

ABA Section on Dispute Resolution's Arbitration Committee E-Newsletter

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The College of Commercial Arbitrators—Setting the Standard

By: James M. Gaitis

From its founding in 2001, one of the principal goals of the College of Commercial Arbitrators (the CCA) has been to establish and promote “best practices” in commercial arbitration. One of the CCA’s primary vehicles for achieving that objective is The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration, the fourth edition of which was released in October 2017.

The CCA Best Practices Guide, the brainchild of the late Honorable Winslow Christian (a former California appeals court justice and a founding member of the CCA), is the product of an intensive collaborative effort by scores of CCA Fellows. The production of the first edition of the Guide involved not only an exercise in substantial legal and practical analysis but also an excursion into creative legal writing due to the need to generate a product that would serve to focus the attention of commercial arbitrators and provide them with a practical resource that was easy to use. The Honorable Curtis E. von Kann (ret.), Editor in Chief of the first edition, ultimately conceived the format that continues to provide the structural framework upon which the Guide is founded. The goal has always been to identify best practices that arbitrators can employ in order to comply with evolving arbitration law and rules and, further, to provide users of arbitration with the highest possible standards of economy and fairness in the disposition of business disputes.

Over the years, the CCA Best Practices Guide—which has grown from 260 to 670 pages and from 12 to 20 chapters—has provided incisive and groundbreaking analysis of many of the issues that commercial arbitrators confront before their appointment, and during and after the commencement and completion of commercial arbitrations. Perhaps most importantly, the Guide has always offered reasoned explanations of why certain approaches for

Member Spotlight: Gary Benton



This issue in the Arbitration Committee Member Spotlight, we are proud to hear from Gary Benton, a full-time arbitrator and mediator of international and domestic commercial disputes, based in Palo Alto, California. <https://www.garybentonarbitration.com>

1. How did you get into the dispute resolution field?

A lucky break – as a young associate I got a job with Coudert Brothers which, in its day, was the premiere international arbitration firm. So, I had the opportunity to learn from some of the luminaries in the field.

2. What roles do you currently play in the dispute resolution field—e.g., domestic arbitrator, international arbitrator, mediator, lawyer representing clients, other?

I have at least two full time jobs right now. I’m a full-time arbitrator, about 2/3 of my work is international and about 1/3 domestic, almost all private investment or technology industry-focused. Mediation fills in the gaps – it requires me to be friendly to people every once in a while, so that’s good. My night job is as the Chairman of the Silicon Valley Arbitration & Mediation Center (SVAMC), a non-profit that serves the global technology sector. SVAMC provides tech companies complimentary resources on efficient tech dispute resolution. SVAMC doesn’t administer cases; rather, we collaborate with tech companies, law firms, universities and all the leading ADR providers. There’s a lot of good being done with education, expanding the field and supporting diversity.

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Gary Benton, Cont.

3. How did you begin your career as an arbitrator?

I started off as an IP litigator and quickly realized that litigation wasn't a very efficient or uplifting process. So, I just started learning everything I could about arbitration, and began exploring innovative ways to bring technology disputes to arbitration. AAA was, and still is, very supportive of the field.

4. What knowledge, experience and/or skills are essential for a successful arbitrator?

I'll do my percentages wrong again – I think industry experience, knowledge of the substantive law, capacity in the arbitration process and arbitration temperament are all 100% requirements. To me, the role is entirely different from being a judge – you're being hired to apply the law but you have to roll up your sleeves, work with counsel and think like a businessperson in a practical, industry-focused way.

5. Do you specialize in a particular subject matter or field? If so, how did you become involved in that field?

Yes, I left New York and started my legal career in Silicon Valley – and there was little choice but to become a technology lawyer. I've done patent litigation, licensing and distribution work, tech development contracts, venture capital financings, M&A and IPOs, and served as inside and outside counsel for some of the most exciting companies in the world

6. In your opinion, what is the most important issue in arbitration today?

To me, it's the global expansion of industry sectors and the resulting opportunities for arbitration. Emerging companies in China and elsewhere in Asia are already changing the way we think about how, when and where arbitration and mediation should be used.

7. Is there anything else you would like to tell the readers about yourself?

My wife and kids think I'm kind of geeky being into tech ADR but I think it's cutting edge and I'm kind of fun.

addressing particularly complex issues are deemed to be so-called best practices and, when a single best practice cannot be identified, what considerations should normally be considered when determining what approach to take. Prior editions of the Guide have proved to have been at the fore in their prescient and insightful analyses of such issues as the appointment of arbitrators and arbitrator disclosures; the use of party-appointed arbitrators both before and after the 2004 amendments to the AAA Commercial Rules and the AAA/ABA Code of Ethics; finality and *functus officio*; intratribunal relations; and unique issues relating to class arbitrations, international arbitration, and hybrid arbitration processes.

The fourth edition of the Guide substantially expands and refines discussions found in prior editions, including with respect to such critical matters as arbitrability; the management of commercial arbitrations; the drafting of arbitral awards and decisions; and eDiscovery. The fourth edition also contains new chapters concerning third-party summonses, emergency arbitrators, and construction arbitrations. Readers of the fourth edition will further benefit both from a new and comprehensive checklist that may be used for preliminary conferences and from new guidance relating to a party's failure to make deposits or pay administrative fees. Finally, the fourth edition includes two new appendices separately pertaining to (1) the security of arbitrators' electronic information and (2) social media and related disclosure considerations.

In the words of some of the leading representatives of the AAA, JAMS, and the CPR, The CCA Best Practices Guide is a "highly comprehensive and authoritative source" that "sets a clear standard for exceptional performance" by providing commercial arbitrators with the "essential tools" they require to provide the quality of service expected of them by the arbitration community. The CCA fully anticipates that in the coming years the CCA Best Practices Guide will continue to evolve and improve with the publication of future editions. The fourth edition of the Guide is available online at <http://www.jurispub.com/Bookstore/?search=college+commercial+arbitrators>.

James M. Gaitis, Distinguished Fellow, College of Commercial Arbitrators and Editor in Chief, The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (J. Gaitis, A.H. Gwyn, L. Kaster, J. McCauley eds., JURIS 2017 4th ed.).

Practice Tips: The Pre-Hearing Conference

By: Dana Welch

Most arbitrators understand the central importance of the preliminary hearing, held soon after their appointment. And rightly so. Meticulous attention at the preliminary hearing to planning each step of the arbitral process, and tailoring it to the needs of the particular dispute, can make all the difference between a well-run, efficient arbitration and one that spins out of control.

The final, pre-hearing conference, typically occurring about a week or ten days before the evidentiary hearing, has attracted far less attention. But attention should be paid: the pre-hearing conference, effectively run, can set the stage for a well-run, efficient, evidentiary hearing. Here are some tips for conducting it:

- Schedule the pre-hearing conference (typically a teleconference) during the preliminary hearing. That way it gets on everyone's calendar.
- Make sure that prehearing briefs and final exhibit and witness lists are due in enough time for you to review them before the pre-hearing conference. Discuss the due date at the preliminary hearing, and get it in the Scheduling Order. I typically only need a few days (longer in a very complex dispute); you may need more.
- At the preliminary hearing, get one of the parties to volunteer to prepare a joint exhibit book, which will be prepared based on the final exhibit lists.
- Circulate an agenda before the pre-hearing conference. Mine is in the form of a checklist. Here are the items that should be addressed (you may have others):
 - o Who will be present at the hearing?
 - o Any motions *in limine*?
 - o Court reporter?
 - o Opening statements? Length?
 - o Witness order – length of examination.
 - o Experts?
 - o Time management (if necessary) at hearing (chess clock, other time limits)
 - o Exhibit books/flash drive –are they prepared? Are the exhibits agreed to?
 - o Rules for admission of documents.
 - o Rules for objections to evidence.
 - o Closing arguments/closing briefs.

The parties want to know what to expect at the evidentiary hearing; you want to control the hearing so as to maximize its efficiency. The pre-hearing conference is the place to start.

Dana Welch is an arbitrator based in Northern California who is listed on the American Arbitration Association's Large and Complex Commercial Case and Employment panels, and the CPR Institute for Conflict Resolution and Prevention. She is the former Chair of the State Bar of California's Standing Committee on ADR, and is a fellow of the College of Commercial Arbitrators. <http://www.welchadr.com>

CO-CHAIRS' UPDATE – SURVEY RESULTS AND MORE NEWS

(Ed. Note: In this issue of the ArbCom E-Newsletter we are starting a column from the Committee's Co-Chairs with news and updates for the membership)

Ed Lozowicki is honored to be the new Co-Chair of the ArbCom, and Louis and Ed welcome all members to the new bar year of activities.

We have some good news for the members. First, the ArbCom's membership is growing. The Committee now has about 460 members which is a significant increase over prior years. Second, there was a large response to the membership survey recently sent to all members. About 80 members completed the survey and the results are impressive. To summarize, here are some take-aways from the survey:

*The large majority of responders agreed that the ArbCom's membership should include a cross-section of the arbitration community: arbitrators, attorneys, academicians, judicial officers, and arbitration providers.

*A wide plurality said that the Committee should address a variety of topics including both domestic and international arbitration, its benefits, arbitrator qualifications and standards, developments in the law and proposed legislation.

*Many members volunteered to work on the Committee's projects, activities and sub-committees such as: presenting educational programs and webinars, writing articles for the E-Newsletter and increasing membership & diversity.

We are gratified to see the high level of interest of members in working on our projects and sub-committees.

Gilda Turitz would like to announce that she recently wrote a white paper for the CCA on "Arbitrating the Business Divorce of the Closely Held Company." Available at: <https://www.ccaarbitration.org/wp-content/uploads/Business-Divorces.pdf>.

Finally, our quarterly teleconference on October 12 was productive. The sub-committee chairs/co-chairs introduced themselves and described their goals for their work in the new bar year. Then Ed and Louis presented four new goals for the coming year: to include a short educational program as part of our quarterly telecons; co-sponsoring webinars with other ABA sections and committees; to include a "Practice Tips" column in our E-Newsletter; and to update the ArbCom website. In the survey several members expressed interest in working on these initiatives.

Peter Merrill proposed that we undertake a new project to draft and promulgate a uniform set of arbitration rules to be used where a binding arbitration agreement but the drafters failed to specify a set of rules to govern the arbitration proceedings. Peter volunteered to lead a group to work on this project.

We have a great slate of activities and projects lined-up for the new bar year and look forward to working with all of you on them.

Ed Lozowicki and Louis Burke, Co-Chairs