LEGAL TERMS for NON LAWYERS
COMMONLY USED IN ARBITRATION PROCEEDINGS

Presented by:

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Acknowledgments:

This material was first presented with the title of “Legal Gobbly-Gook in Arbitration Proceedings” to American Arbitration Association neutrals in Kerrville, Texas in October 1997 at the First AAA Southwest Arbitration Retreat and subsequently at the AAA Neutrals Conference in Orlando, Florida (October 1998), the AAA Neutrals Conference in Scottsdale, Arizona (January, 2003) and again at the AAA Neutrals Conference in Sunny Isles Beach, Florida (March, 2006). We have modified the contents and added several new terms which have been brought to our attention at each of the presentations. We hope all that review this material will find it informative.

Special thanks to the AAA Central Case Management Center in Dallas, Texas which provided assistance in the research. Also a special thanks to Ruth Franklin, Attorney at Law and AAA neutral, Phoenix Arizona, who first assisted in providing and sharing information previously assembled by AAA panel members from other regions of the country.

The contents of this presentation have been modified for arbitrators new to the AAA’s Roster of Neutrals as part of the pre-requisite training (module 1) for all non-lawyer arbitrators. Special care has been taken to maintain both the essential learning points of the original presentations and the sense of humor of the authors.
INTRODUCTION

As arbitrators for the AAA we are attempting to learn the facts of a case to which we have been assigned and to listen to all of the issues brought before us so that we may make a proper ruling based on our understanding of the facts, and the law.

Many times during the various phases of an arbitration proceeding, attorneys representing a party will introduce a legal term or concept in an attempt to persuade the arbitrator or panel of arbitrators to adopt his/her position. The terms used by the attorney are often based on his/her legal training and are "common" to them; however, they are not "common" to the industry arbitrator.

It is our goal to discuss many of the more commonly used legal terms; when they normally arise, what they generally mean, and how to seek further clarification when the legal issue remains confusing. We have attempted to gather information from "far and wide" (a non legal term) and assemble it in one place for AAA arbitrators to review and keep as a reference guide for the future. We know we have probably missed “plenty” (a Texas word) of words or phrases about which you may still have questions. Please address these questions at your scheduled AAA classroom program Arbitration Fundamentals and Best Practices for New AAA Arbitrators.

Our presentation has been broken down into two distinct sections. The first section has been arranged so as to work through a typical arbitration hearing format. We have categorized the legal terms in the various phases of the arbitration proceedings where you will most likely hear them. Secondly, we have provided an alphabetical listing of all the terms we have identified so you may easily review specific terms at any time.

We hope you find this information helpful in your understanding and administration of future AAA cases.
Outline of Arbitration Hearing and Common Terms

I. Legal Relationships Out of Which a Dispute Arises.

II. Pre-Hearing Matters

III. Evidentiary Hearing
   A. Procedures
   B. Evidence
   C. Damages
   D. Other Misc. Items

IV. Awards

V. Miscellaneous (when lawyers develop new theories and such)

VI. Glossary of Legal Terms
I. Legal Relationship Out of Which Disputes Arise

**Agent, agency:** An Agent is someone who, for some purpose(s), represents someone else; and if the agent makes a mistake, the “someone else” is responsible. An officer can be an agent of his company; a lawyer can be an agent for his or her client; a subordinate may be the bosses’ agent.

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**Contract:** A contract is an agreement. The agreement may be written or not. A contract usually consists of two reciprocal promises, one from each party: one person agrees to pay money, the other to deliver goods, construct a building, etc.

(1) **Written:** Where promises are in writing. Sometimes all the promises are completely in writing, in which case the contract is “integrated”. Sometimes the promises are partly oral.

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(2) **Oral:** When some or all of the promises were simply uttered, spoken, and not written. Contracts do not always have to be in writing to be valid; however some types of contracts must be in writing in order to be enforceable (see “Statute of Frauds”).

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**Duties:**

People and have obligations to do things — to pay money, deliver goods, to perform some sort of service. These are duties. There are different types of duties. Duties arise from contracts, from warranties, and sometimes simply from the prior relationship of one party to another.

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**Fiduciary Duties:**

Sometimes people have relationships by reason of which duties arise to do, or not to do, certain things. Lawyers shouldn't turn in their clients to the D.A.'s office; banks should treat you right, a person in charge of a trust should carefully tend the money in his control; an officer of a company should not have deals on the side which harm the company he or she works for. These people — lawyers, bankers, officers — may be “fiduciaries” and have “fiduciary duties” even though there’s no contract between them and anyone else. Fiduciaries are often said to have a “higher duty of care”. These duties are created by “common law” and further defined and interpreted by the courts. If one violates their fiduciary duties, they may get sued.

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**Quantum meruit:**

The monetary amount that the goods or services are “reasonably” worth. For example, a painter paints your house but either there’s no contract or for some reason the contract is no good. The painter shows that you got the benefit of the paint job, and that such jobs are worth about $5,000; he sues you for $5,000 under a “quantum meruit” theory. The dollar sum the painter gets has nothing to do with any contract discussions: it’s just what the arbitrator thinks it’s reasonably worth.

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**Warranty:**

A warranty is a promise. Warranties are of different types. A written warranty may accompany your purchase of an item; if so, it gives you specific rights against the party (legal term) who issues the warranty, just as a contract does. There are also warranties that the law imposes on parties.

1. **Implied by law:** The law may simply impose on a seller of any product the warranty that the product will work, or will do what it says on the box (or in the advertising) it will do. No written warranty is necessary. The Uniform Commercial Code provides for two implied warranties, i.e. (a) merchantability and (b) fitness for a particular purpose. Implied warranties may be “waived” under certain conditions.

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(2) **Express:** This warranty is “explicit” as set forth in the document. A written warranty may be the source of a promise which, if violated, results in a breach of a warranty.

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**II. Pre-Hearing Matters**

**Briefs:** Position papers submitted by the parties (Pre-Hearing Briefs) in which they explain the factual and legal basis of their claims.

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**Bifurcation of Hearing:** The fragmenting of the total hearing into several distinct parts. For example, the panel may decide to resolve only the issue of entitlement in one hearing and have a second hearing on damages only if it awards entitlement to the claimant.

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**Conditions Precedent:** Under certain documents, the right to arbitrate can occur only after an attempt to mediate the dispute has occurred. The satisfaction of this process is a condition precedent.

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**Consolidation:** Normally refers to having a single hearing on several claims between the same parties. Sometimes all claims of various participants on a project are “consolidated” into one hearing if all participants agree.

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**Depositions:** Taking the oral statement of a witness under oath, that is transcribed (legal term) by a court reporter.

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**Discovery:**
Discovery occurs before trial in most court cases. It is the formal process by which litigants ask for, object to, and deliver information about their case to the other side. Lawyers “take discovery” and “object to discovery requests” and “comply with discovery requests”. When lawyers can’t agree on what they should exchange, they file motions. These days, a good part of the cost of litigation is the result of litigating discovery demands. Discovery comes in various forms, i.e. Request for Admissions, Request for Production of Documents, Interrogatories and Depositions.

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**In Camera:**
One of the parties may object to producing certain documents to the other party i.e. “Not relevant” or “contains information of a proprietary nature”. In order for the arbitrators to rule on the objection they may want to actually see the documents to determine if they should be shared with the opposing party. This is referred to as an “in camera” review i.e. reviewed by the arbitrators only in order to rule on the objection.

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**Interim Relief:**
A request made by one of the parties in arbitration for the arbitrator to grant some partial or preliminary ruling prior to issuing a final decision in the matter.

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**Interrogatories:**
Written questions to the other side, requiring written responses under oath.

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**Motions:**
Numerous “Motions” are filed during the pre-hearing phase of an arbitration proceeding. A Motion is nothing more than a request from a party to the arbitrator seeking a ruling on some issue.

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**Motion to Compel:**
This is normally a request that the arbitrator “order” a party to produce documents or a witness for depositions

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**Motion to Dismiss:**
This is a request that all or a portion of a party’s case be dismissed.

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**Motion to Add 3rd Party:**
This is a request to add a party to the arbitration proceedings. An Arbitrator cannot add a third party unless that party has “agreed” to be a party.

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**Motion in Limine:**
A request to the panel, during a pre-hearing conference or just before the evidentiary hearing, to decide an important issue which will affect the way the main hearing is conducted. These motions are brought for various reasons: such as to ensure the panel doesn’t hear prejudicial evidence, to limit the testimony of a particular witness to a sole issue, etc.

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**Motion for Summary Judgment:**
This is a request that judgment be entered based on the record and the law. In order for a summary judgment to be entered there must be no issue of material fact and only a question of the application of the law to uncontested facts.

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**Motion to Quash:**
This is a request to “eliminate” something, i.e. void a previously issued subpoena for a deposition, etc. As one arbitrator told us, “This is not a motion to Quash, it sounds more like a motion to Squash!”

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Recuse: To withdraw as arbitrator either upon your own independent decision or at the request of one of the Parties.

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Request for Production of Documents: A written demand that the other side produce specified documents — perhaps copies of contracts, notes, financial statements etc.

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Subpoena: A court order (usually issued by a lawyer) which demands the production of something or someone. The production might be demanded for trial, or for a pretrial deposition. A subpoena duces tecum is a requirement that documents be brought by a person (duces tecum = bring with you). The arbitrator can issue a subpoena at the request of one of the parties.

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III. Hearings

A. Procedures

**Interlocutory:** An order issued in a case that is not the final order. It is a “temporary" order and is usually not appealable. An order pursuant to “Interim Measures" would be considered an interlocutory order. Arbitrators may be called upon to make Interim Orders such as an Order to preserve property or evidence.

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**ExParte:** The term “ExParte” comes up in two different contexts:

(a) Where the arbitrator communicates with one party to the proceeding outside the presence of all parties. ExParte communication is a “NO - NO"!

(b) On occasion a party does not appear at a hearing after being properly notified. The party who appears wants to proceed with the hearing. The arbitrator may hear the case “ExParte”, i.e. in the presence of only one party.

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**Interim Relief:** Orders issued prior to the final Award by an arbitrator granting some form of “interim” or temporary relief. An example would be ordering that certain evidence be preserved or not removed from a particular location.

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B. Evidence

**Admissible Evidence:** Technically, this is evidence offered at trial that passes various tests and so can be used by the jury, judge or arbitrator in the evaluation of the case. Evidence might not be “admissible” in court if it is hearsay; is totally irrelevant; or if its use would violate an evidentiary privilege or rule of evidence. As an arbitrator you can receive any evidence (other than attorney client privilege or attorney work product) you deem “relevant” and accord it the weight you deem appropriate.

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**Attorney Client Privilege:** Anything that is, or shows, any communication between a lawyer and his client is privileged. This might be letters, someone’s testimony about what a client said to the lawyer, and so on. There is an “evidentiary privilege” involved here, the material itself is “privileged” and is almost never “admissible” evidence. A letter from a lawyer to the client may well be protected by both the attorney work product and the attorney client privileges.

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**Attorney Work Product Privilege:** The actual product of lawyers (or their consultants and/or employees), such as their notes, outlines of strategy, summaries of the law, and so on. There is an “evidentiary privilege” involved here, the material itself “is privileged” and is almost never “admissible” evidence.

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**Authentic (documents):** A piece of paper is “authentic” if it is really what it appears to be (and not a forgery or fake). A document is “authenticated” by some kind of evidence to this effect — i.e. the author testifies that he wrote it, or the recipient says she got it, or someone recognizes the handwriting. It is not necessary that the document be the “original” so long as the Xerox copy is a correct copy of the original.

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**Foundation:** The background or basis for a claim or a legal position. You may not know if something is attorney work product; someone will have to “lay a foundation” that the author was a lawyer, did write out his thoughts, and so on — all facts which may be the basis, or “foundation”, for the claim. You will have attorneys object to testimony or other evidence because of “failure to lay a foundation”.

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**Hearsay:** Evidence is hearsay when you’re being asked to believe a statement uttered or written by someone not at the hearing. If someone testifies that his son told him that someone ran the red light — that’s hearsay: the son isn’t testifying (his father is), and the judge is being asked to believe that the son (who’s not here to tell his story) was telling the truth. Arbitrators have the latitude to accept hearsay testimony but shall give it the appropriate weight as compared to non-hearsay testimony.

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**Objection:**

There are numerous “objections” (and responses) to lawyers’ questions and proffered evidence, i.e. (1) hearsay (2) lack of proper foundation (3) violates an order in limine, (4) lack of relevancy, (5) leading the witness, (6) denial of evidence may prejudice my case, etc. An arbitrator is not bound to the legal “rules of evidence” and should hear all “relevant” evidence presented and ascribe to it the weight to which the arbitrator deems appropriate.

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**Parol evidence:**

Oral or “extrinsic” evidence offered to explain a written document. Judges are to interpret a contract by reading it, and not use other “extrinsic” sources to determine the meaning (otherwise the written agreement would be useless). “Technically” the only time parol evidence is accepted to explain a document is when it is “ambiguous” (susceptible to more than one meaning) and the evidence is needed to help explain the document’s intended meaning. As a matter of practice, arbitrators will accept some parol evidence regarding witness’s understanding of contract terms. It remains the arbitrator’s responsibility, however, to interpret the contract.

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**Privilege:**

A right to withhold evidence. Privileged materials need not be disclosed to the other side. Generally, communications between spouses are privileged as are those between priest and penitent, psychotherapists and their clients, and attorneys and their clients. Additionally, there is the Attorney “work product” privilege.

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**Waiver:**
You may “waive” your rights to do or claim something. Technically a waiver cannot occur unless a party “knowingly” relinquishes a “known right”.

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C. **Damages**

**Damages:**
The monetary amount you get when you sue successfully. The term also refers to the harm suffered by the person who brought the claim, i.e. the injured person has “suffered damages”.

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The following terms refer to different categories or types of “damages”.

1. **Punitive:** Any damages awarded as a penalty or by way of punishment. The law is conflicting as to whether or not an Arbitrator can award punitive damages.

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2. **Treble:** Some state statutes allow a court to award three times (“treble”) the actual damages suffered. Treble damages can only be awarded if specifically authorized by a statute.

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**Joint & Several:** This is a term that describes liability and “who pays”. Under certain circumstances where there are more than one respondent, the panel may decide that “x” amount of money is owed to the claimant. Further the panel may decide that “each” and “every” defendant is responsible for payment i.e. all are “jointly” responsible and each is “severally” responsible. This normally arises when a performance bond surety has intervened in the arbitration and the panel decides that the claimant is entitled to an award of money from the contractor and the surety. The liability is normally “joint & several”.

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**D. Other**

**Cure:** When one person “breaches” a contract, that person might later fix the breach — i.e. “cure” the problem. The term also refers to the amount of money required to cure the problem i.e. “Cure damages.”

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**Breach:** A violation of a contract; failing to do something one has promised to do.

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Mitigation: To lessen. The person suffering damages may be able to “mitigate” those damages, and is generally required to try to do so by law. If one fails to “mitigate” his damages he may not be allowed to recover the full or actual amount of the damages actually suffered, i.e. an arbitrator may decide that the party may not recover those damages he failed to mitigate. Stated another way, if the complaining party could have reasonably prevented a portion of the total damages, he should not recover the portion he could have reasonably prevented.

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IV. Awards

Findings of Facts & Conclusions of Law: At the conclusion of non-jury trials, often times the judge will request the parties to submit to him for his consideration proposed “Findings of Fact and Conclusions of Law”. He then adopts into his opinion the ones he deems appropriate. It is very seldom that an arbitrator will request a formal Statement of Facts & Conclusion of Law.

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Burden of proof: A party asserting a claim has to persuade the arbitrator that the party is right; is entitled to “relief” or “damages”. The “burden of proof” is on the claimant and not on the defending party. If the defendant or respondent asserts a counterclaim, it has to shoulder the burden of proof as to the counterclaims. The party who has the burden of proof must sustain its position by a “preponderance” of the credible evidence (not “beyond a reasonable doubt” which is the standard in a criminal trial).

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Fees: Money paid for certain services or the “right to participate.” Fees that arbitrators are asked to address include:

(1) **Fees of the AAA.** These fees are set forth in the AAA Rules. In making an award, an arbitrator will be required to determine who will pay these fees.

(2) **Attorneys Fees** - We all know what that is! In making an award, an arbitrator will be required to determine if a party is entitled to recover its attorney's fees or if each party is to bear its own costs and attorney fees.

(3) **Expert Witness Fees** - These are fees paid by a party to a consultant or expert witness. The legal community is divided in their opinion as to whether or not the prevailing party is entitled to recover expert witness fees. Also, various states treat the issue differently.

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Prevailing Party: The party who successfully prosecutes or defends by prevailing on its main issue, even though it may not be to the full extent of his original contention.

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V. Miscellaneous

**Causation:** When a party accuses another of a breach of a duty, the accuser must also prove that the breach actually causes some damages. This is the requirement of “causation”.

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**Consideration:** The exchanged-for promise: usually money paid for something accomplished. Technically “consideration” exists if there is a promise by one party in exchange for “something”.

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**Estoppel:** An equitable theory that prevents a party from taking inconsistent positions or benefiting from them. Basically, you can’t have your cake and eat it too. If you insist there is no contract, you may be “estopped” from later claiming there is one or that you are entitled to a remedy “under the contract.” If you claim the contract is oral, you may be estopped from claiming that you have a written copy.

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**Executed:** The term is used in three (3) different ways:

(a) It can mean something is accomplished: An executed promise is one that is done, completed, over — the promise has been carried out.

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(b) It can simply mean a document has been “signed”. When one signs a written contract one is said to have “executed” it.

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(c) Sometimes the result of committing murder - you will be “executed”. (Hopefully, you won’t have to address this issue!)

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Laches:
Whether or not a claim is brought within the period prescribed by the statute of limitation, it might be barred “by laches”: by an unreasonable and unfair delay in bringing the action. Completely aside from what the statute of limitations is, it might be unfair to wait forty years before suing on a breach of contract; it might be unfair to wait a year before suing to have a fence moved back across a property line when the other side has since built a home there! It might be unfair to wait until the prime witness for the other side dies. In these circumstances, a court would weigh the reason for the delay, the effect on the other side, and might apply the equitable doctrine of laches to block the law suit.

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Prejudice:
This term comes about in two (2) contexts:

(a) People are “prejudiced” by an adverse ruling or action of another. A party is “prejudiced” by the other party’s failure to deliver goods, failure to comply with a court order, failure to provide discovery responses, etc.

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(b) A case dismissed “with prejudice” is over, forever and cannot be revived. If it is “dismissed without prejudice” it may be renewed. A motion dismissed “without prejudice” may be made at some future date, perhaps if the facts or circumstances change.

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**Rejection:**

Just what it sounds like: you may “reject” another’s faulty attempt to comply with the contract. In construction an Architect or Owner may “reject” work which does not conform to the contract specifications. An arbitrator may reject the basis of Architect or Owner or Contractor’s position.

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**Relief:**

What you want when you sue. As an arbitrator, you should ask parties for an itemization of all relief requested.

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**Sequester the Witness:**

Have anyone who is to testify removed from the hearing room until it is their time to testify, i.e. they can’t hear the other testimony.

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**Statue of Frauds:**
Called the “statute of frauds and perjuries” in olden days, this law required that certain kinds of written evidence, signed by the party who is being sued. The idea is to prevent “fraudulent” claims that a contract exists. Most states now have a codified “Statute of Frauds” which requires certain types of contracts to be in writing, i.e. in most states a contract to buy or sell real estate must be in writing to be enforceable.

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**Statutes of Limitations:**
The law generally requires that claims be brought — that the litigation commence — within a certain number of years after the events at issue. Different types of claims have different “statutes of limitations”. For example, in Texas, the statute of limitations for breach of a written contract is four years. If you fail to file your cause of action within the specified time, the claim will be dismissed.

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**Tender:**
An offer to perform a duty you have undertaken. You tender your “performance”, such as the tender of money or goods to the other party.

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**Unconscionability:**
Sometimes the terms of an agreement are so outrageous and unfair, even though all parties have technically agreed to them that the enforcement of the terms become “unconscionable”. Unconscionable portions of agreements are sometimes voided by the courts.

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**Tolling Agreement:** This is an agreement between the parties to “stop” the running of the Statute of Limitations, i.e. “toll” the statute.

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GLOSSARY OF LEGAL TERMS
(Alphabetical)

Admissible evidence: Technically, this is evidence offered at trial that passes various tests and so can be used by the jury, judge or arbitrator in the evaluation of the case. Evidence might not be “admissible” in court if it’s hearsay; is totally irrelevant; or if its use would violate an evidentiary privilege or rule of evidence. As an arbitrator you can receive any evidence (other than attorney client privilege or attorney work product) you deem “relevant” and accord it the weight you deem appropriate.

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Burden of proof: A party asserting a claim has to persuade the arbitrator that the party is right; is entitled to “relief” or “damages.” The “burden of proof” is on the claimant and not on the defending party. If the defendant or respondent asserts a counterclaim, it has to shoulder the burden of proof as to the counterclaims. The party who has the burden of proof must sustain its position by a “preponderance” of the credible evidence (not “beyond a reasonable doubt” which is the standard in a criminal trial).

Causation: When a party accuses another of a breach of a duty, the accuser must also prove that the breach actually causes some damages. This is the requirement of “causation.”
**Consideration:** The exchanged-for promise: usually money paid for something accomplished. Technically “consideration” exists if there is a promise by one party in exchange for “something.”

**Contract:** A contract is an agreement. The agreement may be written or not. A contract usually consists of two reciprocal promises, one from each party: one person agrees to pay money, the other to deliver goods, construct a building, etc.

1. **Written:** Where promises are in writing. Sometimes all the promises are completely in writing, in which case the contract is “integrated.” Sometimes the promises are partly oral.
2. **Oral:** When some or all of the promises were simply uttered, spoken, and not written. Contracts do not always have to be in writing to be valid; however some types of contracts must be in writing in order to be enforceable (see “Statute of Frauds”).

**Cure:** When one person “breaches” a contract, that person might later fix the breach — i.e. “cure” the problem. The term also refers to the amount of money required to cure the problem i.e. “Cure damages.”

**Damages:** The monetary amount you get when you sue successfully. The term also refers to the harm suffered by the person who brought the claim, i.e. the injured person has “suffered damages.”

The following terms refer to different categories or types of “damages.”

1. **Punitive:** Any damages awarded as a penalty or by way of punishment. The law is conflicting as to whether or not an Arbitrator can award punitive damages.
2. **Treble:** Some state statutes allow a court to award three times (“treble”) the actual damages suffered. Treble damages can only be awarded if specifically authorized by a statute.

**Depositions:** Taking the oral statement of a witness under oath, which is transcribed (legal term) by a court reporter.

**Discovery:** Discovery occurs before trial in most court cases. It is the formal process by which litigants ask for, object to, and deliver information about their case to the other side. Lawyers “take discovery” and “object to discovery requests” and “comply with discovery requests.” When lawyers can’t agree on what they should exchange, they file motions. These days, a good deal of the cost of litigation is the result of litigating discovery demands. Discovery comes in various forms, i.e. Request for Admissions, Requests for Production of Documents, Interrogatories and Depositions.

**Duties:** People and companies have obligations to do things — to pay money, deliver goods, to perform some sort of service. These are duties. There are different types of duties. Duties arise from contracts, from warranties, and sometimes simply from the prior relationship of one party to another.
**Estoppel:**
An equitable theory that prevents a party from taking inconsistent positions or benefiting from them. Basically, you can’t have your cake and eat it too. If you insist there is no contract, you may be “estopped” from later claiming there is one or that you are entitled to a remedy “under the contract.” If you claim the contract is oral, you may be estopped from claiming that you have a written copy.

**ExParte:**
The term “Ex Parte” comes up in two different contexts:

(a) Where the arbitrator communicates with one party to the proceeding outside the presence of all parties. Ex Parte communication is a “NO - NO”!

(b) On occasion a party does not appear at a hearing after being properly notified. The party who appears wants to proceed with the hearing. The arbitrator may hear the case “Ex Parte”, i.e. in the presence of only one party.

**Executed:**
The term is used in three (3) different ways:

(a) It can mean something is accomplished: An executed promise is one that is done, completed, over — the promise has been carried out.

(b) It can simply mean a document has been “signed.” When one signs a written contract one is said to have “executed” it.

(c) Sometimes the result of committing murder - you will be “executed.” (Hopefully, you won’t have to address this issue!)

**Fees:**
Money paid for certain services or the “right to participate.” Fees that arbitrators are asked to address include:

(1) **Fees of the AAA.** These fees are set forth in the AAA Rules. In making an award, an arbitrator will be required to determine who will pay these fees.

(2) **Attorneys Fees** - We all know what that is! In making an award, an arbitrator will be required to determine if a party is entitled to recover its attorney fees or if each party is to bear its own costs and attorneys fees.

(3) **Expert Witness Fees** - These are fees paid by a party to a consultant or expert witness. The legal community is divided in their opinion as to whether or not a prevailing party is entitled to recover expert witness fees. Also, various States treat the issue differently.
**Fiduciary Duties:**
Sometimes people have relationships by reason of which duties arise to do, or not to do, certain things. Lawyers shouldn’t turn in their clients to the D.A.’s office; banks should treat you right, a person in charge of a trust should carefully tend the money in his control; an officer of a company should not have deals on the side which harm the company he or she works for. These people — lawyers, bankers, officers — may be “fiduciaries” and have “fiduciary duties” even though there’s no contract between them and anyone else. Fiduciaries are often said to have a “higher duty of care.” These duties are created by “common law” and further defined and interpreted by the courts. If one violates their fiduciary duties, they may get sued.

**Findings of Facts & Conclusions of Law:**
At the conclusion of non-jury trials, often times the judge will request the parties to submit to him for his consideration proposed “Findings of Fact and Conclusions of Law.” He then adopts into his opinion the ones he deems appropriate. It is very seldom that an arbitrator will request a formal Statement of Facts & Conclusion of Law.

**Foundation:**
The background or basis for a claim or a legal position. You may not know if something is attorney work product; someone will have to “lay a foundation” that the author was a lawyer, did write out his thoughts, and so on — all facts which may be the basis, or “foundation”, for the claim. You will have attorneys object to testimony or other evidence because of “failure to lay a foundation.”

**Hearsay:**
Evidence is hearsay when you’re being asked to believe a statement uttered or written by someone not at the hearing. If someone testifies that his son told him that someone ran the red light — that's hearsay: the son isn’t testifying (his father is), and the judge is being asked to believe that the son (who’s not here to tell his story) was telling the truth. Arbitrators have the latitude to accept hearsay testimony but shall give it the appropriate weight as compared to non-hearsay testimony.

**In Camera:**
One of the parties may object to producing certain documents to the Other party i.e. “Not relevant” or “contains information of a proprietary nature.” In order for the arbitrators to rule on the objection they may want to actually see the documents to determine if they should be shared with the opposing party. This is referred to as an “in camera” review i.e. reviewed by the arbitrators only in order to rule on the objection.

**Interim Relief:**
Orders issued prior to the final Award by an arbitrator granting some form of “interim” or temporary relief. An example would be ordering that certain evidence be preserved or not removed from a particular location.

**Interlocutory:**
An order issued in a case that is not the final order. It is a “temporary” order and is usually not appealable. An order pursuant to “Interim Measures” would be considered an interlocutory order. Arbitrators may be called upon to make Interim Orders such as an Order to preserve property or evidence.
**Interrogatories:** Written questions to the other side, requiring written responses under oath.

**Joint & Several:** This is a term that describes liability and “who pays.” Under certain circumstances where there are more than one respondent, the panel may decide that “x” amount of money is owed to the claimant. Further the panel may decide that “each” and “every” defendant is responsible for payment i.e. all are “jointly” responsible and each is “severally” responsible. This normally arises when a performance bond surety has intervened in the arbitration and the panel decides that the claimant is entitled to an award of money from the contractor and the surety. The liability is normally “joint & several.”

**Laches:** Whether or not a claim is brought within the period prescribed by the statute of limitation, it might be barred “by laches”: by an unreasonable and unfair delay in bringing the action. Completely aside from what the statute of limitations is, it might be unfair to wait forty years before suing on a breach of contract; it might be unfair to wait a year before suing to have a fence moved back across a property line when the other side has since built a home there! It might be unfair to wait until the prime witness for the other side dies. In these circumstances, a court would weigh the reason for the delay, the effect on the other side, and might apply the equitable doctrine of laches to block the law suit.

**Mitigation:** To lessen. The person suffering damages may be able to “mitigate” those damages, and is generally required to try to do so by law. If one fails to “mitigate” his damages he may not be allowed to recover the full or actual amount of the damages actually suffered, i.e. an arbitrator may decide that the party may not recover those damages he failed to mitigate. Stated another way, if the complaining party could have reasonably prevented a portion of the total damages, he should not recover the portion he could have reasonably prevented.

**Motions:** Numerous “Motions” are filed during the pre-hearing phase of an arbitration proceeding. A Motion is nothing more than a request from a party to the panel seeking a ruling on some issue. Most common motions that arbitrators are asked to rule upon as set forth below

**Motion to Compel:** This is normally a request that the arbitrator “order” a party to produce documents or a witness for depositions

**Motion to Dismiss:** This is a request that all or a portion of a party’s case be dismissed. Motion to Add 3rd Party: This is a request to add a party to the arbitration proceedings. An arbitrator cannot add a third party unless that party has “agreed” to be a party.

**Motion in Limine:** A request to the panel, during a pre-hearing conference or just before the main hearing, to decide an important issue which will affect the way the main hearing is conducted. These sorts of motions are brought for various reasons such as: to ensure the panel doesn’t hear prejudicial evidence, to limit the testimony of a particular witness to a sole issue, etc.
### Motion for Summary Judgment:
This is a request that judgment be entered based on the record and the law. In order for a summary judgment to be entered there must be no issue of material fact and only a question of the application of the law to uncontested facts.

### Motion to Quash:
This is a request to “eliminate” something, i.e. void a previously issued subpoena for a deposition, etc. As one arbitrator told us, “This is not a motion to quash, it sounds more like a motion to Squash!”

### Objection:
There are numerous “objections” (and responses) to lawyers’ questions and proffered evidence, i.e. (1) hearsay (2) lack of proper foundation (3) violates an order in limine, (4) lack of relevancy, (5) leading the witness, (6) denial of evidence may prejudice my case, etc. An arbitrator is not bound to the legal “rules of evidence” and should hear all “relevant” evidence presented and ascribe to it the weight to which the arbitrator deems appropriate.

### Parol Evidence:
Oral or “extrinsic” evidence offered to explain a written document. Judges are to interpret a contract by reading it, and not use other “extrinsic” sources to determine the meaning (otherwise the written agreement would be useless). “Technically” the only time parol evidence is accepted to explain a document is when it is “ambiguous” (susceptible to more than one meaning) and the evidence is needed to help explain the document’s intended meaning. As a matter of practice, arbitrators will accept some parol evidence regarding witness’s understanding of contract terms. It remains the arbitrator’s responsibility, however, to interpret the contract.

### Prejudice:
This term comes about in two (2) contexts:

(a) People are “prejudiced” by an adverse ruling or action of another. A party is “prejudiced” by the other party’s failure to deliver goods, failure to comply with a court order, failure to provide discovery responses, etc.

(b) A case dismissed “with prejudice” is over, forever and cannot be revived. If it is “dismissed without prejudice” it may be renewed. A motion dismissed “without prejudice” may be made at some future date, perhaps if the facts or circumstances change.

### Prevailing Party:
The party who successfully prosecutes or defends by prevailing on its main issue, even though not to the full extent of his original contention.

### Privilege:
A right to withhold evidence. Privileged materials need not be disclosed to the other side. Generally, communications between spouses are privileged as are those between priest and penitent, psychotherapists and their clients, and attorneys and their clients. Additionally, there is the Attorney “work product” privilege.
**Quantum meruit:** The monetary amount that the goods or services are “reasonably” worth. For example, a painter paints your house but either there’s no contract or for some reason the contract is no good. The painter shows that you got the benefit of the paint job, and that such jobs are worth about $5,000; he sues you for $5,000 under a “quantum meruit” theory. The dollar sum the painter gets has nothing to do with any contract discussions: it’s just what the arbitrator things it’s reasonably worth.

**Recuse:** To withdraw as arbitrator either upon your own independent decision or at the request of one of the Parties.

**Rejection:** Just what it sounds like: you may “reject” another’s faulty attempt to comply with the contract. In construction an Architect or Owner may “reject” work which does not conform to the contract specifications. An arbitrator may reject the basis of Architect or Owner or Contractor’s position.

**Relief:** What you want when you sue. As an arbitrator, you should ask parties for an itemization of all relief requested.

**Request for Production of Documents:** A written demand that the other side produce specified documents — perhaps copies of contracts, notes, financial statements etc.

**Sequester the Witness:** Have anyone who is to testify removed from the hearing room until it is their time to testify, i.e. they can’t hear the other testimony. In some states this is sometimes referred to as “invoking the rule.”

**Statue of Frauds:** Called the “statute of frauds and perjuries” in olden days, this law required that certain kinds of written evidence, signed by the party who is being sued. The idea is to prevent “fraudulent” claims that a contract exists. Most states now have a codified “Statute of Frauds” which requires certain types of contracts to be in writing, i.e. in most states a contract to buy or sell real estate must be in writing to be enforceable.

**Statutes of Limitations:** The law generally requires that claims be brought — that the litigation commence — within a certain number of years after the events at issue. Different types of claims have different “statutes of limitations.” For example, in Texas, the statute of limitations for breach of a written contract is four years. If you fail to file your cause of action within the specified time, the claim will be dismissed.

**Subpoena:** A court order (actually issued by a lawyer) which demands the production of something or someone. The production might be demanded for trial, or for a pretrial deposition. A subpoena duces tecum is a requirement that documents be brought by a person (duces tecum = bring with you). The arbitrator can issue a subpoena at the request of one of the parties.

**Tender:** An offer to perform a duty you have undertaken. You tender your “performance”, such as the tender of money or goods to the other party.
**Tolling Agreement:** This is an agreement between the parties to “stop” the running of the Statute of Limitations, i.e. “toll” the statute.

**Unconscionability:** Sometimes the terms of an agreement are so outrageous and unfair, even though all parties have technically agreed to them that the enforcement of the terms become “unconscionable.” Unconscionable portions of agreements are sometimes voided by the courts.

**Waiver:** You may “waive” your rights to do or claim something. Technically a waiver cannot occur unless a party “knowingly” relinquishes a “known right.”

**Warranty:** A Warranty is a promise. Warranties are of different types. A written warranty may accompany your purchase of an item; if so, it gives you specific rights against the party (legal term) who issues the warranty, just as a contract does. There are also warranties that the law imposes on parties.

1. **Implied by law:** The Law may simply impose on a seller of any product the warranty that the product will work, or will do what it says on the box (or in the advertising) it will do. No written warranty is necessary. The Uniform Commercial Code provides for two implied warranties, i.e. (a) merchantability and (b) fitness for a particular purpose. Implied warranties may be “waived” under certain conditions.

2. **Express:** This warranty is “explicit” as set forth in the document. A written warranty may be the source of a promise which, if violated, results in a breach of a warranty. An example is the standard one (1) year warranty contained in the AIA construction form.