

REVISED AS OF  
DECEMBER 2015

# JUDICATE WEST

## APPELLATE RULES



*Results Beyond Dispute<sup>SM</sup>*

## JW APPELLATE RULES

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One of the cornerstones of the arbitration process is the finality of the award. However, in those rare circumstances in which the parties need to retain the ability to appeal an award, Judicate West now offers our Commercial Arbitration Appellate Rules. These Rules provide for appeals to a panel of our experienced commercial arbitration neutrals. All parties must expressly agree to use the appellate process. A party sometimes objects to arbitration simply because of its finality, the aspect that most would consider favorable in dispute resolution. In these cases, the Appellate Rules provide the practical solution and the safety valve necessary for parties who want to arbitrate, but who also want to retain appellate oversight.

# JW APPELLATE RULES

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## Table of Contents

<i>RULE 1. INTRODUCTION</i> .....	1
<i>RULE 2. EFFECT ON UNDERLYING AWARD OR DECISION</i> .....	1
<i>RULE 3. ACCESS TO APPEAL</i> .....	1
<i>RULE 3.A. AGREEMENT OF THE PARTIES</i> .....	1
<i>RULE 3.B. SAMPLE CLAUSES</i> .....	1
<i>Rule 3.B.1 Pre-Dispute Agreement to Appellate Review</i> .....	1
<i>Rule 3.B.2 Post-dispute Agreement to Appellate Review</i> .....	1
<i>Rule 3.B.3 Agreement to Appellate Review during Arbitration</i> .....	2
<i>RULE 3.C. JUDICATE WEST IS NOT GIVING LEGAL ADVICE</i> .....	2
<i>RULE 3.D. DELEGATION AND CHALLENGES TO JURISDICTION</i> .....	2
<i>Rule 3.D.1. Delegation of Powers and Responsibilities</i> .....	2
<i>Rule 3.D.3 Time for Challenging Appellate Panel Jurisdiction</i> .....	2
<i>RULE 4. REQUESTING APPELLATE REVIEW</i> .....	2
<i>RULE 4.A. REQUEST FOR APPEAL</i> .....	2
<i>Rule 4.A.1 Send a Request for Appeal</i> .....	2
<i>Rule 4.A.2 Sample Request for Appeal</i> .....	3
<i>RULE 4.B. DEPOSIT</i> .....	3
<i>RULE 4.C. ADMINISTRATION</i> .....	3
<i>RULE 4.D. REPRESENTATION BY COUNSEL</i> .....	3
<i>RULE 5. COMMUNICATIONS</i> .....	3
<i>RULE 5.A. NOTICES AND COMMUNICATIONS</i> .....	3
<i>RULE 6. APPELLATE PANEL SELECTION</i> .....	4
<i>RULE 6.A. SELECTING THE APPELLATE PANEL</i> .....	4
<i>Rule 6.A.1 Neutrals are Independent and Impartial</i> .....	4
<i>Rule 6.A.2 Number of Neutrals on the Panel</i> .....	4
<i>Rule 6.A.3 Process for Selecting Neutrals</i> .....	4
<i>Rule 6.A.4 Acceptance by Each Panel Member</i> .....	5
<i>Rule 6.A.5 Chairperson</i> .....	5
<i>RULE 6.B. REPLACING OR CHALLENGING A NEUTRAL</i> .....	5
<i>Rule 6.B.1 When a Neutral May Be Challenged</i> .....	5
<i>Rule 6.B.2 Process for Challenging a Neutral</i> .....	5
<i>Rule 6.B.3 Neutral May Be Replaced for Failure to Perform</i> .....	6

# JW APPELLATE RULES

---

<i>RULE 7. PRESENTATION OF CASE ON APPEAL</i> .....	6
<i>RULE 7.A. RECORD FROM UNDERLYING CASE</i> .....	6
<i>RULE 7.B. BRIEFS</i> .....	6
<i>Rule 7.B.1 Appellant’s Brief</i> .....	6
<i>Rule 7.B.2 Respondent’s Brief</i> .....	6
<i>Rule 7.B.3 Appellant’s Reply Brief</i> .....	7
<i>Rule 7.B.4 Extending Time Limits</i> .....	7
<i>RULE 7.C. NO EX PARTE COMMUNICATIONS</i> .....	7
<i>RULE 7.D. HEARING</i> .....	7
<i>Rule 7.D.1 Time Limits</i> .....	7
<i>Rule 7.D.2 Postponement of Hearings</i> .....	7
<i>Rule 7.D.4 Closing the Hearing</i> .....	7
<i>RULE 8. STANDARD OF REVIEW AND FORM OF DECISION</i> .....	8
<i>RULE 8.A. SCOPE OF REVIEW</i> .....	8
<i>RULE 8.B. APPLICABLE STANDARD OF REVIEW</i> .....	8
<i>RULE 9. NATURE OF DECISION</i> .....	8
<i>RULE 9.A. EACH NEUTRAL MAKES AN INDEPENDENT DECISION</i> .....	8
<i>RULE 9.B. GROUNDS FOR REVERSAL FOUND</i> .....	8
<i>RULE 9.C. GROUNDS FOR REVERSAL NOT FOUND</i> .....	8
<i>RULE 9.D. TIME FOR DECISION</i> .....	9
<i>RULE 9.E APPELLATE REMEDIES ON REVERSAL</i> .....	9
<i>RULE 9.F DETERMINATION OF PREVAILING PARTY AND COSTS ON APPEAL</i> .....	9
<i>RULE 9.G. CORRECTION OF A DECISION</i> .....	9
<i>RULE 9.H FINALITY OF DECISION</i> .....	9
<i>RULE 9.I FILING OF DECISION</i> .....	10
<i>RULE 10. PENALTIES FOR FAILURE TO COMPLY WITH RULES AND PROVISIONS</i> .....	10
<i>RULE 10.D.1 FAILURE TO COMPLY</i> .....	10
<i>RULE 10.D.2 WAIVER OF OBJECTIONS</i> .....	10
<i>RULE 11. DEPOSITS</i> .....	10
<i>RULE 11.A. FAILURE TO MAKE SUFFICIENT DEPOSITS</i> .....	10
<i>RULE 11.B. RETURN OF UNUSED DEPOSITS</i> .....	10
<i>RULE 11.C. RETURN OR DESTRUCTION OF DOCUMENTS AFTER HEARING</i> .....	10

# JW APPELLATE RULES

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## **Rule 1. Introduction**

These appellate rules are designed to give the parties and counsel greater flexibility and confidence in obtaining fair, efficient, and swift resolution of disputes. These appellate rules do not create a second avenue after litigation, mediation or arbitration, but allow the parties to be confident their dispute was resolved with fairness and justice.

## **Rule 2. Effect on Underlying Award or Decision**

The request for private appellate review, as detailed in these rules, stays implementation of the underlying award until completion of this appellate review process and the final award is either confirmed or a new award is made and served.

## **Rule 3. Access to Appeal**

### **Rule 3.A. Agreement of the Parties**

These rules only apply when the parties have agreed in writing to utilize a private “appellate review” process. At any time, the parties may agree in writing to request that the final decision or award be submitted for appellate review. These Appellate Rules are not applicable in consumer arbitration. Consumer arbitration is between individual consumers and a business that has a pre-written standard arbitration clause.

### **Rule 3.B. Sample Clauses**

The parties may specify in their agreement a specific process for private appellate review or may incorporate these JW Appellate Rules by including one of the following clauses or any similar language:

#### **Rule 3.B.1 Pre-Dispute Agreement to Appellate Review**

*In addition to the preceding agreement for dispute resolution, the parties agree that within (30) thirty days of receipt of a final award resolving the aforementioned dispute, claim or controversy arising out of or relating to this contract, including the scope, interpretation, breach or validity thereof though arbitration, either party may unilaterally request review of the award or decision by a private appellate panel consisting of \_\_\_ neutrals, in conformity with the Judicate West Appellate Rules. Costs to be divided \_\_\_\_\_. Judgment of the appellate panel will be final and the award rendered by the panel may be entered by any court having jurisdiction. The place of the appellate review will be (city, state).*

#### **Rule 3.B.2 Post-dispute Agreement to Appellate Review**

*The parties \_\_\_\_\_ and \_\_\_\_\_ hereby agree that within (30) thirty days of receipt of a final award resolving the dispute, claim or controversy between these parties, including the scope, interpretation, breach or validity of a contract, either party may unilaterally request review of the award by a private appellate panel consisting of \_\_\_ neutrals, in conformity with the Judicate West Appellate Rules. Costs to be divided \_\_\_\_\_. Judgment of the appellate panel will be final and the award rendered by the panel may be entered by any court having jurisdiction. The place of the appellate review will be (city, state).*

# JW APPELLATE RULES

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## **Rule 3.B.3 Agreement to Appellate Review during Arbitration**

*The parties \_\_\_\_\_ represented by \_\_\_\_\_ and \_\_\_\_\_ represented by \_\_\_\_\_ hereby agree that upon conclusion of the arbitration and within (30) thirty days of receipt of the final award either party may unilaterally request review of the award by a private appellate panel consisting of (number) \_\_\_\_\_ neutrals, in conformity with the Judicate West Appellate Rules. Costs to be divided \_\_\_\_\_. Judgment of the appellate panel will be final and the award rendered by the panel or pursuant to its decision by the underlying arbitrator(s) may be entered by any court having jurisdiction. The place of the appellate review will be (city, state).*

## **Rule 3.C. Judicate West Is Not Giving Legal Advice**

The sample clauses contained in these rules are to aid parties and their counsel in drafting contracts and should be considered in consultation with the advice of legal counsel. JW will not give legal advice, and is not giving legal advice as to the precise language to be used nor its meaning or effect.

## **Rule 3.D. Delegation and Challenges to Jurisdiction**

### **Rule 3.D.1. Delegation of Powers and Responsibilities**

By agreeing to the applicability of these rules, the parties delegate to Judicate West and the appellate panel selected, the power and responsibility to resolve all administrative issues, disputes, and related matters relevant to the subject matter embraced by their agreement, except as otherwise agreed by the parties and provided for in writing to Judicate West at the outset of the engagement for the appellate review proceeding.

### **Rule 3.D.2 Challenges to Jurisdiction**

To the fullest extent permitted under applicable law, disputes as to the jurisdiction of the appellate panel and the scope of that jurisdiction as to any issue, including disputes regarding the existence or validity of an agreement that is the basis for the dispute, or any other disputed claims or controversies, may be heard and determined by the appellate review panel. In any challenges to jurisdiction, an appellate review clause will be considered separable from the remaining provisions of any agreement of which it forms a part.

### **Rule 3.D.3 Time for Challenging Appellate Panel Jurisdiction**

Any challenges to the jurisdiction of the appellate review panel, except challenges based on the award, must be made within 15 days of selection of the appellate panel. Any jurisdictional challenge, thereafter, must be based upon new matters raised and be immediately brought to the panel's attention in writing.

## **Rule 4. Requesting Appellate Review**

### **Rule 4.A. Request for Appeal**

#### **Rule 4.A.1 Send a Request for Appeal**

After the receipt of a final award a party can request appellate review by serving a Request for Appeal to counsel of record for each party and to the appellate administrator at Judicate West within 20 days of the service of the final Award in the underlying case. There are no writs or other interim appellate forms of relief under these rules.

# JW APPELLATE RULES

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## **Rule 4.A.2 Sample Request for Appeal**

\_\_\_\_\_ PARTY (Plaintiff) v. \_\_\_\_\_ PARTY (Defendant)      DATE

JW Case NO: \_\_\_\_\_

\_\_\_\_\_ (party) represented by \_\_\_\_\_ (legal counsel) hereby requests appellate review of the \_\_\_\_\_ (final award / arbitration decision) entered on \_\_\_\_\_ (date).

A copy of the agreement to submit the matter for appellate review and a copy of the underlying award/decision is attached.

## **Rule 4.B. Deposit**

The party requesting the appeal will submit a deposit of an appropriate amount to be utilized for the administration of the appeal, as detailed in Rule 11.

## **Rule 4.C. Administration**

A JW appellate administrator will be assigned to the matter and will contact all counsel for all parties to confirm representation and calendar panel selection and hearings.

## **Rule 4.D. Representation By Counsel**

Each party will be represented by a licensed attorney(s) of their choice, and, promptly and in writing, will provide contact information, including the name, address, telephone number, fax number and e-mail address for its attorney(s), to the other parties, the neutrals and to JW. Upon change, replacement or substitution of counsel, the party(ies) involved will update that information immediately. JW reserves the right to decline administration of any matter, or cease administration of any matter, where one or more parties are not represented by counsel. If for any reason any party to the appeal ceases to be represented by counsel, the appellate panel may suspend or terminate the appellate process, unless doing so would unduly prejudice a party, or unless the neutral determines that in the interests of justice and equity the appeal should proceed.

## **Rule 5. Communications**

### **Rule 5.A. Notices and Communications**

Notices or other communications under these rules must be in writing and sent to the address specified in writing by the recipient or, if no address has been specified, to the last known business or residence address of the recipient. Notices and communications may be given by any means that provides a written record. The burden is on the sending party to assure that the appellate panel, the JW appellate proceedings administrative team, and all parties receive the notice or communication.

## **Rule 5.B. Date of Receipt of Communications**

Communications will be deemed received and time periods will start to run as follows: DATE OF TRANSMISSION for communications transmitted by electronic mail, facsimile transmission, or by hand-delivery by no later than 6:00 pm in the venue of the appellate proceedings hearing; DATE OF DELIVERY for overnight delivery; THREE DAYS AFTER MAILING for communications sent via U.S. Mail. If the date a communication will be deemed received falls on a weekend or court holiday in the place the communication is received, then the date of receipt will be on the next business day in the place the communication is received. Proof of transmission is prima facie evidence of proof of service / receipt of any notice or communication sent under these rules.

## **Rule 6. Appellate Panel Selection**

### **Rule 6.A. Selecting the Appellate Panel**

#### **Rule 6.A.1 Neutrals are Independent and Impartial**

Each neutral will be independent and impartial and will be bound by these rules.

#### **Rule 6.A.2 Number of Neutrals on the Panel**

Unless otherwise specified, the dispute will be determined by a panel of (3) three neutrals.

#### **Rule 6.A.3 Process for Selecting Neutrals**

- a. If the parties have agreed on the neutrals to be appointed, those neutrals will be notified and follow the procedures in Rule 6.A.4.
- b. When two or more claimants in a case have aligned interests in the outcome of the claims in dispute, they will be treated as a single party for purposes of the appellate panel selection process. A claimant with a divergent interest to the other claimant(s) will be treated as a separate party. The same applies to cases with more than one respondent; respondents with aligned interests in the outcome of the claims in dispute will be treated as a single party for purposes of the appellate panel selection process. Any dispute as to the number of parties will be resolved by JW.
- c. Selection Process
  1. Unless the parties otherwise agree or the contract otherwise states, in two-party cases (as defined in Rule 6.A.3.b) JW will provide a list of seven neutrals, with each party striking up to two and ranking those remaining. In matters where there are three or more parties or otherwise specified, JW will provide a list of neutrals that exceeds by three the maximum possible number of strikes permitted by the above rule.
  2. The three Neutrals ranked highest (the lowest combined numbers) will be selected.
- d. If a party fails to participate in the above selection procedures, or if for any other reason the above selection procedures fail to result in the selection of the appropriate number of panel members, JW will appoint the neutral(s) it deems qualified to serve.

## **Rule 6.A.4 Acceptance by Each Panel Member**

1. JW will promptly notify the neutrals selected for the appellate panel of the appointment and will provide each panel member copies of the claim and/or any information JW has regarding the case and the identities of the parties, their attorneys and any known witnesses.
2. Within 10 calendar days of being advised of the selection, the selected neutrals will notify JW in writing of acceptance of the appointment and provide the disclosures required by law for the parties. The disclosures to be made include any circumstances that might cause a reasonable person to question the neutral's independence or impartiality, such as any bias, any interest in the outcome of the dispute, or any past or present relationship with the parties or their representatives. In addition, the neutral will promptly disclose any circumstances that arise that could cause a reasonable person to question the neutral's impartiality.
3. JW will promptly forward all disclosures to the parties and will notify the parties of the appointment. JW will also disclose to the parties the applicable fee arrangement for the selected neutrals at the time of appointment.

## **Rule 6.A.5 Chairperson**

The panel of neutrals will appoint one of themselves as chairperson who will act to set deadlines and make decisions that assist the appellate administrator in creating an efficient appellate process. All decisions that may affect final resolution of the matter to be reviewed will be made by the panel.

## **Rule 6.B. Replacing or Challenging a Neutral**

### **Rule 6.B.1 When a Neutral May Be Challenged**

Any neutral may be challenged if circumstances exist or arise that give rise to a legitimate question regarding that neutral's independence or impartiality. In order to prevent delay and potential prejudice, all parties are urged to conduct customary due diligence searches regarding the suitability of the neutral at the time the initial disclosures are received. All parties have an obligation to disclose promptly any information that suggests that the neutral's impartiality or independence might reasonably be in question.

### **Rule 6.B.2 Process for Challenging a Neutral**

- a. A party may challenge a neutral only by giving notice in writing to JW, with a copy to the neutral and the other parties, no later than 15 days after the challenging party (i) receives notification of the appointment of that neutral and any disclosures made by that neutral, or (ii) becomes aware of circumstances that lead to a legitimate question regarding the neutral's independence or impartiality.
- b. The challenge will state with specificity the circumstances and rationale that raise a legitimate question about the neutral's impartiality.
- c. The neutral will be replaced if the other party agrees to the challenge or if the neutral voluntarily withdraws. A replacement neutral will be selected pursuant to the process specified in Rule 6.A.3.
- d. If neither agreed disqualification nor voluntary withdrawal occurs, JW will provide the non-challenging party and the neutral an opportunity to comment on the challenge. JW will then assign three neutrals, not including the appointed neutrals, to decide the challenge based on the merits and the interests of justice, without charge to the parties.
- e. If a neutral must be replaced, the appellate proceedings will be stayed until a replacement neutral is selected.

## **Rule 6.B.3 Neutral May Be Replaced for Failure to Perform**

If a neutral fails to perform, or for any reason is prevented from performing the functions of a neutral, such as death, incapacity or resignation, a replacement neutral will be chosen using the selection process in Rule 6.A.3. Any unearned neutral fees on deposit will be applied to the replacement neutral. If the parties do not agree on whether the neutral has failed to act or is prevented from performing the functions of a neutral, any party may request that JW make that determination. JW will then assign three neutrals to make that determination based on the merits and the interests of justice, without charge to the parties. If the panel determines a replacement neutral is required, a replacement neutral will be selected pursuant to the process specified in Rule 6.A.3.

## **Rule 7. Presentation of Case on Appeal**

### **Rule 7.A. Record from Underlying Case**

The parties and their counsel will assist the appellate administrator to gather and present a Record for each neutral on the appellate panel. The Record will include copies of all evidence submitted in the underlying proceeding and either the stenographic record or the settled statement of the facts. Evidence submitted that is confidential, privileged, or protected will be marked accordingly. No new evidence may be presented to the appellate panel. The chairperson of the appellate panel will set a deadline for the submission of the Record. Any party may object to or request clarification of the Record by motion.

### **Rule 7.B. Briefs**

#### **Rule 7.B.1 Appellant's Brief**

- a. Within (15) fifteen days after the Record has been submitted, Appellant will submit a brief explaining the error in the underlying decision or award, citing specific evidence and law. The brief should also state whether the appellant wishes to submit on the briefs or have oral argument.
- b. At the same time, Appellant will also submit a numbered Statement of Claims to be decided. The Statement of Claims will have a separated 2" margin on the right side of each page, to allow the neutrals to note whether, for each claim, there are grounds for reversal.

#### **Rule 7.B.2 Respondent's Brief**

- a. Within (20) twenty days after Appellant's brief has been served, Respondent will submit a brief explaining whether Respondent agrees or disagrees with the underlying decision or award and agrees or disagrees with the arguments made in appellant's brief, citing specific evidence and law. The brief should also state whether the respondent wishes to submit for appellate decision based entirely on the briefs or requests oral argument.
- b. The Respondent's brief will also include a Response to the Statement of Claims, utilizing the same numbering as is in the appellant's Statement of Claims to be decided. The Response to the Statement of Claims will specifically state respondent's agreement or disagreement with each claim and a brief summary statement of the reasons therefor.

## **Rule 7.B.3 Appellant's Reply Brief**

Within (15) fifteen days after Respondent's brief has been served, Appellant may submit a brief replying to the arguments made in respondent's brief. The reply brief should also state whether the Appellant wishes to submit for appellate decision based entirely on the briefs or requests oral arguments.

## **Rule 7.B.4 Extending Time Limits**

The chairperson of the appellate panel may extend any time limit for good cause shown.

## **Rule 7.C. No Ex Parte Communications**

No party, or anyone on behalf of a party, may have any ex parte or unsolicited communication with a neutral concerning any matter relating to the appeal. Should any party, or anyone acting on behalf of any party, communicate directly with a neutral on the appellate panel in violation of this rules, or should the content of any such communication be considered by a neutral on the appellate panel to be an attempt to prejudice the appellate proceedings, the appellate panel may impose such sanctions or take such other action as the appellate panel deems appropriate.

## **Rule 7.D. Hearing**

If oral argument has been requested, the appellate administrator will schedule a hearing before the appellate panel, at a time convenient to the neutrals and all parties, to be set within (20) twenty days of the submission of the Reply or the deadline for submission of the Reply if no Reply was submitted. The deadline for setting oral argument may be extended for good cause by the chairperson of the appellate panel.

### **Rule 7.D.1 Time Limits**

The appellate panel has the power to impose reasonable time limits on each phase of the hearing, including the time allotted to each party for explanations, arguments, and rebuttal. In setting time limits, the appellate panel will manage the proceedings appropriately to conclude the appellate proceedings as economically and expeditiously as practicable without compromising fairness.

### **Rule 7.D.2 Postponement of Hearings**

The appellate panel may postpone any hearing upon request, for good cause shown, or on the panel's own initiative. The parties cannot unilaterally postpone the hearing. Postponement is discouraged due to the considerable difficulty of rescheduling. Postponement or cancellation within 45 days of the hearing may affect refunds or credits of fees paid or due.

### **Rule 7.D.4 Closing the Hearing**

When the appellate panel determines, after inquiry of counsel for the parties, that there are no additional arguments to be presented, the appellate panel will declare the hearing closed. However, if post-hearing briefs are to be filed, and unless the appellate panel determines otherwise, the hearing will be deemed closed as of the date of receipt of the briefs or at the conclusion of closing arguments, whichever is later. The time limit for the appellate panel to make the decision will begin on the date the hearing is closed, unless the parties agree otherwise.

## **Rule 8. Standard of Review and Form of Decision**

### **Rule 8.A. Scope of Review**

The appellate panel will review the Statement of Claims and Record for grounds for reversal.

### **Rule 8.B. Applicable Standard of Review**

The standard for determining whether there are grounds for reversal shall be the same legal standard applicable for the underlying proceeding, unless otherwise agreed by the parties in writing.

### **Rule 8.C. Privilege**

The appellate panel will apply applicable law pertaining to attorney-client privilege, other privileges and work product. Unless put at issue for error, the appellate panel will respect and follow the determinations made in the underlying matter on the issue of any privilege, waiver or immunity.

## **Rule 9. Nature of Decision**

### **Rule 9.A. Each Neutral Makes an Independent Decision**

The appellate panel may decide whether each neutral will deliberate individually or working together on each claim to be ruled upon, but each neutral must make his or her own determination and decision. A majority decision will identify and decide each item in the statement of claims.

### **Rule 9.B. Grounds for Reversal Found**

If a majority of the appellate panel decides that there are grounds for reversal with respect to any claim in the Statement of Claims, then the appellate panel's decision will supersede the underlying decision for that claim. The specific remedy on appeal will be determined in accordance with Rule 9.E below. The remainder of the underlying award will be final. The majority decision will contain a reasoned decision in connection with each claim. The neutrals who agree with the finding of grounds for reversal will sign and date the majority decision. A neutral who disagrees will prepare, sign and date a dissenting opinion.

### **Rule 9.C. Grounds for Reversal Not Found**

If a majority of the appellate panel decides that there are no grounds for reversal of the underlying matter, then the appellate panel will issue a decision so indicating, and the entire underlying award will be final. All costs of the appeal will be paid by the appellant. The majority decision will contain a reasoned decision in connection with each Claim. The neutrals who agree with the finding of no grounds for reversal of the underlying award will sign and date the majority decision. A neutral who disagrees will prepare, sign and date a dissenting opinion.

## **Rule 9.D. Time for Decision**

The decision of the appellate panel will be made no later than 30 days from the date of close of the hearings, unless the parties agree to a later date, or unless there is good cause for the appellate panel to extend the time for making the decision. JW has the right to withhold a decision from all parties until all requisite fees and deposits owed by the parties have been paid in full. If JW withholds a decision for this reason, the appellate panel will be deemed to have good cause to extend the time for making the decision, and in any event, the decision will not be rendered tardy or invalid.

## **Rule 9.E Appellate Remedies on Reversal**

The remedies at the appellate level will vary depending upon the nature of the case and the appellate findings with respect to grounds for reversal. Specific awards at the appellate level will only be made if there is no need for the presentation of evidence to make the determination. Most specific remedies resulting from the decision on appeal will be implemented through reference back to the arbitrator or panel that heard the underlying matter. Examples of awards at the appellate level would be awards that require only mathematical calculation or involve only uncontested amounts or awards that can be made strictly based upon the Record. The appellate panel will not take evidence.

## **Rule 9.F Determination of Prevailing Party and Costs on Appeal**

In appropriate cases, the decision will identify the prevailing party or parties, if any, for purposes of allocating the costs associated with the proceedings and dealing with any issues of punitive damages or attorney's fees. In appropriate cases, the appellate panel will award costs to the prevailing party.

## **Rule 9.G. Correction of a Decision**

Within 10 days after service of the decision, any party, in accordance with Rule 5.B. may give notice to the appellate panel, the JW appellate proceedings administrator, and the other parties, and request that the appellate panel correct any clerical, typographical or computation errors, or any errors. The request must be sent at least via electronic mail to all parties, the appellate panel, and the JW appellate proceedings administrator. The burden is on the requesting party to assure that the appellate panel, the JW appellate administrator, and all parties receive the notice of the request for a correction of an decision within the 10 day timeframe, and failure of the appellate panel, JW or any party to receive the notice of the request may constitute waiver of the request. The other parties will have 10 days to respond to the request. The appellate panel will make any correction or additional decision the appellate panel deems justified within 30 days of initial service of the decision. Unless the appellate panel notifies the parties within 30 days of the initial service of the decision that additional time is required to consider the request for correction, the request will be deemed denied if the appellate panel does not respond to the request within 30 days of service of the decision. The process repeats, if warranted, allowing a party, within 10 days after delivery of the corrected or additional decision to the parties, to request a correction or additional decision, 10 days for other parties to respond, and within 30 days from service of the corrected decision for the appellate panel to make any further corrections and additional decisions. The appellate panel, as appropriate, may make any correction or additional decision within 30 days of the service of the decision. All corrections, and additional decisions will be in writing, and the provisions of these rules will apply to them. The appellate panel automatically retains jurisdiction indefinitely to hear an application from any party to remove from any decision information asserted to be confidential and not essential to the decision.

## **Rule 9.H Finality of Decision**

The decision, including any amendments, will be considered final and binding on the parties. The parties will undertake promptly to carry out the decision without delay. The parties to the appellate proceedings will be deemed to have consented that judgment on the decision may be entered in any federal or state court having jurisdiction.

## **Rule 9.I Filing of Decision**

The parties are responsible for filing the decision with a court of competent jurisdiction and any confirmation or enforcement proceedings.

## **Rule 10. Penalties for Failure to Comply with Rules and Provisions**

### **Rule 10.D.1 Failure to Comply**

Whenever a party fails to comply with these rules, or any order of the appellate panel pursuant to these rules, in a manner deemed material by the appellate panel, the appellate panel may fix a reasonable period of time for compliance. If the party does not comply within said period, the appellate panel may impose any remedy the appellate panel deems just, including payment of costs or determination of an issue or claim.

### **Rule 10.D.2 Waiver of Objections**

A party knowing of a failure to comply with any provision of these rules, or of any requirement of the appellate proceedings agreement or any direction of the appellate panel, and neglecting or failing to state its objections promptly, waives any objection thereto.

## **Rule 11. Deposits**

The Appellant, upon notification by JW, will deposit an appropriate amount as an advance for the estimated costs of the appellate proceedings that will be incurred by the parties, including hearing fees, fees incurred by the appellate panel for time outside of hearing time, and the administrative/case management fees of JW. During the course of the proceedings, JW may request supplementary deposits, as appropriate. Any such amounts will be held and disbursed in such a manner as is necessary and appropriate to compensate the appellate panel for fees and expenses, and JW for its fees, and as otherwise directed by the appellate panel. The final award after the appellate review process may allocate the costs of the proceeding in accordance with Rule 9.F.

### **Rule 11.A. Failure to Make Sufficient Deposits**

If the deposits requested by JW are not paid in full by the date stated on the invoice, JW may inform the other parties. If a party neglects or refuses to deposit the amount requested, another party may make the deposit, which will be a cost item in the proceedings. If the requested deposits are not made, JW or the appellate panel may suspend or terminate the appellate proceedings.

### **Rule 11.B. Return of Unused Deposits**

After the appellate proceedings have been concluded, JW will return to the parties any unexpended balance of the retainer deposits as may be appropriate.

### **Rule 11.C. Return or Destruction of Documents After Hearing**

Within 10 days after the appellate proceedings have been concluded a party may request return of that party's documents and JW will arrange for return of the documents. If no request is received within the 10-day period then JW will destroy the documents.