the arbitrators' deliberation time. As a courtesy, memoranda of law should be exchanged in advance of the hearing to allow opposing counsel to respond and avoid surprise.

16. Failure to Participate in an Arbitration Hearing in a Meaningful Manner

All parties to the arbitration hearing must participate in the hearing in good faith and in a meaningful manner. Committee Comments to Illinois Supreme Court Rule 91 note that to permit any party or counsel to ignore the arbitration hearing or to exhibit an indifference to its conduct would permit a mockery of this deliberate effort on behalf of the public, the bar, and judiciary to attempt to achieve an expeditious and less costly resolution to private controversies.

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 for such finding shall be stated on the award. The award shall be prima facie evidence that the party failed to participate in the arbitration hearing in good faith and in a meaningful manner. A court, when presented with a petition for sanctions or remedy therefor based on the award finding, may order sanctions as provided in Illinois Supreme Court Rule 219(c), including but not limited to, an order debarring the party from rejecting the award and costs and attorney fees incurred for the arbitration hearing. *Illinois Supreme Court Rule 91(b).*

Like any evidentiary narrative, the lack of good faith finding should be complete and specific. The factual basis should chronicle every reason for the panel's finding. Those reasons must be in the form of facts, not conclusions. The findings should also include a recitation of specific facts in this case which have lead the panel to the conclusion that there has not been good faith participation.

In drafting its factual basis, the panel should put itself into the shoes of the petitioner. What facts or what evidence would be both relevant and material to the issues in a petition for sanctions. What facts will the petitioner need to show in order to prevail. Those facts should be included in the findings. The panel does not fulfill its obligation either to the arbitration system or to the party by entering a finding of no good faith against their opponent and failing to substantiate the claim.

Prior to the adoption of these sanctions, there were complaints by arbitrators that some parties and lawyers would attend arbitration hearings but refuse to participate. The arbitration process, and this rule in particular, was not intended to force parties to settle cases. Settlement, by definition, must be voluntary and not compelled. However, court-annexed mandatory arbitration is a dispute resolution process under the auspices of the court. Parties and lawyers must not be allowed to abuse the arbitration process so as to make it meaningless. Arbitration must not be perceived as just another hurdle to be crossed in getting the case to trial. Good faith participation, as required by this rule, was therefore intended to assure the integrity of the arbitration process.

ABSENCE OF A PARTY AT THE ARBITRATION HEARING

1. Ex Parte Awards

Illinois Supreme Court Rule 91 provides that the hearing shall proceed in the absence of a 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 making an ex parte award.

A party's failure to appear at the arbitration hearing acts as a waiver of that party's right to reject the award and a consent to the entry of a judgment on the award by the court.

If plaintiff fails to appear at the arbitration hearing, an award is normally entered in favor of the defendant for plaintiff's failure to sustain its burden of proof. If the defendant fails to appear, plaintiff is

still required to put forth evidence in support of his/her case. In the event neither party appears, an ex parte award may be entered under Rule 91 or the court may dismiss the case for want of prosecution.

2. Default Judgments or D.W.P.

The arbitration panel does not have the authority to enter a default judgment; therefore any such motion must be brought before the Supervising Judge for Arbitration prior to the arbitration hearing. The arbitration panel may enter an ex-parte award under Illinois Supreme Court Rule 91 in the event that defendant fails to appear at the arbitration hearing, or the court may dismiss (D.W.P.) the case if neither party appears at the arbitration hearing.

3. Filing an Appearance or Answer at the Arbitration Hearing

The filing of a written appearance or answer instanter at the arbitration hearing is inappropriate and will only be allowed upon leave of court. In exceptional circumstances, the Supervising Judge for Arbitration will be contacted for a ruling on the issue.

4. Parties Arriving Late to the Arbitration Hearing

When both parties appear on the scheduled hearing date, they are assigned to an arbitration panel. The Arbitration Administrator should be notified immediately if a party will be late on the day of hearing; otherwise, an absent party will be found to be in default. It is the practice to wait 15 minutes after the scheduled hour before proceeding to an ex parte hearing and award.

If one of the parties has called the Arbitration Center and has indicated that he or she will be late, the case may be held at the discretion of the panel and Arbitration Administrator pending arrival of the missing party. However, the party causing the delay will have that time deducted from their presentation of the case.

5. Vacating a Judgment Made on an Ex Parte Award

The party failing to appear may petition the court to vacate the judgment in accordance with 735 ILCS 5/2-1301 or 735 ILCS 5/2-1401. The court may, in its discretion, order the matter set for rehearing in arbitration. However, under Illinois Supreme Court Rule 91, costs, fees and other sanctions may be assessed upon the party seeking to vacate the judgment.

H. THE AWARD

Illinois Supreme Court Rule 92(b) provides that the panel shall make an award promptly upon termination of the arbitration hearing. The first issue for determination by the panel is whether the award will be in favor of the plaintiff or the defendant. If the plaintiff has failed to meet his or her burden of proof, the panel may enter an award in favor of the defendant. If the plaintiff has met the necessary burden, the panel may then address the issue of damages.

The award must dispose of all claims for relief including any counter-claims, statutory or contractual attorney fees, or other relief sought. The award may not exceed the monetary limit authorized by the Supreme Court, exclusive of interest and costs. *Illinois Supreme Court Rule 92.* The

award shall be signed by the arbitrators or the majority of them. A dissenting vote without further comment may be noted. The arbitration award should be written in clear and understandable language as to avoid any potential confusion concerning the panel's decision. Note that the panel is not entering a judgment, but is making an award. The following are examples of language that can be used in the drafting of an arbitration award:

"Award is made in favor of the Plaintiff, XYZ Company, in the amount of $5,000, against Defendant, ABC Company, plus costs."

or

"Award in favor of defendant John Jones, parties to pay their own costs."

In cases involving multi-party plaintiffs or defendants, the arbitrators must indicate by name which party or parties the award is being made in favor of or against so as to avoid confusion. Likewise, when making an award in favor of a counter-plaintiff or counter-defendant, the parties should be indicated by name.

The amount of the award for or against each party must be specifically set forth, particularly when different parties may be awarded different amounts:

"We further make an award in favor of Defendant/Counter-plaintiff, ABC Company, on the counter-claim in the amount of $3,000."

If one party fails to appear at the arbitration hearing the panel should indicate that the award is being made ex parte.

If the award contains an obvious or unambiguous error in math or language, any party can bring a motion before the Supervising Judge for Arbitration for correction of the award as provided for in Illinois Supreme Court Rule 92(d). The filing of such a motion will stay the thirty-day period for rejection of the award until disposition of the motion. The parties may not contact the arbitrators directly for clarification or call an arbitrator to testify as to what transpired at the arbitration hearing. *Illinois Supreme Court Rule 93(b).*

Once the award and written oath forms are completed, they should be delivered to the Arbitration Administrator.