

Rule 2.11

ARBITRATION

(a) **Statement of Purpose and Scope of Authority.** Pursuant to 28 U.S.C §654-658 *et seq.*, the United States District Court for the District of Arizona has established a court-annexed, voluntary, non-binding arbitration program. The intent of this alternative dispute resolution program is to provide for the just, efficient, and economical administration of justice, preserving each party's right to trial.

An advisory committee may be constituted to assist the Chief Judge in aiding the development, implementation and continued control and support of the arbitration program.

(b) **Jurisdiction.** Pursuant to 28 U.S.C. §652, all civil cases filed after February 1, 1992, shall be referred to arbitration, if the relief sought consists only of money damages not in excess of \$150,000, exclusive of interest and costs. For purposes of this Rule, the Court shall presume damages are \$150,000 or less unless the parties certify that damages exceed such amount.

(1) Exclusions. Cases excluded from arbitration are those which are either:

(A) 28 U.S.C. §1343 civil rights, 28 U.S.C. §1346(a) tax refunds, 29 U.S.C. §626 ADEA, 29 U.S.C. §1132 ERISA, 42 U.S.C. §405g social security, 42 U.S.C. §2000(e)5(f) Title VII; class actions, or cases pending on a multi-district docket; or

(B) actions based on an alleged violation of a right secured by the Constitution of the United States; or

(C) cases in which a prisoner appearing *pro se* is a party; or

(D) actions seeking equitable or injunctive relief;
or

(E) actions filed against six (6) or more individually named defendants; or

(F) actions assigned to the Expedited Track under the Differentiated Case Management Rule.

(2) Exemption by Court. The Court, at any time, may exempt, *sua sponte*, cases in which the objectives of arbitration

would not be realized because:

(A) the case involves complex or novel legal issues;

(B) legal issues predominate over factual issues;
or

(C) other good cause.

(3) Cases Not Otherwise Within Jurisdiction. Cases other than those defined in paragraph (b) may be referred to arbitration by the assigned District Judge or Magistrate Judge, *sua sponte*, and may proceed upon the consent of all parties. The District Judge or Magistrate Judge shall advise the parties of the opportunity to submit an action for arbitration by consent. If such consent is not achieved, the District Judge or Magistrate Judge to whom the action is assigned shall not be advised of the identity of any party or attorney who opposed the use of arbitration.

(4) Consent. Upon consent of and stipulation by the parties, the Court may refer any civil action to non-binding or binding arbitration.

(A) Non-binding arbitration shall be conducted in accordance with this Rule.

(B) Binding arbitration shall be conducted in accordance with the Federal Arbitration Act (9 U.S.C. §1, *et seq.*). The order of reference to binding arbitration shall specify the agreement(s) of the parties with respect to conduct of the arbitration and payment of the arbitrator.

(C) Parties who consent to non-binding or binding arbitration shall certify, personally or through their counsel, that they have read this Rule and 28 U.S.C. §654-658 *et seq.* A party's consent to arbitration shall not be made known to any District Judge or Magistrate Judge until all parties in the action have joined in the consent.

(5) Referral to Private Alternative Dispute Resolution Procedures. In lieu of arbitration under this Rule, the parties to any civil action may elect private consensual alternative dispute resolution procedures as agreed upon in writing by and between

those parties. The written stipulation for referral to private consensual alternative dispute resolution procedures shall set forth the agreement of the parties with respect to the conduct of such proceeding(s). Cases referred to private consensual alternative dispute resolution procedures which have been pending before the arbitrator for more than twelve (12) months may be dismissed without prejudice by the District Judge or Magistrate Judge for lack of prosecution following notice to all parties by the clerk that good cause must be shown why such dismissal should not be ordered.

(c) **Referral to Arbitration.** Cases determined eligible pursuant to paragraph (b) shall be referred to arbitration when the case is at issue; that is, when all defendants have either filed an answer or the time has expired within which a defendant must file an answer, as prescribed in Rule 12 of the Federal Rules of Civil Procedure. In the event additional parties have been joined in the action, the case shall not be referred to arbitration until an answer has been filed by all such parties who have been served with process and are not in default. Notwithstanding the foregoing, motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties, or motion for summary judgment, if the motion was filed during a time period specified by the district court, shall be heard by the assigned District Judge or Magistrate Judge prior to such referral.

(1) Default. Rule 55, Fed.R.Civ.P., and not this Rule, shall govern all proceedings regarding the default of any, or all, defendant(s).

(2) Notification. Within twenty-one (21) days after the case is at issue, the arbitration clerk shall send a Notice of Referral to all parties.

(3) Withdrawal from Arbitration. At any time during the twenty-one (21) day period following the date shown on the Notice of Referral, any party may opt-out of the arbitration program provided by this Rule by submitting to the arbitration clerk a Notice of Withdrawal from Arbitration, advising that the action is withdrawn from arbitration. The Notice of Withdrawal

from Arbitration must include a certification that the party has read this Rule, and 28 U.S.C. §651 *et seq.* The notice shall be submitted under seal with both the original and a copy placed in an envelope directed to Deputy Clerk, Arbitration.

(4) Failure to Submit Timely Notice of Withdrawal from Arbitration. A party's failure to submit a timely Notice of Withdrawal from Arbitration shall constitute that party's consent to arbitrate under this Rule. A Notice of Withdrawal from Arbitration submitted to the arbitration clerk after the twenty-one (21) day opt-out period is null and void. The arbitration clerk shall refuse to accept any such untimely notice and shall return such notice to the submitting party indicating thereon that the notice was rejected as untimely. Notwithstanding the foregoing, after the expiration of the twenty-one (21) day opt-out period, a party may seek relief from a referral to arbitration under this Rule by submitting to the arbitrator a Motion for Relief from Referral to Arbitration. The arbitrator shall not grant such motion except for good cause shown.

(d) **Selection of Arbitrators.** The arbitration hearing shall be held before a single arbitrator. Unless the parties stipulate to an arbitrator pursuant to subparagraph (d)(3) below, the arbitrator shall be chosen by the arbitration clerk randomly from among the lawyers who have been certified as arbitrators pursuant to paragraph (e), and whose case type preference matches that of the nature of suit as noted on Civil Cover Sheet (JS 44).

(1) Acceptance, Declination, or Disqualification of Arbitrator. Upon selection, the arbitration clerk shall inform the arbitrator of selection, and send a copy of all the pleadings. Within seven (7) days of receipt of the Notice of Selection, the arbitrator shall mail to the arbitration clerk either a Letter of Acceptance or a Letter of Declination or Disqualification. An arbitrator selected is subject to the disqualification rules set forth in 28 U.S.C. §455, but may decline to serve for any reason. Upon disqualification or declination, the arbitration clerk shall select a new arbitrator. Such re-selection shall not revive a peremptory strike option, if such option has been exercised

pursuant to subparagraph (d)(2) following.

(2) **Peremptory Strikes.** The arbitration clerk shall notify all parties of the arbitrator selected and shall provide all parties with the arbitrator's biographical information. Each side shall have ten (10) days to exercise a peremptory strike. If a peremptory strike has been exercised by one side, the arbitration clerk shall select another arbitrator. The side not exercising the strike in the first instance may exercise such peremptory strike of the second arbitrator assigned. Each side is limited to one peremptory strike during the pendency of the case.

(3) **Selection by Stipulation.** The parties may select an arbitrator, who, upon stipulation by the parties and approval of the assigned District Judge or Magistrate Judge, may be so appointed. An arbitrator selected by stipulation need not be certified pursuant to paragraph (e) and, in such cases, may be appointed, upon joint application of the parties, *pro hac vice* by the assigned District Judge or Magistrate Judge. An arbitrator selected by stipulation shall be subject to all provisions of this Rule (including those relating to compensation), and shall take the Arbitrator's Oath.

(4) **Notice of Appointment.** After expiration of the foregoing period, or upon selection of arbitrator by stipulation, the arbitrator shall be appointed and a Notice of Appointment entered, copies of which shall be mailed to the arbitrator and all parties.

(e) **Certification of Arbitrators.** The Chief Judge shall certify as many arbitrators as determined to be necessary and the Clerk of Court shall maintain a separate roster of arbitrators for each of two geographical divisions, Phoenix/Prescott and Tucson, who are so certified to hear and determine actions under this Rule.

(1) **Eligibility.** To be eligible for certification by the Court, an attorney:

(A) must have been admitted and qualified to practice for not less than five (5) years,

(B) must be a member in good standing of the bar of any United States District Court, and

(C) must either (i) have committed, for not less than five (5) years, 50% or more of his/her professional time to matters involving litigation, or (ii) have had substantial experience serving as a "neutral" in dispute resolution proceedings, or (iii) have had substantial experience negotiating consensual resolutions to complex problems.

(2) Experience/preference designations. Any attorney who applies for certification as an arbitrator shall specify legal area(s) of expertise or preference according to the nature of suit codes listed on Civil Cover Sheet (JS 44). In addition, each applicant shall provide biographical information (not to exceed ten (10) typewritten lines) to be included in the notice to parties of selection of arbitrator.

(3) Exemption from other Court appointment. Those attorneys who are eligible for selection as arbitrators and whose names appear on the roster maintained by the Clerk of Court shall be exempted from the list of attorneys from which counsel are appointed to represent indigent criminal defendants pursuant to the Criminal Justice Act, 18 U.S.C. §3006(A), unless they request to remain eligible for such appointment or otherwise agree to accept such appointment.

(4) Oath. Each person shall, upon certification as an arbitrator, take the oath or affirmation prescribed in 28 U.S.C. §453 and shall complete any training which may be offered by the Court.

(5) Withdrawal. Any person whose name appears on the roster maintained in the clerk's office may ask at any time to have his or her name removed or, if selected as an arbitrator, decline to serve but remain on the roster.

(f) **Authority of Arbitrators.** Pursuant to 28 U.S.C. §655, an arbitrator to whom an action is referred shall have, for that specific action within this judicial district, the authority to:

- (1) hear all motions, including dispositive motions;
- (2) schedule and conduct arbitration hearings;
- (3) administer oaths and affirmations;

- (4) impose reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing; and
- (5) make awards.

(g) **Compensation of Arbitrators.** The arbitrator shall be paid \$250 for each day of the arbitration hearing, as that term is defined in subparagraph (i)(1), or \$250 per case, whichever is greater. When the arbitrator files the arbitration award, the arbitrator also should submit to the arbitration clerk a claim on the form prescribed by the Clerk of the Court for payment by the Administrative Office of the United States Courts of compensation and out-of-pocket expenses necessarily incurred in the performance of the duties under this Rule. No reimbursement shall be made for the cost of office or other space for the hearing. In the event a case settles within two (2) days of any scheduled arbitration hearing, an arbitrator may submit a claim to the arbitration clerk for compensation in the amount of \$50 plus expenses reasonably incurred, and shall represent that prior to the settlement the arbitrator had been actively preparing for the arbitration hearing.

(h) **Pre-hearing Exchange of Information; Discovery; Notice of Settlement.**

(1) Arbitrator. Upon entry of the Notice appointing the arbitrator, the arbitration clerk shall send to the arbitrator a copy of all the pleadings, papers, notices, and orders (including said Notice of appointment) filed or lodged in the action. Thereafter, each party shall submit to the arbitrator all subsequent pleadings and papers, including the statement required by subparagraph (h)(2) below.

(2) Pre-Hearing Statement. No later than ten (10) days prior to the hearing date, each party shall serve on the arbitrator, and all other parties, a pre-hearing statement which sets forth for such party the following information:

- (A) identification of the issues to be determined;
- (B) identification of all witnesses to be called at arbitration hearing; and
- (C) identification of all exhibits to be presented

at the hearing.

Each party may, at the same time, serve a pre-hearing brief. Neither the pre-hearing statement nor any pre-hearing briefs shall be filed with the Court.

(3) Discovery. If pursued, discovery shall be conducted in accordance with the applicable rules of procedure and shall be completed within 120 days of Notice referring the case to arbitration.

(4) Notice of Settlement. The parties shall promptly report settlement of the action to the arbitration clerk and to the arbitrator assigned to the action and shall file an appropriate notice of settlement with the Clerk of the Court, with a copy to the arbitration clerk. A notice of settlement shall have the effect of terminating the arbitration phase of the proceeding. Thereafter, the case shall proceed in accordance with the rules of civil procedure.

(i) **Arbitration Hearing.**

(1) Scheduling. The arbitration hearing shall take place on the date and time established by the arbitrator. The arbitrator shall inform the arbitration clerk of the location, date, and time of the hearing; the arbitration clerk will prepare and send to all parties a Notice Setting Hearing. The arbitrator is authorized to change the date and time of the hearing provided the hearing is commenced within a time period specified by the district court, but in no event later than 180 days after the filing of an answer, except that the arbitration proceeding shall not, in the absence of the consent of the parties, commence until 30 days after the disposition by the district court of any motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties, or motion for summary judgment, if the motion was filed during a time period specified by the district court. The 180-day and 30-day periods specified in the preceding sentence may be modified by the court for good cause shown. The arbitrator shall provide the arbitration clerk with a copy of any notice which schedules or continues the arbitration hearing. If the arbitrator is unable to commence the arbitration

hearing within the time prescribed above, the arbitrator, or any party, may request that the District Judge or Magistrate Judge extend the time period. For purposes of this Rule, an "arbitration hearing" is defined to include (a) any proceeding before the arbitrator on any dispositive motion which addresses some or all of the claims at issue, and/or (b) any evidentiary proceeding on the merits of the case.

(2) Location. The hearing shall take place at a neutral location which is convenient for and agreed to by the arbitrator and the parties. If a suitable location can not be found, the arbitrator may request the arbitration clerk to make a hearing room available in a United States Courthouse facility.

(3) Failure to Appear or Participate in Good Faith at the Arbitration Hearing. An arbitration hearing may proceed in the absence of any party who, after notice, fails to appear. In the event a party fails to appear or participate in good faith at an arbitration hearing, the arbitrator shall make that determination and shall support such determination with specific written findings set forth in the arbitration award to be filed with the arbitration clerk. Failure to appear or to participate in good faith at an arbitration hearing which has been set in accordance with subparagraph (i)(1) shall constitute a waiver of the right to appeal absent a showing of good cause. If the District Judge or Magistrate Judge finds that further proceedings before the arbitrator are appropriate, the case shall be remanded to the assigned arbitrator.

Individual parties and authorized representatives of corporate or governmental parties must attend arbitration unless excused by the arbitrator for good cause shown.

(4) Each party shall have the right to cross-examine witnesses.

(5) Witnesses. Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at the hearing before the arbitrator. Testimony at the hearing shall be under oath or affirmation.

(6) Evidence. The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be marked for identification and delivered to adverse parties at least ten (10) days prior to the hearing and the arbitrator shall receive such exhibits into evidence without formal proof unless counsel has been notified at least five (5) days prior to the hearing that the adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrator may refuse to receive into evidence any exhibit, a copy or photograph of which had not been delivered prior to the hearing to the adverse party, as provided herein.

(7) *Ex Parte* Communication. There shall be no *ex parte* communication between the arbitrator and any counsel or party on any matter touching the action except for purposes of scheduling or continuing any hearing, including the arbitration hearing.

(8) Record of Proceedings. A party may have a recording and transcript made of the arbitration hearing at the party's expense. In the absence of agreement of the parties and except as related to impeachment of a witness, no transcript of the proceedings shall be admissible in evidence at any subsequent trial *de novo* of the action.

(9) Arbitrator's Report. The arbitrator is required to prepare a written record of place, time, date and presence of parties and counsel, and certify mailing of the award to all parties.

(j) **Arbitration Award and Judgment.**

(1) Notice of Arbitration Decision; Attorneys' Fees and Related Non-Taxable Expenses; Filing of Arbitration Award. Within ten (10) days after completion of the arbitration hearing, as that term is defined in subparagraph (i)(1), the arbitrator shall file a notice of arbitration decision with the arbitration clerk, and on the same day shall mail or deliver copies thereof to all parties or their counsel. Within ten (10) days of the filing of the notice of arbitration decision, the prevailing party shall submit to the arbitrator a proposed form of arbitration award, and motion for

award of attorneys' fees and related non-taxable expenses, if such fees and expenses are recoverable, together with a detailed and itemized statement of such fees and expenses. A notice of application to have costs taxed and the statement of costs, as provided by Local Rule 2.19, shall not be filed until after the entry of judgment. Within five (5) days of receipt of the proposed form of arbitration award the opposing party may submit objections to the arbitrator. Within ten (10) days of receipt of the objections, the arbitrator shall pass upon the objections, if any, and shall file the arbitration award with the arbitration clerk, and on the same day shall mail or deliver copies thereof to all parties or their counsel. The arbitration clerk shall file under seal the notice of arbitration decision and the arbitration award.

(2) Contents of Arbitration Award. The arbitration award shall be in writing, shall be signed by the arbitrator, and shall:

(A) identify the prevailing party or parties and the party or parties against whom the award is rendered;

(B) state whether the award was entered following a hearing on a dispositive motion or following an evidentiary hearing on the merits; and

(C) if awarded, state the precise monetary amount of the award, including the amount of any attorneys' fees and non-taxable expenses, and describe the nature of any other relief granted.

Except as provided in subparagraph (i)(3) above, the arbitration award need not state factual findings or legal conclusions.

(3) Limitations on Award. The amount of the award, if any, is not limited to the sum stated in this paragraph (b) if the arbitrator determines that an award in excess of that amount is just and is in keeping with the evidence and the law.

(4) Award Entered as Judgment. In accordance with 28 U.S.C. §657, the award shall be entered as the judgment of the Court after the expiration of the thirty (30) day time period for demanding a trial *de novo* has expired as hereinafter provided. The

judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the Court in a civil action in accordance with Rule 58 of the Federal Rules of Civil Procedure, except that it shall not be the subject of appeal.

(5) Sealing of Award. The contents of any arbitration award shall not be made known to any District Judge or Magistrate Judge who might be assigned to preside at the trial of the case or to rule on potentially case dispositive motions

(A) until the Court has entered final judgment in the action or the action has been otherwise terminated, or

(B) except for purposes of preparing the report required by §903(b) of the Judicial Improvements and Access to Justice Act.

(6) Multiple Claims. In an action involving multiple claims and parties, any separable part of an arbitration award may be the subject of a trial *de novo* if the aggrieved party makes a timely demand for same pursuant to paragraph (k) below. If the aggrieved party files a timely demand pursuant to paragraph (k) below, that part of the arbitration award shall not become part of the final judgment as described in subparagraph (j)(3) above.

(k) **Trial *de novo*.** Within thirty (30) days after the arbitration award is filed with the arbitration clerk, any party may file a written demand for a trial *de novo*. A copy of such demand shall be served by the party making such demand upon all parties. Withdrawal of a demand for a trial *de novo* shall not reinstate the arbitrator's award and the case shall proceed as if it had not been arbitrated.

(1) Restoration of Case to Docket. Upon the timely filing of a demand for a trial *de novo*, the action shall be restored to the regular docket of the Court and treated for all purposes as if it had not been referred to arbitration. Any right of trial by jury which a party would otherwise have shall be preserved.

(2) Disclosure of Arbitration Matters. At the trial *de novo*, the Court shall not admit any evidence that there has been an

arbitration hearing, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, unless the evidence would otherwise be admissible in the Court under the Federal Rules of Evidence or the parties have otherwise stipulated.

(3) Disclosure of Arbitration Award. To make certain that the arbitrator's award is not considered by the Court or jury either before, during or after the trial *de novo*, the arbitration clerk shall, upon the filing of the arbitration award, enter onto the docket only the date and "arbitration award filed" and nothing more, and shall retain the arbitrator's award in a separate file in the Clerk's office. In the event demand for trial *de novo* is not timely filed, the arbitration clerk shall enter the award on the docket and place it in the case file.

(4) Deposit. Upon filing a demand for trial *de novo*, the party filing such demand, other than the United States or its agencies or officers, shall, unless permitted to proceed *in forma pauperis*, deposit with the arbitration clerk a sum equal to the total fees paid or payable to the arbitrator. The sum deposited shall be returned to the party demanding a trial *de novo* in the event that party obtains a final judgment, exclusive of interest and costs, which is more favorable than the arbitration award. In the event that the party demanding a trial *de novo* does not obtain a more favorable result, the sum deposited shall be paid to the Treasury of the United States.

(5) Any party aggrieved by the imposition of sanctions imposed by the arbitrator may obtain *de novo* review thereof by the District Judge or Magistrate Judge by filing a motion for review within 30 days of the entry of such sanctions. In the event review is sought, in whole or in part, of an arbitrator's award of monetary sanctions, then at the time the motion for review is filed the aggrieved party, other than the United States or its agencies or officers, also shall deposit with the arbitration clerk a sum equal to such monetary sanction.

(6) At any time after the filing of a demand for trial *de novo*, the parties or counsel may, with the consent of the

arbitrator, confer with the arbitrator as to the strengths and weaknesses of their cases. Any fee which may be charged by the arbitrator for this conference shall be paid by the requesting party or parties. This conference must be held with all sides represented; *ex parte* communication with the arbitrator is prohibited.

(1) **Cases Pending.** Notwithstanding the provisions of this Rule, each District Judge or Magistrate Judge may select cases from his/her docket currently in process and notify counsel of the availability of the arbitration program.