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;

(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. A template Notice of Intent Pursuant to Supreme Court Rule 90(c) is provided in the Article I Forms Appendix.

(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, 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, 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.

Adopted May 20, 1987, effective June 1, 1987; amended April 7, 1993, effective June 1, 1993; amended March 26, 1996, effective immediately; amended March 28, 2002, effective July 1, 2002; amended December 5, 2003, effective January 1, 2004; amended October 14, 2005, effective January 1, 2006; amended June 4, 2008, effective July 1, 2008; amended June 22, 2017, eff. July 1, 2017.

Committee Comments
(January 1, 2006)

Paragraph (h) is directed toward eliminating the problem of party or attorney use of information/feedback obtained during posthearing *ex parte* communication. Such communication could hinder the program goal of parties participating in good faith and could possibly influence the decision of the parties to accept or reject an award. This rule is not intended to restrict the ability of a party to communicate *ex parte* with a nonneutral party-arbitrator when used outside of court-annexed mandatory arbitration.

Administrative Order

In re Discovery Rules

The order entered March 28, 2002, amending various rules and effective July 1, 2002, shall apply to all cases filed after such effective date as well as all cases pending on such effective date, provided that any discovery order entered in any such case prior to July 1, 2002, shall remain in effect unless and until amended by the trial court.

Order entered November 27, 2002, effective immediately.

Committee Comment
(March 28, 2002)

This rule is amended to conform to the changes in terminology made in Supreme Court Rule 213.

Committee Comments

The conduct of the hearings, the outcome included, will substantially determine the regard and acceptance to be held by the legal community for this procedure as an effective method of dispute resolution for achieving a fair, early, economical and final result. For this reason, more perhaps than for any other of these rules, has the Committee devoted its attention to this rule. Meetings and interviews with out-of-State practitioners, judges and administrators were conducted with the greatest emphasis on the evidentiary aspect of the hearings.

Paragraph (a)

The authority and power of the arbitrators exist only in relation to the conduct of the hearing at the time it is held. Issues that may arise in the proceedings of the case prior, ancillary or subsequent to the hearing must be resolved by the court.

In some jurisdictions, including Pennsylvania, rulings on the evidence are to be made by a majority of the panel. Ohio has recently amended its rule to permit the chairperson to make such rulings. Practitioners, familiar with the practice in multiple-person panels, recommend that the ultimate authority reside with the chairperson. In practice one could reasonably expect the chairperson to consult with other members of the panel on difficult questions of admissibility.

Paragraph (b)

Several jurisdictions do not require hearings to be conducted according to the established rules of evidence.

New Jersey provides: “The arbitrator shall admit all relevant evidence and shall not be bound by the rules of evidence.”

Ohio’s statewide rules make no reference to the nature of the evidence admissible in mandatory arbitration hearings. Cuyahoga County (Cleveland), Hamilton County (Cincinnati) and Stark County (Canton) by local rules provide that the arbitrators shall be the judges of the relevancy and materiality of the evidence and “conformity to legal rules of evidence shall not be necessary.”

The State of Washington rules leave to the discretion of the arbitrator the extent to which the rules of evidence will apply.

The States of Arizona, California, Minnesota, New York and Pennsylvania provide, as does this rule, for the application of the established rules of evidence with exceptions similar to those

stated under paragraph (c).

It is the view of the Committee that the Illinois practitioner will enjoy a sense of security in that the established rules of evidence will apply to these hearings.

Paragraph (c)

All jurisdictions utilizing court-annexed arbitration have adopted rules substantially and conceptually similar to the provisions at paragraph (c) of this rule. The purpose for allowing presumptive admissibility of documents is to enable the parties to achieve the economy of time and expense available for the conduct of the hearing. The emphasis should be placed on substance and not form; the integrity of the evidence should be more meaningful than its formal method of introduction. The documents described in (c) are generally considered reliable and trustworthy for the purpose of admission. The documents that could be admitted under the general classification in (c)(6) could be photos, maps, drawings and blueprints, weather reports, business records and communications, and the like, so as to relieve the requirements of a foundational predicate for their admission.

The practice of the presumptive admission of documents of the type and nature described in the rule has stood the test of time and of experience in many thousands of hearings; one encounters no reported criticism or suggestion for change.

Regardless of the presumptive admissibility of the documents, the arbitrators will be required to apply the tests under established rules of evidence otherwise relating to admissibility and credibility and to determine, fairly, the weight to be given such evidence. Otherwise, the purpose of this procedure to achieve a fair, economical and early disposition of the controversy must ultimately fail by virtue of the lack of an essential integrity to the hearing itself.

Practitioners may not assume that practice will tolerate the blanket submission of voluminous records, charts or entire depositions with the expectation that the panel must pore over these documents and attempt to sort out that part which may be relevant or material to the issues at hand. Nor should such burden be placed on opposing counsel when such documents have been provided by notice. It would not be inappropriate or unreasonable, on the part of the panel, if it were to reject such blanket submissions unless proffering counsel specifies the entries or statements therein having relevancy and materiality.

None of the documents eligible for admission without foundation may be so offered unless the intention to do so, and a copy thereof, has been provided to opposing counsel not less than 30 days prior to the hearing. That length of time should be sufficient to enable counsel to verify the authenticity of the document, if prior discovery has not already accomplished that purpose. The Committee is recommending a period of notice longer than any of the arbitration jurisdictions; many provide a 20-day notice and some as few as seven days. We recommend the longer period so that there is less reason for the parties to request a continuance.

If the period of notice given for the submission of documents for presumptive admission is the minimum provided by this rule, and opposing counsel, in the exercise of prudent practice finds need to submit a document in rebuttal, he should apply to the court for leave to do so,

unless his adversary will stipulate to a submission in less time than is required by this rule. Under such circumstances the court, in its ruling, should be guided by the degree of diligence and preparation previously undertaken by both counsel.

Whenever possible, counsel should endeavor to avoid delay and needless expense by stipulating to the admission of documents where there is no reasonable basis for believing they will not and should not be admitted.

Paragraph (d)

It is intended under this paragraph to require disclosure of the identity of an opinion witness whose written opinion will be offered under the provisions of paragraph (c)(5) herein, or who will testify at the hearings; and to the extent required under Rule 222, his qualifications, the subject matter of his testimony, and the basis of conclusions and opinions as well as any other information required by Rule 222(d)(6). This information must be provided not less than 30 days prior to the scheduled date of hearing. The longer the period of notice provided to one's adversary, the less justification there would be to delay the hearing by reason of a late and unexpected disclosure.

Paragraph (e)

Although existing practice in other jurisdictions indicates that the option provided under (e) is rarely exercised, opposing counsel is given the right to subpoena the maker of the document as an adverse witness, and examine that witness as if under cross-examination. This provision is not intended to act as a substitute for the right, under Rule 237, to require the production of a party at the hearing. In the event the maker sought to be served is not amenable to service of a subpoena, and provided further that counsel has been diligent in attempting to obtain such service, it would be incumbent on counsel to seek to bar its admissibility. Such motion should be made well in advance of the hearing date.

The Explanatory Note to Pennsylvania Rule 1305 states that if a member or author of the document is not subject to the jurisdiction of the court and cannot be subpoenaed, that document would not be presumptively admissible. The use of subpoena under this provision of the rule is rare and this problem does not appear to be one that has been bothersome to the practitioners. The Committee does not believe that there should be a hard and fast rule if such issue should arise but rather that it be decided on a case-by-case basis. This seems to be the prevalent view among practitioners of other jurisdictions. The materiality of the document to the issues should be a significant matter. The courts should also be alert to prevent the attempted use of this process by opposing counsel as an abusive tactic for delay and harassment.

Paragraphs (f) and (g)

Although these provisions of the Code of Civil Procedure and Supreme Court Rule 237 apply to trials, they should be equally applicable to hearings in arbitration. The Committee is advised that in actual practice it has been customary for counsel to arrange for the appearance of such

witnesses by agreement.

A party who fails to comply with a Rule 237(b) notice to appear at a trial is subject to sanctions pursuant to 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) is to make clear that a Rule 237(b) notice to appear at an arbitration hearing carries equivalent importance, such that a court may, in an appropriate case, debar a party who fails to comply from rejecting the award. The amendments also allow 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.