THE REAL PROPERTY AND ADR SECTIONS

OF THE SAN DIEGO COUNTY BAR ASSOCIATION

Present

Part 2 of a 2 Part Program

Part 2 ARBITRATING REAL ESTATE CASES

Speakers

Sean Ponist, Esq.

Bob Flynn, Mediator

John Campbell, Esq.

Harold Coleman, Jr., Mediator

November 21, 2016

Sean Ponist, Ponist Law Group, 12626 High Bluff Drive, Suite 440, San Diego, CA 92130, 858-412-1211
Robert H. Flynn, Keller Williams Realty, 12780 High Bluff Drive, San Diego, CA 92130, 858-775-3079
Harold Coleman Jr., Harold Coleman Jr. Ltd., 16870 West Bernardo Drive, Ste. 400, San Diego, CA 92127, 619-794-6001
John B. Campbell, Campbell Law Group, 12340 El Camino Real, San Diego, CA 92130, 619-318-0940

MEDIATING REAL ESTATE CASES

TABLE OF CONTENTS

Presenter Biographies

Presentation Outline

ARBITRATING REAL ESTATE CASES

PRESENTER BIOGRAPHIES

SEAN E. PONIST, ESQ.

Sean Ponist is the founder of the Ponist Law Group, a firm specializing in real estate, construction defect and business litigation. Prior to founding his own firm, Mr. Ponist was a prosecutor with the Marin County District Attorney's Office and in-house counsel for Marcus & Millichap Real Estate Investment Brokerage Company. He has successfully tried over 25 cases to verdict. For the past five years, Mr. Ponist has been recognized as a Super Lawyer and has also been recognized as being one of the Best of the Bar by the San Diego Business Journal.

Mr. Ponist has also published numerous articles on real estate topics, including recent articles in The Daily Journal ("Recovering Lost Profits in Real Estate Transactions" and "Should Equitable Indemnity Apply Against Negligent Misrepresentation Claims?"), California Lawyer magazine ("The Nonrefundable Deposit – Not!") and Commercial Investment Real Estate ("Going to the Source: Minimize your liability by providing attributions").

He has further lectured for the San Diego County Bar Association ("Deconstructing Commercial Leases" and "Commercial Real Estate Brokerage Standard of Care"), San Francisco Bar Association ("Bringing Down the House: Assessing Damages in Real Estate Cases," "Best Use of Experts in Real Estate Cases," "The Rogue Agent: Agency Issues In Real Estate," "Private Investigation and the Legal Community," and "Commercial Real Estate Brokerage Standard of Care," and "Contract Interpretation"), the San Mateo County Bar Association ("When Real Estate Deals Go Bad," "Expert Witnesses at Trial," and the "Agent-Principal Relationship") as well as for the National Business Institute ("Direct and Cross-Examination for Civil Litigators").

Mr. Ponist graduated from *UC Davis School of Law*, receiving his Juris Doctor degree in 1999. Prior to law school, Mr. Ponist attended *UCLA* where he earned a Bachelor of Arts in Philosophy in 1995 and was a Departmental Scholar.

ROBERT H FLYNN, ESQ., MEDIATOR

Bob Flynn is an AV rated attorney, repeatedly been named a SuperLawyer (including 2016) with a perfect 10 AVVO rating. He is a member of the Massachusetts Bar, the 1st Circuit USDCA, the USDC for MA and the United States Supreme Court! He has been a trial lawyer, mediator and arbitrator over the course of a few decades and has represented professionals over those years including many lawyers and real estate brokers/agents. He has mediated and arbitrated as a neutral for over 15 years his work as a neutral today is restricted to real estate and construction matters.

He was first licensed as a real estate broker in MA and is today a licensed CA real estate agent, BRE# 01970581. He leads the Fairway Residential Team at Keller Williams Realty in Carmel Valley/Del Mar working with residential sellers, buyers and investors throughout San Diego County and he focuses on working as a real estate agent with lawyers and fiduciaries whose clients are selling real estate.

• Lawyers intuitively understand in divorce and business dissolutions the value to having a realtor experienced as a lawyer and mediator!

• Lawyers selling probate property value a marketing strategy sensitive to their ethical duties to the clients, beneficiaries and the court.

"I like to think of my role as an agent as being a real estate resource and advisor for lawyers and fiduciaries and their clients whose real property is to be sold. Often it takes the nuanced sensitivity of an experienced lawyer acting as a real estate agent to negotiate a real estate deal and then project manage its escrow process, making sure that counsel and clients are ready for the Probate Court approval process and using the conflict resolution skills of an experienced mediator facilitate the conversation spouses need to have when selling marital real property. Lawyers appreciate having a lawyer/realtor on their team!"

JOHN CAMPBELL, ESQ.

John B. Campbell is the Senior Partner and founder of the Campbell Law Group ("CLG"). Mr. Campbell is an experienced trial lawyer and has extensive experience in real estate litigation and insurance defense matters. He is licensed to practice law in the States of California, Nevada, Massachusetts and Rhode Island. Mr. Campbell has been admitted to practice before all of the Federal Courts in California and Nevada; he has also been admitted to practice before the United States Supreme Court. Mr. Campbell graduated from Harvard University, with a BA in Psychology in 1970; and he received his JD from Boston College Law School in 1973.

From 1973-1977, Mr. Campbell served as a Lieutenant in the United States Navy JAG Corps, specializing in criminal litigation. While serving first with the Marine Corps in Southeast Asia, and then with the Navy in San Diego, Mr. Campbell prosecuted and defended over 150 general and special court-martials that were tried to completion. In civil practice, Mr. Campbell has tried over 30 complex civil jury trials. Many of those trials involved millions of dollars of exposure. Mr. Campbell has also handled hundreds of binding and non-binding arbitration and mediation proceedings.

Over the past several years, Mr. Campbell has been recognized as a "Top Lawyer in San Diego" – Highest in Ethical Standards & Professional Excellence. Since 1978, Mr. Campbell has specialized in the representation of medical practitioners, restaurant clients; real estate clients; clients involved in construction litigation; insurance carrier clients – for the defense of legal and medical malpractice cases, high-exposure catastrophic injury cases, construction defect cases, insurance bad faith, subrogation and declaratory relief cases; and clients who were involved in other non-insured complex litigation matters (i.e., involving unfair competition/antitrust; fraud; and breach of contract issues).

Mr. Campbell has developed expertise in the representation of buyers/sellers/real estate agents in residential real estate transactions – including the sale of residential/commercial properties with undisclosed defects. Mr. Campbell provides advice and litigation services in connection with such disputes. Mr. Campbell also provides such services to his clients involved in the purchase of commercial and/or industrial real estate.

Mr. Campbell has also been involved in the following published appellate decisions: Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Company, Inc. (1991) 234 Cal.App.3d 1724, 286 Cal.Rptr. 435; Shaffer v. Debbas (1993) 17 Cal.App.4th 33; 21 Cal.Rptr.2d 110; Alcala Company, Inc. v. Superior Court (1996) 49 Cal.App.4th 1308, 57 Cal.Rptr.2d 349; University Canyon Homeowner Association v. Collins Development Company, et al. (2000) 81 Cal.App.4th 771, 97 Cal.Rptr.2d 83. Mr. Campbell has been involved in the following appellate opinions that were not certified for publication by the 4th District Court of Appeal: Noon v. U.S.A. Track & Field, et al. (1998); Smith, et al. v. San Dieguito Unified High School District, et al. (2001); and Hirsch, et al. v. Pacific Crematorium, Inc., et al. (2006).

HAROLD COLEMAN, JR., ESQ., MEDIATOR

Harold Coleman, Jr., Esq**.,** is principal of *Harold Coleman Jr. Ltd.* (2004 to date), a San Diego-based conflict-management firm that delivers solution-focused and value-driven professional alternative dispute resolution (ADR) services in the areas of real estate, construction, commercial, consumer, business and employment law, with a practice focus in complex technical disputes and pre-dispute avoidance. As an ADR professional, he also serves as senior executive for mediation at the American Arbitration Association (AAA) – the global leader in dispute resolution services worldwide.

Coleman is an ADR panelist with the *Superior Court of California's* Civil Mediation Program, the *San Diego Association of Realtors'* Real Estate Mediation Center, the *San Diego County Bar Association's* attorney/client fee arbitration and mediation committees, and the AAA's Large & Complex Case (LCC) panel for commercial and construction disputes. He is a licensed attorney, licensed real estate broker, and credentialed mediator, arbitrator and educator who since 1987 has served the international business and legal communities in resolving complex litigated and non-litigated disputes through innovative ADR applications of interest-based negotiation, facilitation, mediation, independent fact-finding, early neutral evaluation, and binding arbitration. He is a former civil-litigation attorney (*McInnis, Fitzgerald, Rees, Sharkey & McIntyre*, 1990-97; *Gaglione, Coleman & Greene, LLP*, 1997-2004) with expertise in complex technical litigation. He is a professional trainer who routinely trains corporate management teams in ADR, communication, conflict management, claims prevention, strategic planning, and critical thinking/problem solving, among other enterprise risk-management themes. His corporate clientele includes *The Boeing Company*, the global aerospace leader.

A former project design engineer and multi-disciplinary project manager (*County of San Diego*, Office of Architecture & Engineering, 1980-90; *Arizona Department of Transportation*, 1975-80), Coleman's ADR expertise has actively facilitated the resolution of several hundred mediated and arbitrated complex disputes, with an aggregate case disposition value well exceeding 500-million dollars.

Among other honors and awards, Coleman has been recognized by the *State Bar of California* in 2000 with its "Distinguished Service to the Legal Profession" citation. More recently, Coleman in 2009 was inducted as Fellow of the prestigious national *College of Commercial Arbitrators*, comprised of the most esteemed neutrals in the industry. In 2011, Coleman was appointed to the

international Board of Directors of the AAA. In 2012, Coleman was appointed to the CCA's national Board of Directors and in 2013 to the Board of Directors of the *International Mediation Institute*.

ARBITRATING REAL ESTATE CASES

I. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

A. Advantages:

-Quicker results than court;
-Shorter and less costly proceedings than court;
-Greater choice in selection of fact-finder and, potentially, better qualified fact-finders;
-Greater privacy than judicial proceedings;
-No exposure to "runaway" jury verdicts and less risk of punitive damages.

B. Disadvantages:

-"Splitting the baby";
-No/limited discovery and dispositive motions;
-No assurance arbitrator will apply rules of law;
-Limited judicial review;
-Inability to join third parties.

II. SELECTION OF ARBITRATOR AND CLAIMS

A. Selection of Arbitrator

1. Parties may designate a single arbitrator or a panel and may specify the qualifications the arbitrator(s) must possess

2. Failure to designate an arbitrator (or a procedure for selection of the arbitrator) does not render an arbitration agreement unenforceable. If necessary, an arbitrator will be appointed by the court.

(Judge H. Warren Knight (Ret.) et al., Cal. Prac. Guide: Alt Dispute Resolution (TRG 2016) ¶5.24.)

B. Selection of Claims to Arbitrate

The parties may agree to arbitrate some but not all disputes arising between them. (*Kroll v. Doctor's Assocs., Inc.* (7th Cir. 1993) 3 F.3d 1167, 1171.)

III. CALIFORNIA ARBITRATION ACT V. THE FEDERAL ARBITRATION ACT

A. Statutory Authority

1. California Arbitration Act (CCP § 1280 et seq.)

2. Federal Arbitration Act (9 USC § 1 et seq.)

3. The Federal Arbitration Act (FAA, 9 USC §§ 1-14) governs contractual arbitration in written contracts involving interstate or foreign commerce or maritime transactions. [9 USC §§ 1, 2]

4. Conflicting state law preempted: conflicting state law is preempted under the Supremacy Clause: "Federal law in the terms of the Arbitration Act governs … (arbitrability) in either state or federal court." (*Southland Corp. v. Keating* (1984) 465 US 1, 12, 104.)

B. Interstate Commerce Requirement

1. The Federal Act provides for enforcement of arbitration provisions in any contract "evidencing a transaction involving commerce." (9 USC § 2; see *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 67.)

2. Examples:

- A termite protection contract between an Alabama homeowner and Termite Protection Co. "involved commerce" because Termite Protection Co. was a multistate firm and shipped termite-treating and repair materials from outside the state. (*Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995) 513 U.S. 265, 282.)

- A residential purchase contract involved interstate commerce where the developer had used five different out-of-state building material suppliers. It was irrelevant that the out-of-state materials were not at issue in the case. (*Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 Cal.App.4th 1092, 1096.)

IV. DEFENSES TO ENFORCEMENT

A. In General

1. Public Policy

Public policy strongly favors arbitration and any doubts will be resolved against the party asserting a defense to arbitration. (*Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.* (1983) 460 US 1, 24.) Thus, defenses, like those discussed below, generally face an uphill battle.

2. Timing

Defenses generally must be raised in court before the arbitration: "(A) party who questions the validity of the arbitration agreement may not proceed with arbitration and preserve the issue for later consideration by the court after being unsuccessful in the arbitration." (*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 129.)

B. WHO ADJUDICATES THE DEFENSE

Who adjudicates the defense often turns on whether the agreement falls under the CAA or the FAA. "The California Arbitration Act (CCP § 1280 et seq.) and the Federal Arbitration Act (9 USC § 1 et seq.) allocate authority for deciding defenses to enforcement of an arbitration provision in varying ways and are not always consistent with each other." (*Duffens v. Valenti* (2008) 161 Cal.App.4th 443,447.) Generally, but not always, under the CAA, the court hears and determines challenges to arbitration; likewise, generally, but not always, under the FAA, the arbitrator hears and determines challenges to arbitration.

C. DEFENSES

The grounds for revocation / rescission under California law include mistake, lack of capacity, undue influence, material failure of consideration, duress, illegality … and, of course, fraud. (See Civ.C. §§ 1689, 1566, 39.)

1. Lack of Agreement. (*United Steelworkers of America v. Warrior & Gulf Navigation Co*. (1960) 363 U.S. 574, 582.)

2. Illusory provisions. (*Saika v. Gold* (1996) 49 Cal.App.4th 1074, 1082.)

3. Duress, undue influence claims: Lack of voluntary assent to the underlying agreement is a defense to enforcement of the arbitration clause. (*Ford v. Shearson Lehman American Express, Inc.* (1986) 180 Cal.App.3d 1011, 1027-1029.)

4. Lack of authority: Agents cannot bind parties to arbitrate without actual or implied authority to do so (or subsequent ratification). (*Madden v. Kaiser Found. Hosps.* (1976) 17 Cal.3d 699, 709.)

5. Lack of mental capacity: Lack of mental capacity to enter into the entire contract is a defense to enforcement of the arbitration clause. (Civ. Code § 1556.)

6. Fraud. (*Moseley v. Electronic & Missile Facilities, Inc*. (1963) 374 U.S. 167, 170-171; *Engalla v. Permanente Med. Group, Inc*. (1997) 15 Cal. 4th 951, 973.)

7. Unconscionability. (Walnut Producers of Calif. v. Diamond Foods, Inc. (2010) 187 Cal.App. 4th 634, 642-644.)

8. Waiver. (Code of Civ. Proc. § 1281.2; *Davis v. Blue Cross of Northern Calif*. (1979) 25 Cal.3d 418, 425.)

a. Requirements: A party seeking to prove waiver of a right to arbitration must demonstrate "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration." (*United States v. Park Place Assocs., Ltd.* (9th Cir. 2009) 563 F.3d 907, 921.)

b. Presumption against waiver. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 375.)

c. Waiver by litigation. (*Saint Agnes Med. Ctr. v. PacifiCare of Calif.* (2003) 31 Cal.4th 1187, 1203.) Look at what the party seeking litigation has done and where the parties are at in the litigation. (See generally, *ibid*.)

V. SPECIAL REQUIREMENTS FOR ARBITRATING REAL ESTATE CONTRACTS

A. Application: special requirements apply to arbitration agreements in contracts for the sale or lease of real property and in real estate listing agreement. (Civ. Code § 1086(b).)

B. Real Estate Contract Requirements:

The arbitration provision must:

1. Be clearly captioned in capital letters;
2. Be printed in 10-point bold type or typed in all capital letters;
3. State, immediately following the arbitration provision, in the same size print or type, there must appear a warning in statutory language as to the effect of arbitration (waiver of right to jury trial, etc.);
4. Have the parties must initial or sign the arbitration provision (apart from any other signatures required on the document.

(Code of Civ. Proc. § 1298.)

C. Note Also Special Requirements re Residential Construction Contracts

Bus. & Prof. Code § 7191 provides that arbitration provisions in residential construction contracts (1-4 units) must satisfy certain disclosure and format requirements, including advice that the consumer is giving up the right to a jury trial. Provisions that fail to comply with § 7191 are unenforceable against anyone but the licensee. (*Woolls v. Turner* (2005) 127 Cal.App.4th 197, 205-206.)

VI. NONSIGNATORIES

A. Nonsignatories Enforcement of Arbitration

Parties who did not sign the agreement to arbitrate may be entitled to enforce it and prosecute the arbitration in their own names. (*Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 Cal.App.4th 761, 772, n.3.)

- Third party beneficiaries may be entitled to enforce arbitration clauses in contracts, even if not specifically named in the agreement. (*Macaulay v. Norlander* (1992) 12 Cal.App.4th 1, 7-8.)

- If the arbitration clause encompasses claims against a contracting party's employees or associates, those persons may compel arbitration of claims against them. (*Gravillis v. Coldwell Banker Residential Brokerage Co*. (2006) 143 Cal.App.4th 761, 772 [arbitration clause in residential purchase agreement was enforceable by nonsignatory brokers].)
- An undisclosed principal may prosecute an arbitration in its own name under a contract signed by an agent on the principal's behalf. (*American Builder's Ass'n v. Au-Yang* (1990) 226 Cal.App.3d 170, 176.)
- A nonsignatory agent of a party to a contract containing an arbitration clause may compel the other parties to the contract to arbitrate their claims against him or her for liability arising under the contract … but not other claims. (*Britton v. Co-op Banking Group* (9th Cir. 1993) 4 F.3d 742, 748.)
- An assignee of a contract containing an arbitration clause has standing to compel other parties to the contract to arbitrate claims against the assignee. (*Britton v. Co-op Banking Group* (1993) 4 F.3d 742, 746.)
- In certain situations, a nonsignatory defendant may compel a nonsignatory plaintiff to arbitrate under equitable estoppel principles. (*JSM Tuscany, LLC v. NMS Properties, Inc*. (2011) 193 Cal.App.4th 1222, 1237-1241; see also, *Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 Cal.App.4th 828, 831-835 [claims intertwined with contract containing arbitration provision, therefore arbitration proper].)

B. Enforcing Arbitration Against Nonsignatories

Arbitration is a matter of contract and thus generally someone not a party to the arbitration agreement cannot be compelled to arbitrate. (*McArthur v. McArthur* (2014) 224 Cal.App.4th 651, 653, 658-659.) Nonetheless, an arbitration agreement can still be enforced against certain nonsignatories under applicable principles of agency and contract law. (*Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 Cal.App.4th 761, 772.)

- Principals or agents of a party to the arbitration agreement may be bound on ordinary agency or contract principles. (*Harris v. Mirsaidi* (1986) 188 Cal.App.3d 475, 478-479.)
- Third party beneficiaries are treated as parties to the contract, and thus are bound by any arbitration provisions. (*Epitech, Inc. v. Kann* (2012) 204 Cal.App.4th 1365, 1371.)
- An arbitration clause in a lease is held to "touch and concern" and "run with" the land. Thus, an assignee or sublessee in possession of the property may compel and be compelled to arbitrate disputes regardless of whether he or she assumed the lease. (*Kelly v. Tri-Cities Broadcasting, Inc*. (1983) 147 Cal.App.3d 666, 679.)

C. Who Decides Whether Nonsignatories Bound

In California, nonsignatory's Status Determined by Court, Not Arbitrator. (American Builder's Ass'n v. Au-Yang (1990) 226 Cal.App.3d 170, 179.) Federal courts, however, are split as to who decides the status of nonsignators. (Compare *Carpenters 46 Northern Calif. Counties*

Conference Bd. v. Zcon Builders (9th Cir. 1996) 96 F.3d 410, 414 [court decides alter ego status of nonsignatory] with *Contec Corp. v. Remote Solution Co., Ltd.* (2nd Cir. 2005) 398 F3d 205, 209-211 [arbitrator to decide issues of arbitrability].)

VII. ARBITRATION PROCEEDINGS

A. The Demand

A "demand" for arbitration is akin to a complaint and serves to start the arbitration proceedings. (*Ikerd v. Warren T. Merrill & Sons* 1992) 9 Cal.App.4th 1833, 1844, n. 10.)

B. Response to Demand

A response is generally optional, but is nonetheless wise to provide.

C. Attorneys and Authorized Representatives

1. A party has the right to be represented by an attorney at the arbitration proceeding. (Code of Civ. Proc. § 1282.4(a).)

2. Some arbitration rules provide, however, that any "authorized representative" may represent a party in arbitration. (E.g., AAA Commercial Arbitration Rules and Mediation Procedures, Rule R-26; JAMS Comprehensive Arbitration Rules and Procedures, Rule 12 ["The Parties … may be represented by counsel or any other person of the Party's choice"].) However, representation by a representative who is not a member of the California Bar may constitute the unauthorized practice of law, unless an exception applies. (Judge H. Warren Knight et al., ¶5:384.7 et seq.; see also, Code of Civ. Proc. § 1282.4 [allowing out-of-state attorneys to appear in arbitration matters provided certain requirements have been met].)

D. Selecting an Arbitrator

Parties may agree to a particular arbitrator or, if unable to do so, an arbitrator will be selected pursuant to the operative arbitration rules or, if none, the court may appoint an arbitrator, selection method or arbitration rules to be followed.

E. Discovery

1. In the absence of agreement, there generally is no right to discovery in arbitration proceedings under either state or federal law. (*McRae v. Hale* (1963) 221 Cal.App.2d 166, 172.)

2. If, however, the parties agree to arbitrate under certain rules, there may be discovery under those rules. (E.g., the AAA's Commercial Dispute Resolution Procedures give the arbitrator power to order production of documents and the identification of witnesses to be called, and obligates the parties to disclose documents intended to be offered at the hearing.)

F. Dispositive Motions

Arbitrators have implicit authority to hear and decide dispositive motions (sometimes erroneously referred to as summary judgment motions) where the governing procedural rules allow for such motions and the responding parties are afforded a fair opportunity to present their cases. (*Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1105-1109.)

G. Arbitration Hearing

1. A "hearing" is generally akin to a "trial."

2. Scope of hearing defined by agreement and/or rules agreed to by the parties. Unless the arbitration agreement provides otherwise, the arbitrator is not required to hear oral presentations or live testimony or to provide opportunity for cross-examination of witnesses. All that is required is the opportunity to present one's side of the case. Declarations and deposition testimony may be adequate for this purpose where no material facts are in dispute. (*Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1105.)

3. Rules of evidence not applicable. (Code of Civ. Proc. § 1282.2(d); see *Bowles Fin'l Group, Inc. v. Stifel, Nicolaus & Co., Inc*. (10th Cir. 1994) 22 F.3d 1010, 1013.)

4. Limitation—"fundamentally fair" hearing required. (*Bowles Fin'l Group, Inc. v. Stifel, Nicolaus & Co., Inc.* (10th Cir. 1994) 22 F.3d 1010, 1013; see also, *Carpenters 46 Northern Calif. Counties Conference Bd. v. Zcon Builders* (9th Cir. 1996) 96 F.3d 410, 413 [fundamental fairness means adequate notice, hearing on evidence and impartial decision by arbitrator].)

5. Privacy—arbitrations are generally not open to nonparties and most arbitration ethics codes and provider rules require the arbitrators to keep communications, documents and testimony confidential (but no such obligation is imposed on counsel or parties). (Judge H. Warren Knight (Ret.) et al., ¶5:395-6.)

6. Record of Proceedings: Unless otherwise provided by agreement or court order, no formal record of the arbitration hearing is required.