

To: Rick Crum

From: Hannah Fuchser

Appellate Arbitration

Introduction and Scope

The following addresses (1) whether any state courts in the U.S. have established an appellate arbitration program, analyzing the rules of any such program; (2) the court rules and procedures under various trial court-level arbitration programs in California, Hawaii, and New York; (3) secondary resources regarding appellate and trial court arbitration programs; and (4) the extent to which private ADR firms arbitrate appeals, including analysis of any relevant rules.

Brief Summary of Findings

a. Appellate Court Arbitration Programs

Only one state has a rule enabling arbitration for appellate cases: South Carolina.

b. Trial Court Arbitration Programs

Several jurisdictions maintain trial court arbitration programs, including California, the District of Columbia, Delaware, Hawai'i, New Hampshire, New York, Oregon, and Rhode Island. The following analyzes the programs in California, Hawai'i, and New York.

c. Academic Research

Literature found on the [RAND Institute for Civil Justice website](#), the [Resolution Systems Institute](#), and various legal databases was reviewed. No existing research, studies, or other reviews on programs for arbitrating appellate cases were found.

d. Private ADR Firms and the American Arbitration Association

Private ADR firms such as Dispute Prevention & Resolution Inc., JAMS Mediation, Arbitration and ADR Services, the American Arbitration Association, and more were reviewed for appellate arbitration rules. None were found.

Discussion

Utilizing the National Center for State Courts and Court Statistics Project's State Court Structures¹, the appellate rules for each state were reviewed for ADR practices.

Almost all states have either an appellate mediation program or some guidelines on how mediation can be utilized. Only one state, South Carolina, has a rule specifically on arbitration. South Carolina's rule is included in full below.

¹ [Understanding state court jurisdictions | National Center for State Courts](#)

South Carolina Appellate Court Arbitration

SC Rules of Appellate Practice Rule 223

(a) Arbitration by Consent. Except criminal cases and civil cases in which the State or one of its political subdivisions is a party, the parties may agree to arbitration of the appeal in lieu of having the case decided by an appellate court. Before any case may be disposed of by arbitration, counsel for all litigants must agree in writing to disposition of the case in that manner. The arbitration panel shall consist of three (3) retired justices, retired judges, active or retired attorneys, or a combination thereof who shall consent in writing to serve. The parties shall select their own arbitrators. The parties agreeing to submit their appeal to arbitration shall file a completed consent to arbitration form supplied by the Clerk of the Supreme Court. Each arbitrator shall receive actual expenses and compensation in the amount of \$150 for each case acted upon, to be charged against the losing party.

(b) Submission; Oral Argument. Counsel may agree to submit the case to the arbitrators on the basis of the transcript and the briefs filed or may require oral arguments. If a hearing is held it shall be at such place and time as counsel agree upon and need not be in Columbia.

(c) Decision. The arbitrators shall, within fifteen (15) days after argument, file their decision with the Supreme Court which shall be that the order or judgment on appeal be either (1) affirmed, (2) reversed, (3) modified, or (4) remanded. When the order or judgment is affirmed or reversed outright, no statement of reasons shall be required. If the order or judgment is modified or the case is remanded, a brief recitation of the modification or the purpose for which the remand is made shall be stated. No formal opinion shall be filed or published by the Supreme Court and the action of the arbitrator shall not serve as a precedent for any court of the State. In event of disagreement among the arbitrators a vote of two shall prevail.

(d) Judgment. The Supreme Court shall give to the decision of the arbitrators the same weight and force as a determination by the Supreme Court and judgment shall be entered and enforced accordingly. In no case shall the arbitrators' decision be subject to review. By consenting to arbitration, counsel and the parties waive all jurisdictional objections.

Trial Court Arbitration Programs

Three trial court level programs were reviewed and compared. To compare the three programs, the Hawai'i Arbitration Rules for the Court Annexed Arbitration Program (CAAP), the California Civil Rules Division 8 Chapter 2 "Judicial Arbitration", and the New York Rules of the Chief Judge Part 28 "Alternative Method of Dispute Resolution by Arbitration" were all reviewed and organized into common categories. Categories relating specifically to trial proceedings (discovery, evidence, etc.) were excluded.

The rules regarding each remaining category are detailed in the following tables.

Binding/Non-binding

CA	Haw. Arbitration Rule 1, Id. 6(C)	NY
Mandatory, can be binding/non-binding depending on the county ²	Mandatory, non-binding unless agreed upon	Mandatory

Cases Subject to Arbitration

Cal. Rules of Court, rule 3.811(a)	Haw. Arbitration Rule 6	22 NYCRR § 28.2
All civil cases with amount in controversy under \$50,000	- Tort cases less than \$150,000 - Any other civil case upon party agreement	Civil actions with recovery less than \$6k (\$10k in the City of NY)

Cases Exempt from Arbitration

Cal. Rules of Court, rule 3.811(b)	Haw. Arbitration Rule 8	NY
- Class actions - Small claims - Unlawful detainer - Family - Court's discretion	- Exemption must be requested - Reviewed by Arbitration Admin., appealable to Arbitration Judge	No exemptions specified

Assignment to Arbitration

Cal. Rules of Court, rule 3.812	Haw. Arbitration Rule 8	22 NYCRR § 28.5
- Stipulation to arbitrate - Written election of all plaintiffs - Any cases determined to be for less than \$50k	- All tort cases arbitration eligible and automatically "in" unless over \$150k - Reviewed by Arbitration Admin., appealable to Arbitration Judge	- Commissioner shall assign at least three but no more than 6 cases to each panel from the calendar

Arbitration Program Administration

Cal. Rules of Court, rule 3.813, Id. rule 10.783	Haw. Arbitration Rule 4	22 NYCRR § 28.3
- Administrator designated by presiding judge – supervise selection of arbitrator for cases and operations - ADR committee maintains panel, establishes procedures, and reviews program	- Arbitration judge appointed from CC judges by CJ - Arbitration Administrator appointed by CJ for each circuit - Arbitration committee – each Arb Judge, HSBA rep – maintains panel, establishes procedures, reviews program	- Arbitration commissioner in each county assigned by Chief Administrator - Maintains record of cases and list of atty. arbitrators

² [Court ADR Programs | Judicial Branch of California](#)

Panels of Arbitrators

Cal. Rules of Court, rule 3.814	Haw. Arbitration Rule 10	22 NYCRR § 28.4
- Every court must have a panel of arbitrators for personal injury cases³ and other panels as needed - The panels must be composed of active or inactive members of the State Bar, retired court commissioners licensed to practice law, and retired judges.	- Licensed attorneys and qualified non-attorneys - Substantial experience in civil litigation, licensed in Hawaii for 5 years - Orientation and training program, and additional training as scheduled	- Panelists appointed by Chief Administrator from NY State attys - Administrator may establish procedures to evaluate qualifications

Selection of the Arbitrator

Cal. Rules of Court, rule 3.815	Haw. Arbitration Rule 9	22 NYCRR § 28.4
- By stipulation, the parties may select any person to serve as arbitrator⁴ - Otherwise, the administrator has 15 days to randomly select arbitrators from the panel (equal to the number of sides plus one) - Each side has 10 days to file rejection of no more than 1 name	- By stipulation, parties may select a private arbitrator within 20 days of defense counsel appearance - Arbitration Administrator shall assign one arbitrator - Each party has 10 days to file an objection or appeal - Arbitration Administrator shall decide, appealable to the Arbitration Judge	- Random selection from list - When panel of three, first name drawn is chairperson - Chairperson must have been atty for 4 years - Only one member of partnership/firm per panel - List must rotate through fully

³ Must contain an equal number of those who usually represent plaintiffs and those who usually represent defendants.

⁴ If the person is not on the panel, they must submit consent to serve and oath with the stipulation.

Arbitration Hearings

Cal. Rules of Court, rule 3.817	Haw. Arbitration Rule 15, Id. Rule 16	22 NYCRR § 28.6
- The arbitrator has 15 days to set time, date, and place of the hearing - The hearing must be at least 30 days after the notice, and on a weekday. It must be scheduled within 90 days of the case assignment.	- All arbitrations must be finished and filed in 9 months - Pre-hearing conference required within 30 days of assignment - Pre-hearing statement due 30 days before hearing - Evidence and court files due 20 days before hearing	- Chairperson must schedule hearing not less than 15 or more than 30 days after the case is assigned, with 10 day notice - If chair fails to schedule within 30 days, case is continued - If case is continued twice, exits arbitration

Arbitrator's Fees

Cal. Rules of Court, rule 3.819	Haw. Arbitration Rule 9	22 NYCRR § 28.10
- Arbitrator's award must be filed with the clerk before a fee may be paid to them.⁵ - Arbitrator must submit fee statement to administrator. - Court ordered arbitration is pro bono.⁶	Arbitrators on the panel serve as volunteers. Parties may select a private arbitrator, in which case all fees and expenses are borne by the parties.	- Claim for compensation shall be made to commissioner after entry of award - Chief Administrator shall provide compensation to the extent of money available to the admin office

Award

Cal. Rules of Court, rule 3.825	Haw. Arbitration Rule 19, Id. Rule 20	22 NYCRR § 28.11
- Award must be in writing and signed - No findings or conclusions required - Must be filed within 10 days, unless granted additional	- Award must be in writing and signed - Determine all issues subject to arbitration, can award damages⁷ - No findings or conclusions required - Must be filed within 7 days of the hearing or 30 days after receipt of final memo from counsel	- Award must be signed by at least majority of panel - Must be filed within 20 days

⁵ There are some ways the court can authorize payment if the case settled without a hearing or award.

⁶ [Civil Alternative Dispute Resolution: Sacramento Superior Court](#)

⁷ Damages can be more than the jurisdictional amount.

Arbitrator's powers

Cal. Rules of Court, rule 3.824	Haw. Arbitration Rule 11	22 NYCRR § 28.8, <u>id.</u> § 28.9
- Administer oaths/affirmations to witnesses - To take adjournments - To permit testimony by deposition - To permit evidence - To rule upon admissibility of evidence - To request arbitration briefs - To decide the law and facts of the case and make an award - To award costs not exceeding the suit - To examine relevant sites or objects - May make a recording⁸	- Administer oaths/affirmations to witnesses - To relax applicable rules of evidence/procedure - To decide procedural issues - To request/order briefs - To examine relevant sites or objects - To issue subpoenas - To determine the time of the hearing - To interpret rules - To find witnesses/parties in contempt and impose sanctions - To attempt to aid in the settlement of the case - No transcription or recording allowed	- General powers of court including: - Subpoenaing witnesses or evidence - Administering oaths/affirmations - Determining admissibility of evidence - Deciding questions of law and facts - Record not required but party may make request at least 5 days before the hearing with \$50 deposit

Trial After Arbitration

Cal. Rules of Court, rule 3.826	Haw. Arbitration Rule 22	22 NYCRR § 28.12
- Within 60 days of award filing, party may request a trial - Case must be tried as though no arbitration had occurred	- Within 20 days of award filing, party may request a trial - Statements/testimony made in arbitration not admissible for trial	- Within 30 days of award notice, party may request a trial - Party must pay fees - Arbitrators cannot be witnesses and report cannot be evidence

Entry of Award as Judgment

Cal. Rules of Court, rule 3.827	Haw. Arbitration Rule 21	22 NYCRR § 28.11
- After the 60 days has passed, clerk must enter the award as judgement - The judgment entered is not subject to appeal	- After the 20 days has passed, clerk shall enter the arbitration as final judgement, with possible extension to 40 days - Award may not be appealed	Unless there is demand for trial, award shall be final and judgment entered by the clerk

⁸ The records are deemed arbitrator's personal notes and not subject to discovery. Additionally, no other record may be made.

Vacating Judgement on Award

Cal. Rules of Court, rule 3.828	HI	22 NYCRR § 28.13
Within 6 months of the award, party can move to vacate if the arbitrator did not disclose conflict of interest	No rules specified	- A party cannot file motion to vacate if they requested trial - Within 30 days of award, motion to vacate if: - corruption/fraud/misconduct in procuring award - panel exceeded its power or did not make a final and definite award - failure to follow procedures, unless party continued with notice of defect and without objection

Settlement of Case

Cal. Rules of Court, rule 3.829	Haw. Arbitration Rule 15	NY
If the case settles, each plaintiff must notify the arbitrator and court	Arbitrator immediately notifies Administrator if there is a settlement	No rules specified

Research

No existing research, studies, or other reviews on programs for arbitrating appellate cases found.

Private ADR

The following prominent US and international arbitration rules were reviewed in search of sections relating to arbitrating appellate cases:

- The American Arbitration Association's [Commercial Arbitration Rules and Procedures](#);
- CPR Dispute Resolution Services' [Arbitration Rules](#);
- Dispute Prevention & Resolution, Inc.'s [Arbitration Rules](#);
- the International Chamber of Commerce's [Arbitration Rules](#);
- the International Centre for Dispute Resolution's [International Dispute Resolution Procedures](#);
- JAMS Mediation, Arbitration, ADR Services' [Streamlined Arbitration Rules & Procedures](#);
- the London Court of International Arbitration's [Arbitration Rules](#);
- and the UN Commission on International Trade Law's [Arbitration Rules](#).

AAA, JAMS, and CPR had sections regarding the process for appealing arbitration awards, but none of the above included anything regarding appellate cases undergoing arbitration. However, it is worth noting that none of the sections specifying the application of the rules explicitly restrict cases on appeal from being arbitrated.

Appealing Arbitration Awards Requirements

AAA restricts appeals to awards based upon either (1) an error of law that is material and prejudicial, or (2) determinations of fact that are clearly erroneous.

CPR restricts appeals to awards where (1) the arbitrator(s) were required to reach a decision in compliance with applicable law and submitted a written decision with factual and legal bases, and (2) there is a record that includes all hearings and evidence in the original arbitration proceedings.

JAMS does not restrict what awards may be appealed in their program.

Analysis

Because there are no current rules or programs besides South Carolina's very limited rule, the rules for a potential arbitration program would likely have to be based upon trial court arbitration programs and appellate mediation programs.

Many private ADR firms note one of the most desirable aspects of arbitration is the binding nature of the award. These opinions and functions should be considered when drafting rules for a potential appellate arbitration program.

The most major difference between the three state programs is the number of days required for each deadline. It may be most helpful to utilize the Hawaii rules as those will be most familiar to practitioners here.

Conclusion

There is no substantial program for arbitrating appellate cases currently. There is no research done or reviewed. Starting an appellate arbitration program would be completely new.

The rules governing Hawaii's CAAP could serve as a good skeleton to base the new program on, but some changes may need to be made in regard to appellate procedure. See below for a proposed option based on CAAP, the Hawai'i rules of appellate procedure (HRAP), and the South Carolina Rule 223.