

I AM YOUR ARBITRATOR: HERE IS WHAT TO EXPECT FROM ME . . . AND WHAT I EXPECT FROM YOU

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I have been a trial lawyer for over 40 years. Over the last 30 years, service as an arbitrator, special master and *pro tem* judge has become an increasingly important and significant part of my practice. My experience as a lawyer and arbitrator has taught me much, most especially that:

- parties to a dispute choose arbitration for the advantages it has over traditional civil litigation, particularly (1) an early opportunity to present their evidence and get a resolution and (2) a process that minimizes the most expensive phase of litigation—discovery,
- parties to a dispute, and their lawyers, need and want information about how the decision-maker manages cases and conducts the dispute resolution process, and
- the decision-maker is best able to carry out his or her role—and the parties and their counsel are most comfortable with the fundamental fairness and integrity of the process—if the decision-maker manages the process fairly and efficiently.

With these principles in mind, and mindful that information about how individual arbitrators conduct proceedings is hard to come by—and in any event generally anecdotal—in the late 1990s I set about to summarize my arbitration philosophy and the principles which govern my management of cases, essentially what I expect from the lawyers who appear before me . . . and what they may expect from me. In my experience, most arbitrators in commercial cases manage their cases

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in the same fashion, and have similar expectations of themselves and counsel. Although the balance of this article will flesh out the below, here is the essence of what you may expect from me . . . and what I expect from you.

WHAT YOU MAY EXPECT FROM ME

Fairness, professionalism and respect: I will treat you, your clients and your case with professionalism, fairness and respect.

Preparation: I will have read everything that has been sent or made available to me relevant to any matter that is before me.

Case management—integrity and efficiency of the arbitration process: I will do my best to help you and your clients realize the benefits of arbitration—a process that is managed to provide all parties with the tools to prepare for an evidentiary hearing, at manageable cost; an early hearing and decision; a final decision that marks the end of the dispute rather than the beginning of a new one.

Adherence to schedules: I will do my utmost to adhere to any scheduled case event, and will schedule other matters so as not to interfere with those events.

Timely action: I will respond promptly to requests for my action.

Principled decision-making: I will do my best to follow a rigorous and principled decision-making process.

WHAT I EXPECT FROM YOU

Professionalism and respect: I expect you and your clients to conduct yourselves so as to demonstrate respect for the office I hold as your arbitrator and for the others involved in your case—lawyers, staff, clients, provider-organization case managers.

Preparation: I expect you to be prepared for any hearing—preliminary or otherwise—and, if I've asked you to confer with opposing counsel, expect that you will have done so. I also expect you to be familiar with the rules governing your arbitration and any authority relevant to any matter that may come before me.

Case management: I expect you to cooperate reasonably with me and with other parties in the case so as to provide all parties with the benefits of arbitration.

Adherence to schedules: Deadlines I set are not aspirational, they are firm and directive and I expect you to meet them. If for some extraordinary reason you cannot meet a deadline, I expect you to let me know as soon as possible, giving me a reason why the deadline should be changed.

Candor: I expect you to conduct yourselves as you might in a court proceeding, with candor toward the tribunal.

CASE MANAGEMENT PRINCIPLES¹

I follow the below policies in AAA arbitrations where I am the sole arbitrator and, with the consent of my fellow arbitrators, in cases where I am the Chair of a 3-arbitrator panel. They generally guide me in other arbitrations, such as *ad hoc* (non-administered) cases and those administered by FINRA. While I am flexible and will tailor both pre-hearing and hearing procedures to suit the needs of a particular case, the following gives the parties and their lawyers a fair idea of my philosophy toward arbitration and case management. They are designed to ensure that parties obtain the benefits they have bargained for by choosing arbitration over traditional litigation: confidentiality; reduced legal expenses; an early opportunity to present evidence; an expeditious decision; finality.² Of course, if the parties' arbitration agreement or applicable rules specify particular protocols or rules, or addresses one or more of the subjects discussed in this article, those rules or their agreement will govern to the extent they are inconsistent with my policies. I encourage the lawyers in a case to share my views with their clients.

¹ In AAA-administered and private arbitrations, these principles are addressed in a letter sent to counsel in advance of our initial preliminary hearing. In FINRA-administered cases, I follow FINRA's initial preliminary hearing "script" which covers most of them. In all cases, these principles are embodied within the prehearing order I enter following the initial preliminary hearing.

² Over the last 10 years, arbitration has taken on more and more of the hallmarks of litigation, with parties saddled with the sort of wide-ranging discovery and motions practice common in traditional litigation. The reasons are many and varied, and lawyers, their clients, provider-organizations and arbitrators all bear responsibility for the change. In response to growing complaints from arbitrators, lawyers and corporate counsel that commercial arbitration has become as slow and costly as litigation, the College of Commercial Arbitrators (a by-invitation only association of leading arbitrators), in conjunction with the major arbitration provider-organizations, convened a national summit of lawyers, commercial users of arbitration, and arbitrators. The result of the summit was the development and publication of *Protocols for Expeditious, Cost Effective Commercial Arbitration* (downloadable from www.thecca.net). I encourage you and your clients to review them. The protocols echo many of the points made here.

I. DISCLOSURES

The integrity of the arbitration process depends in large part on the faith of the parties and counsel in the impartiality and independence of the arbitrator. I take my disclosure obligations seriously (*see* Revised Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA, March 1, 2004) and the Revised Uniform Arbitration Act, Section 12) and make a good faith effort to make all appropriate disclosures in a timely fashion. I expect counsel to share my disclosures with their client representatives, do their own due diligence, and to bring to the attention of the Case Manager any concerns they might have with any disclosures I make.³

Many arbitration-provider organizations require that the parties submit a list of related entities and key potential witnesses in order to assist the arbitrator in disclosing, prior to confirmation of appointment, potential conflicts and appearance of fairness issues. Even if submission of such a list is not required, it is good practice to do so. The parties' lists should be seasonably supplemented as necessary. It is important that the arbitrator know, at the earliest possible time, whether any additional disclosures need to be made.

II. PRE-HEARING CONFERENCES

A. In General

A telephone (or in-person) conference to discuss some variation of these policies, or to bring some special circumstance to my attention, may be arranged at any time. Simply call (or e-mail) your Case Manager (or, in unadministered, private arbitrations, my office staff). You may assume that I will have read any papers submitted in connection with such a conference and be prepared to address the issues you have identified. I expect proper decorum to be followed in all pre-hearing conferences: address yourself to me or to the Arbitration Panel, not to your opposition; avoid personalizing your comments; one person speaks at a time.

B. Mid-Case and Final Pre-Hearing Conferences

In complex cases, or cases where the evidentiary hearing is some ways off, I usually schedule a conference with counsel or the parties

³ In private arbitrations, my private arbitration agreement sets forth a procedure to be followed in the event of disclosure concerns that arise after my appointment has been confirmed. I expect counsel to read and follow it.

(normally by telephone conference call) mid-way through the case to make certain that the case is on-track for the Hearing. I always schedule a final pre-hearing conference a couple of weeks before the Hearing to discuss final arrangements and logistics for the Hearing. Dates and times for these conferences will be set at our initial preliminary hearing.

II. INITIAL PRELIMINARY HEARING CONFERENCE

I hold a preliminary hearing and scheduling conference in almost every case. Although an in-person conference is desirable, most often that is impractical and the initial preliminary hearing is satisfactorily handled by telephone conference call. I encourage clients/client representatives to attend the initial preliminary hearing.

Rules P-1 and P-2, AAA Commercial Rules,⁴ discuss the initial preliminary hearing generally. However, I will send counsel an agenda for the initial preliminary hearing conference and a detailed letter setting forth my expectations concerning matters I expect you to be prepared to address at the conference; this article recaps many of them. You may expect that at our initial preliminary hearing I will:

- ask the parties to confirm that all conditions precedent to arbitration have been waived or satisfied, the parties' statements of their claims and defenses are sufficient to enable them to prepare for the evidentiary hearing and the claims asserted in the arbitration are arbitrable and
- cover many of the matters addressed in these policies, including setting a schedule for exchange of documents and lists of witnesses and exhibits, and, if one has not already been set, a date for the arbitration Hearing.

I also expect that prior to our preliminary hearing, counsel will have discussed:

- the adequacy of the operative pleadings (demand/complaint, answer, counterclaim, reply to counterclaim) to prepare a discovery plan and otherwise prepare for the evidentiary hearing,

⁴ Unless otherwise noted, all references to "Rules" are to the AAA's Commercial Rules, October 1, 2013 edition, entitled "Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)." All of the AAA's current rules are available on-line at the AAA's website: www.adr.org. Many other arbitration provider-organizations (*e.g.*, FINRA, JAMS, CPR) have similar rules.

- the parties' need for information from each other and from third parties,
- whether any party foresees any dispositive motions or other requests for interim relief, and
- the anticipated length of the evidentiary hearing and a time-frame when the parties, their counsel, and their witnesses will be available for that hearing.

We will discuss each of the foregoing matters at the initial preliminary hearing. I enter a Scheduling Order following the initial preliminary hearing. It will usually be labeled Pre-Hearing Order No. 1 and will govern further management of the case.

III. MOTIONS—IN GENERAL AND FOR INTERIM RELIEF

Most arbitration-administering organization rules (and arbitration agreements) do not provide for the type of broad motions practice common in judicial proceedings. Nonetheless, in appropriate cases one or more parties may have matters they desire to raise by motion. You should be prepared at the preliminary hearing to advise me what (if any) motions, dispositive or otherwise, your client anticipates making and whether your client anticipates seeking any interim relief (*see, e.g.*, AAA Rule R-37).

Although I have the authority to permit the filing of—and to decide—dispositive motions (*see, e.g.*, Section 15 of the RUAA and AAA Rules R-32 and R-33), I exercise that authority sparingly and with caution. If any party indicates at the preliminary hearing or thereafter that it may wish to file such a motion, we will discuss the protocol to be followed.

I expect that before filing any sort of motion—except in an emergency—you will discuss with the other party (1) the motion you intend to file and (2) a briefing schedule for that motion. If you are unable to agree on a briefing schedule, I will set one.

IV. AMENDMENT OF A CLAIM

Ordinarily, once the arbitrator has been appointed, any party wishing to amend its claim to state another or different claim may do so only with the consent of the arbitrator. *See, e.g.*, AAA Rule R-6. I will generally set a date by which any such motion must be filed. If you desire to amend your claim (or counterclaim) to assert another or

different claim, I expect you to first discuss the matter with the other party and then do so by motion served on all other parties and filed with the arbitration provider-organization. Ordinarily, if all parties agree that the amendment may be made, I will approve its filing unless doing so will impact other case events, including the date set aside for the evidentiary hearing. The motion should set forth the nature of the new claim you wish to present and, if appropriate, state why the claim was not put forward in your demand for arbitration or response to the demand. Any such motion, if made, will be heard by me (or the Arbitration Panel), after all other parties have been given an opportunity to comment and reply. Monetary claims should be quantified at the earliest practicable time; once a claim has been quantified, payment of the appropriate filing fee or administrative charge for that level of claim may be required in order for that party's claim—to the extent it exceeds the amount of the claim originally quantified—to be heard in the arbitration.

V. INFORMATION EXCHANGES—WHAT IS REFERRED TO AS “DISCOVERY” IN LITIGATION

One of the most attractive features of arbitration as a method of dispute resolution is its general economy as compared to traditional civil litigation. Experience has shown that discovery is ordinarily the single most expensive aspect of litigation. To underscore the difference between “discovery” in court litigation and what we will be talking about in this case, I suggest that you think about “exchanges of information” as that is how discovery is referred to in AAA rules. While a limited amount of information exchange is generally appropriate in arbitrations (unless the parties have expressly restricted discovery by contractual agreement or discovery is limited by rule, such as in FINRA securities arbitrations), the amount and nature of appropriate discovery is dependent upon many factors, including the complexity of the case, the amount in controversy and the issues and claims presented. Under AAA rules, discovery of information to prepare for the evidentiary hearing is governed generally by Rule R-22, which I will follow. I encourage all parties to mutually develop a discovery plan appropriate to the case and to cooperate in its implementation. In private or AAA-administered cases you may also wish to stipulate with the other parties to your case that the AAA's “Procedures for Large, Complex Commercial Disputes” (particularly Rules L-3 and L-4) will apply to your case.

General Principles

Any party may undertake “discovery” of another party, or a third party, only with my approval, unless the “discovery” is permitted as of right by your arbitration agreement or applicable law. Any requests for information or documents should be directed to information you *need* to prosecute or defend your claims or defenses and should be consistent with the goals of arbitration: an expeditious and cost-effective resolution of a dispute.

Plan for Obtaining Necessary Information

The wholesale importation into any arbitration of court rules and procedures is most often undesirable and serves to increase the expense of the case and delay ultimate resolution. I expect that you will, prior to our initial preliminary hearing and as needed thereafter, discuss among yourselves what information you believe is necessary in order to prepare for the evidentiary hearing and be prepared to request approval for (a) any written discovery requests beyond the exchange of witnesses and reliance documents discussed below and (b) the number of depositions (if any), and length, that should be permitted. Even if you agree on a plan, I reserve the right to evaluate your agreement in the context of the claims asserted in the case and the amount in controversy; I often use Article 21 of the AAA/ICDR International Dispute Resolution Procedures effective June 1, 2014 as a guide when evaluating parties’ proposed discovery plan or any party’s request for particular discovery vehicles or requests. Those rules are available at www.adr.org (click on “Rules & Procedures” and then “Search Rules”). I also reserve the right to schedule a hearing on the scope of requests for information or documents, to be attended by your client representative. Whatever limits are set—whether at our initial preliminary conference or later—will be enforced; while I will entertain a request for variance, I will require a showing of substantial need in order to permit a variance from them. A date will be set by which all “discovery” must be *completed*, ordinarily about 45 days prior to the evidentiary hearing.

I expect counsel to cooperate reasonably on all matters, including exchanges of information, and will not tolerate discovery abuse of any kind.

A. Documents

I encourage, and normally require, the timely mutual exchange of relevant documents, particularly documents upon which a party relies. In private and AAA-administered cases I commonly require the parties to exchange, a month or two after our initial conference, all documents on which they rely or which a reasonable person looking at the case objectively would deem relevant or material to the claims. I encourage you to agree as soon as possible on what types of documents are relevant and will be provided, as well as a schedule for exchanging such documents. If, after reviewing the reliance documents produced by other parties you believe that additional specific document requests are needed, I expect you to discuss such needs with other parties and then present me with a request or agreement for my approval. Alternatively, if you know that a particular document exists that is germane to the issues, ask me to order the party in possession of it to produce it, or ask me to issue a subpoena to the third party who is in possession of it. I discourage exceedingly broad Requests for Production (such as for production of “all documents referring or relating to” a particular subject matter); document requests should be narrowly tailored to what is reasonably *necessary* for the case and to limit the burden on the producing party.

B. E-Discovery

Because so much correspondence is by email, and documents are routinely created, modified and amended by computer, e-discovery is now commonplace. Unfortunately, searching for and producing relevant electronic documents can be inordinately expensive. Please discuss your e-discovery needs with the other party. If you foresee the need for e-discovery beyond what you obtain in your mutual exchange of reliance documents, I expect you to discuss the subject with all other parties. In evaluating your e-discovery requests, my focus is first on the relevance and need for the discovery, then on cost and burden. Ordinarily, I impose limits on e-discovery along the following lines:

- Production of electronic documents will be limited to sources used in the ordinary course of business. Absent a showing of compelling need, no “documents” are required to be produced from back-up servers, tapes or other media.

- The fact that a document was originally created electronically does not, in the absence of a showing of compelling need, require production of the document in electronic form.
- Absent a showing of compelling need for another format, production of electronic documents will normally be made on the basis of generally available technology in searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party.
- Absent a showing of compelling need for metadata, metadata need not be produced with the exception of header fields for email correspondence.
- Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the relevance (or potential relevance) of the materials requested, I will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production, subject to further allocation of costs in the Final Award.

C. Interrogatories

Lengthy and detailed interrogatories—on any subject, but particularly about “facts” or “contentions”—are generally inappropriate in arbitration and I discourage them. To the extent you wish to use interrogatories as an information-gathering device, please discuss the issue with the other parties and include it in the plan you submit to me for approval. If interrogatories are used, I encourage you to limit interrogatories to inquiries regarding the existence and whereabouts of documents, and witnesses with knowledge or information, relevant to issues in the case. I am unlikely to approve any plan that contemplates wide-ranging interrogatories.

D. Identification of Potential Fact Witnesses

I encourage you to exchange pertinent identifying information (name, address, telephone number or other contact information) about persons with knowledge or information concerning issues in this case and to agree on a time for delivery of this information. I most often require the parties to provide this information within a month of two following our initial conference. I expect you to seasonably supplement your submissions in the event you acquire knowledge or information about other witnesses. The purpose for

your disclosure of potential fact witnesses is to enable the other parties to your case to evaluate the need for formal or informal discovery concerning these people, including the potential need to take their deposition. Thus, it is important that your disclosures be as complete as possible and that they take place sufficiently in advance of the discovery cut-off to enable other parties to prepare. It is also important that you notify me of additional potential witnesses so that I may timely make any additional disclosures that may be required.

E. Requests for Admission

Requests for Admission are rarely effective in arbitration. If you feel the need to use them, consider using them to pin down what you have learned from the information gleaned from your exchanges or other discovery and be prepared to demonstrate to me that their use in this case is appropriate.

F. Expert Witnesses

Expert witnesses are not required in every case. Where you anticipate presenting expert testimony at the evidentiary hearing, I expect you to notify all other parties of the name, address and qualifications of your expert promptly after you have determined that you will present expert testimony—and in any event sufficiently in advance of the discovery cut-off to allow any appropriate expert discovery. I also expect that you will promptly provide all other parties with:

- a copy of your expert's report or analysis and
- a narrative statement of
 - the subject matter on which your expert is expected to testify;
 - the substance of the facts and opinions to which the expert is expected to testify; and
 - a summary of the grounds for each opinion.

I encourage you to mutually agree on a date by which this information will be provided and whether it will be simultaneous or staged; please discuss this subject with the other party prior to the initial preliminary hearing and be prepared to advise me of what you have agreed to. If a deposition of an expert is to be taken, and the expert has prepared a report for the party retaining him or her, I normally require that a copy of the expert's report be furnished to all

other parties at least one week prior to the deposition. As with other witnesses, it is important that you notify me of anticipated experts so that I may timely make whatever disclosures are indicated.

G. Depositions

Numerous and/or lengthy depositions are inappropriate in most arbitrations. I encourage you to realistically evaluate both your deposition needs and those of the other parties to this dispute and to work cooperatively to (1) agree on a deposition schedule and (2) utilize less formal—and less expensive—witness interviews when appropriate. I expect your discovery plan to address the need for depositions.

H. Protective Order

Documents produced for this arbitration and the testimony of witnesses should be used only for purposes of this case. If you feel that a protective order is necessary or desirable, please confer with the other parties and propose one. If you are unable to agree, either that a protective order is appropriate or that the form proposed is acceptable, I expect counsel to let me know so that the matter may be dealt with promptly.

I. Disputes over Information Requests or Information-Gathering Plan

Judges, and arbitrators, dislike discovery disputes. However, if you and the other parties are unable to agree on a plan for gathering necessary information, the appropriateness of particular discovery devices, or particular discovery requests or responses to same, I need to be promptly advised so that the matter may be timely resolved. I expect you and your clients to cooperate and engage in good faith negotiation so as to resolve disputes over information requests without my intervention. When, however, you are unable to resolve a dispute, a prompt conference call with me, or submission of brief letters, is frequently sufficient to place the dispute in context and allow me to rule. Where appropriate, I will ask that the party seeking relief provide me with a letter or brief succinctly demonstrating the necessity of the information or discovery vehicle requested (or, in the case of an objector, the reasons why the requested discovery should not be granted or a request for a more expansive response should be denied); if particular information requests (or responses to same) are at issue, you should provide me with a copy of same so that I may

place the dispute in context. Where numerous discovery requests are at issue, I will advise you of how your briefing should be structured so as to make my consideration of such matters most efficient. I will rule promptly on any discovery disputes brought to me for resolution.

VI. WITNESSES AND EXHIBITS

A. In General

A reasonable time prior to the arbitration hearing, I expect you to exchange lists of witnesses who are expected to testify at the hearing and lists (and a copy) of all documents which will be offered or are expected to be offered at the hearing. Pre-Hearing Order No. 1 will set a date for both the initial (generally several weeks prior to the evidentiary Hearing) and final (normally 7-10 days prior to the Hearing, what I call a Joint Statement of the Evidence) exchanges. Late-disclosed witnesses will ordinarily not be permitted to testify over the objection of an opposing party, although I will evaluate prejudice and make my decision on a case-by-case basis. The same is true of exhibits (except for demonstrative or rebuttal exhibits and, in some cases, exhibits prepared especially for the Hearing).

B. Witnesses

Each party's witness list should identify the witnesses (name, address, phone number) that party expects to testify at the Hearing, identify the general nature of their testimony, and indicate how the witness will testify at the Hearing (in-person, by telephone, by video conference, by deposition (if a deposition has been permitted) or by affidavit or declaration). If the witness is expected to testify by affidavit or declaration, I will require that a copy of the affidavit or declaration be delivered to all other parties a reasonable time before the Hearing; you may be required to make such a witness available (by phone or video conference, or in-person) for cross-examination as a condition of presenting the witness's affidavit or declaration. A copy of your witness list should be delivered to me and to your Case Manager at the same time as you deliver it to the other parties. In complex cases and cases where the parties expect the Hearing to last several days or weeks, I may require that party-controlled witnesses' direct testimony be presented in written narrative form; in that event, the offering party will be given an opportunity to conduct reasonable oral direct examination to "introduce" the witness to me and highlight the essence of the witness's testimony.

Although in many cases a witness's testimony may be presented by declaration or affidavit (*see, e.g.*, AAA Rule R-35(a)), I strongly encourage the offeror to have the witness available by telephone or video conference for cross-examination, as his or her availability for cross-examination may affect the witness's credibility and the weight I accord his or her evidence. If you wish to utilize all or a portion of a deposition transcript as substantive evidence (*i.e.*, in addition to or in lieu of a witness testifying in-person or by telephone or video conference), I will expect you to provide all other parties with a copy of the transcript, highlighting those portions you intend to offer, at least a week prior to the Hearing so that your opponent may designate other portions of the transcript or identify any objections he or she may have to the portions you intend to use.

C. Exhibits

Each party's exhibit list should identify all documents the party expects to offer at the hearing. An exhibit list that is a document dump is unacceptable, as is a list that simply says that you may use as an exhibit any document produced in the case. I expect you to make a good faith effort to identify relevant exhibits. Unless the document has already been provided, a legible copy of each exhibit must be provided to all other parties along with the list; if it has already been provided, a reference to the production number or a description of the document will normally suffice. I expect you to confer with your opponent regarding the number and numbering of exhibits and make a reasonable effort to eliminate duplicate exhibits. Exhibits should be pre-marked to the extent possible and should be numbered sequentially, using Arabic numerals (*e.g.*, Exhibit 1, 2, etc.). To facilitate preparation of a final exhibit list, assign number ranges for your exhibits (*e.g.*, claimant: Exhibits 1-100; respondent: Exhibits 200-300). Letter or party designations (*e.g.*, A-1, C-33 (or Claimant's 33)) are unnecessary and unhelpful. Because I am expected to decide your case, please highlight relevant portions of your exhibits in my exhibit book. To the extent you want me to read and understand an exhibit, be sure to have a witness testify about it—otherwise, the document will have little meaning when I review it.

D. Supplementation

I recognize that even the most skilled and diligent lawyer cannot anticipate every eventuality and that supplementation of witness or exhibit lists may be necessary and appropriate. I expect, however,

that you will make a good faith effort to timely identify witnesses and exhibits so as to minimize any prejudice to the opposition generated by late disclosure. I will consider foreseeability and prejudice in deciding whether to allow a late-designated witness or exhibit.

E. Subpoenas

If you desire me to issue a subpoena to any person to attend the Hearing, or for a deposition (or pre-hearing production of documents),⁵ I expect you to first discuss the matter with the other parties to the case and provide other parties with a draft of the subpoena you desire me to issue. For subpoenas to third-parties, I expect that you will also, before asking me to issue a subpoena, have contacted the third-party to discuss the scope of the subpoena (if for documents) and the timing of the third-party's appearance. I will ordinarily only issue a subpoena if I conclude, after hearing from the other parties to the case, that such action is appropriate. A subpoena to a third-party will specifically advise the third-party that it may seek a hearing before me as to any concerns it has regarding the subpoena. Enforcement of subpoenas to non-parties is generally for the appropriate court.

VII. CLAIMS AND CONTENTIONS / NARROWING THE ISSUES

I frequently find it helpful if the parties provide me (and the other parties), fairly early in the arbitration process, with a short "plain English" outline of the principal claims (or defenses) and issues involved in the arbitration, a statement of their respective contentions and a plain statement of the relief sought. This is particularly true of cases where the operative pleadings are a one-page arbitration demand or general denial. At the initial preliminary hearing we will discuss whether such a claims statement should be submitted—and, if so, when.

I also find it helpful if the parties furnish me with a pre-hearing statement (preferably a joint statement) setting forth those facts which are agreed or stipulated to and summarizing each side's disputed factual contentions and each side's legal contentions. While I do not require a pre-hearing statement in every case, I encourage all parties to stipulate to matters or claims not in controversy so that we may make the most of the time set aside for the Hearing.

⁵ Please bear in mind that in a case subject only to the Federal Arbitration Act there is currently a split of authority among the circuits concerning the authority of the arbitrator to issue subpoenas for discovery depositions or document production.

VIII. ARBITRATION BRIEFS

No party is required to submit an arbitration brief, although I encourage the submission of succinct briefs addressing relevant issues (legal and factual) in the case. Briefs which apply the law to critical factual issues are particularly helpful. Prehearing Order No. 1 will set a date by which arbitration briefs are due and ordinarily set a page limit.

I discourage string citations to authority (case or otherwise). You will help me keep arbitration costs in check by including with your brief a copy of any key decisional or other authority on which you rely. You will aid my understanding of your position and the relevance of the authority to it if you highlight pertinent portions.

IX. ARBITRATION HEARING

A. Hearing Date / Continuances

The date for the evidentiary hearing will almost always be set at our initial preliminary hearing. It will ordinarily be changed only for good cause shown or if all parties agree to a continuance. *See, e.g.,* AAA Rule R-30. Prior to the initial preliminary hearing, I expect counsel to confer regarding (1) when the case will be ready for hearing, (2) the number of days reasonably anticipated to be necessary for the hearing (including opening statement and closing argument), and (3) their and their witnesses' availability for a hearing during the 30 day period surrounding the time when the case is anticipated to be ready for hearing. Counsel should have their calendars readily available at the preliminary hearing.

When I set your hearing date, I block out that date (or dates) on my calendar and schedule other matters around it, at times turning down other legal work or arbitration or mediation assignments. As a courtesy to me (and to avoid any cancellation fee disclosed on my profile) and your opponent, if you foresee a need for a continuance, please notify the other party and me or your Case Manager as soon as the need becomes apparent.

B. Decorum and Facilities

I generally hold arbitration hearings at my office or another suitable location. While the setting is less formal than a courtroom, I expect that counsel, parties, and witnesses will observe proper decorum. Direct your objections and argument to me or to the Arbitration Panel,

not to opposing counsel. Do not use purple prose or engage in *ad hominem* attacks on opposing parties or their counsel; you will not advance your client's cause by doing so. Cell phones must be turned off (or the no-ring option selected) when in the hearing room. Please discuss any special hearing needs (*e.g.*, white board, easel and flip chart, overhead projector, video deposition equipment, power point projector, etc.) with me, my assistant or your Case Manager as soon as possible so that appropriate arrangements can be made. We will discuss other logistics at our final pre-hearing conference.

C. The Arbitration “Day”

The Notice of Arbitration Hearing Date will identify the starting time for the arbitration. I expect everyone to be ready to begin at the appointed time. That means arriving before the time set for us to begin; if you are “just in time,” you are late. Morning “starts” will ordinarily begin at 9 or 9:30 am; afternoon “starts” will ordinarily begin at 1:30 pm. The arbitration day will ordinarily conclude between 4:30 and 5 pm. We will take reasonable breaks throughout the day. The lunch recess will normally be from 12 noon until 1 or 1:30 pm in order to allow the parties and counsel sufficient time not only to eat, but also to return telephone calls and prepare for the afternoon session. I expect counsel and witnesses to return to the hearing room from breaks promptly and be ready to proceed at the appointed time. With the agreement of all parties (and assuming the hearing facilities are available), I am ordinarily prepared to continue the Hearing through the lunch recess and/or for a limited time beyond 5 pm.

D. Stenographic Record

If any party desires that a stenographic record be made of the arbitration hearing, that party must make the arrangements for same—and notify the Case Manager, me and the opposing party. *See, e.g.*, AAA Rule R-28. The reporter's attendance fee will be the responsibility of the party arranging for same. If any party obtains a transcript that it will reference directly or quote from in examining witnesses or in argument, that party will be expected to provide me and the opposing party with a copy at no cost.

E. Exhibits and Use of Exhibits

Please bring with you to the evidentiary hearing a full set of your exhibits, appropriately marked, along with a current exhibit “list”, for

my use during the Hearing. I will provide you with a form to list your exhibits so you, your opponent, and I can annotate it easily to record the status of exhibits as offered, admitted, rejected, or withdrawn. You should also have a full set of your exhibits for use by witnesses and another full set for yourself. You will, of course, already have provided opposing counsel/all other parties with a full set of your exhibits. Please use a tabbed 3-ring binder for exhibits; include a few extra number tabs at the end of the binder to accommodate the inevitable “additional” exhibits. I prefer a consolidated, consecutively numbered set of all (*i.e.*, all parties’) exhibits. If there are exhibits which will be referred to multiple times during the hearing, please consider a separate set of “core exhibits.” If, as inevitably happens, additional exhibits are offered at the hearing, be sure they are side-hole-punched for the exhibit books. I encourage you to highlight the relevant portions of documents in my (or the Panel’s) set of exhibits; exhibits in the witness’s set should not be highlighted. I also encourage the parties to agree on the admissibility of as many exhibits as possible. Once an exhibit has been admitted, there is no need for authentication or foundation testimony; however, you will want to make sure I understand that a witness has some connection with or understanding of an exhibit (or that he or she has none). As noted above, an exhibit that has not been the subject of any testimony during the Hearing will be of scant use to me in considering the case.

F. Opening Statement

Counsel, or a party which is unrepresented, may give a brief opening statement if desired; the opening statement will ordinarily be given immediately after the opening of the Hearing and will, except in unusual circumstances or complex cases, be limited to 15-20 minutes. Your opening statement should be non-argumentative and should focus on (1) the issues, (2) the proof you anticipate will be presented, and (3) the specific relief you seek.

G. Presentation of Evidence

You should come to the evidentiary hearing fully prepared to put on all of your evidence. I encourage you to stipulate to matters or claims not in controversy so that we may make the most of the time reserved. The claimant will put on his or her case first, followed by the respondent. Evidence concerning counterclaims or cross-claims (offensive or defensive) will ordinarily be put on as part of the party’s

case. I encourage you to focus your questions, and witnesses are encouraged to focus their answers, on substantive matters and to dispense with lengthy preliminaries; rambling oral witness narratives are not helpful. Cross-examination and reasonable re-direct and re-cross examination will be permitted. Non-cumulative rebuttal evidence specifically directed to evidence in the opposing party's case-in-chief may be permitted, but ordinarily only on good cause shown.

H. Hearing Management Procedures

In cases where the parties anticipate the hearing will take several days or weeks, I encourage the parties to consider the use of hearing management procedures designed to streamline the hearing process. Some options are:

- Use of a “chess clock” to allocate the parties’ time fairly, and/or separate time limits on discrete portions of the hearing (*e.g.*, openings, closings, etc.); and/or
- A requirement that the direct testimony of all party-controlled witnesses, or perhaps only the expert witnesses, be submitted in writing (and exchanged in advance of the hearing). Where this option is adopted, the party “presenting” the witness will be given an opportunity to “introduce” the witness by a short (*e.g.*, 15-30 minutes) live direct examination to “introduce” the witness and highlight portions of the witness’s written narrative. Normal cross- and redirect examination then follows.

I generally raise this subject in our initial preliminary hearing only to highlight its potential usefulness in streamlining the Hearing. We will revisit this subject at other pre-hearing conferences that precede the evidentiary Hearing. While I encourage the parties themselves to agree upon the hearing management procedures they believe are best suited to their case, I retain the discretion to require the parties to follow such procedures as I believe are appropriate in the case.

Regardless of whether any of the above hearing management procedures are utilized in your case, I expect counsel to be organized and fully prepared for the Hearing: a command of all the exhibits is critically important so that exhibits are presented to witnesses (and identified to me) expeditiously; questions, whether on direct or cross, should be crisp and understandable; witnesses should be present and available on short notice; repetitive questions and testimony should be avoided, as should time spent on inconsequential matters.

I. Order of Witnesses

On occasion a witness's availability is limited to certain times or dates. Requests for an accommodation in this regard will be handled on a case-by-case basis but will ordinarily be granted absent a showing of some prejudice. I encourage counsel to cooperate and agree on such requests. In cases where multiple hearing days are scheduled, I normally require that the "presenting" party notify me and all opposing parties, the day before, of the order in which the next day's witnesses are expected to testify.

J. Rules of Evidence

Unless your arbitration agreement requires application of state or federal rules of evidence, strict adherence to those rules will not ordinarily be required, although I generally use the rules of evidence as a guide in determining admissibility of exhibits and the appropriateness of questions and testimony. While the rules governing admission of evidence at the Hearing (*see* AAA Rule R-34) will be more relaxed than in a court proceeding, counsel will be expected to lay an appropriate foundation and to observe normal witness interrogation rules regarding the form of questions (leading one's own witness on substantive matters, for example, will not ordinarily be permitted—and doing so impacts my assessment of the witness's credibility). Hearsay evidence will normally be admitted if it is of the sort that business people and other prudent persons commonly regard as trustworthy and rely on. Double- and triple-hearsay will not normally be admitted. Counsel are encouraged to bring anticipated evidentiary problems to my attention prior to the Hearing so that they may be resolved with minimal interruption to the proceeding. Motions *in limine* are disfavored and should be resorted to only in the rarest of circumstances. If you feel compelled to object to a question at the Hearing, please make your point succinctly. Direct any response to an objection to me. You may impeach a witness who departs materially from his or her deposition testimony, but use the process sparingly and only with respect to material departures; do not waste your time niggling over minor, non-substantive variations.

K. Cumulative Evidence

A parade of witnesses who all say the same thing is a waste of time—mine, yours, your clients' and that of the other parties and lawyers. This is not to say that corroborating evidence will be

excluded, however. If a witness will corroborate evidence given by others, establish that fact quickly and move on.

L. Use of Depositions

If depositions are permitted, it is the responsibility of the party desiring to offer deposition testimony to provide other parties with a copy of the transcript marking/highlighting those portions the party desires to offer. Other parties may then mark/highlight the portions of the deposition they wish to offer. Prehearing Order No. 1 will set a schedule for this. You may simply submit the marked/highlighted transcript to me; I will read it after the hearing day. If the deposition is lengthy, I may ask counsel to give me an oral summary of the key points for which the witness's deposition is being offered.

M. Use of Technology in the Presentation of Evidence

I prefer that counsel use power-point presentations, videos and overhead projectors sparingly, if at all. I, other counsel and the witness will have a copy of all exhibits before us and can easily read what you direct us to. If you do use technology, be sure you know how to use it efficiently and effectively; transitions should be pre-cued and seamless.

N. The Arbitration Hearing is a "Closed" Proceeding

The Hearing is not open to the public and will not be opened to the public, unless required by applicable law, except (1) on stipulation of all parties and (2) with my permission. *See, e.g.*, AAA Rule R-25. Ordinarily, the only persons permitted in the hearing room will be counsel, a designated representative of each party (who may also be a witness at the hearing), and the witness testifying. I will generally permit future witnesses (except the parties' designated representatives and expert witnesses) to sit-in on the Hearing only if the opposition has no objection.

O. Closing Argument

You may expect that a reasonable amount of time will be afforded you for closing argument. Closing argument will ordinarily take place immediately following the close of the presentation of evidence and will be oral. If necessary, we will take a short recess following the close of the evidence in order to permit counsel to organize themselves for argument. I encourage you to focus your argument on

the evidentiary support for your case and the legal principles you believe apply. I expect you to precisely identify the relief you seek. On occasion, I permit “argument” to be presented in writing, within a week or two following close of the presentation of evidence. I encourage you to discuss this subject with all other parties and agree in advance on the type of argument desired (oral or written). I retain the discretion to decide the form of argument.

P. “Close” of the Arbitration Hearing

Ordinarily, I will “close” the arbitration Hearing upon completion of the parties’ closing argument. *See* AAA Rule R-39. This formal “closure” begins the time within which I may make my award. Once closed, the hearing will be reopened only upon good cause shown and in accordance with applicable law and/or the rules and policies of the provider-organization. *See* AAA Rule R-40.

Q. Hearing Record

I will not normally prepare a separate Hearing Record (describing pre-hearing proceedings and listing witnesses who testified and exhibits) following close of the Hearing. If a formal hearing record is desired, any party may request a stenographic record, which will ordinarily be the official record of the proceedings. *See* AAA Rule R-28. To the extent appropriate, I will in my Award summarize pre-hearing proceedings and describe the Hearing generally.

X. AWARD

A. Statement of Relief Requested

As an aid to preparation of the award in your case, I will require that each party provide me, generally on the first day of Hearing but in any event prior to closing argument, with a statement of relief requested—the substance of the award (claim-by-claim) the party proposes that I enter. It is important that in your statement you tell me exactly how you want me to rule on all claims made in the arbitration—yours and your opponent’s. If, for example, you have a claim for pre-award interest, I need you to tell me exactly how I should deal with it, including the applicable interest rate, the principal amount to which the rate is supposed to apply, and the starting/ending date for interest accrual. Unless the other party can show substantial prejudice, I will ordinarily permit a party to amend its statement of relief requested immediately prior to closing argument.

B. Procedure in Most Cases

Unless your arbitration agreement provides for a different time, I will make my written award within the time permitted by the arbitration rules applicable to your case—30 days following the “close” of the arbitration hearing for cases conducted pursuant to the AAA Commercial Arbitration Rules (*see* Rule R-45); 14 days for cases conducted pursuant to the AAA’s “Expedited Rules” (*see* Rule E-9, Expedited Procedures under AAA Commercial Rules).

Also, unless your arbitration agreement requires otherwise or all parties have timely requested a “reasoned award” (*see* AAA Rule R-46, requiring that such request be made prior to appointment of the arbitrator), or I determine that a “reasoned award” is most appropriate for the case, my award will be very short and simply make an “award” based on the evidence presented; I will not make formal findings of fact or conclusions of law, nor will I ordinarily give you reasons for my award. If your arbitration agreement requires or all parties desire entry of findings of fact and conclusions of law, I will expect each party to provide me with their form of proposed findings and conclusions prior to conclusion of the Hearing. Unnecessarily detailed findings and conclusions will be rejected; findings and conclusions should be ultimate, not predicate, findings and conclusions.

If a “reasoned award” has not been timely requested by all parties, but all parties nonetheless agree that my award should be in that form, I will generally do so. If the parties disagree as to the form of award, I will provide them with an award in the form I deem most appropriate.

Unless I agree to provide the parties with a draft award, I will simply make and enter my award and serve it on the parties. Therefore, my award (whether a Partial or Interim Award (below) or a Final Award) is final as to all matters addressed therein. Transmittal of an award is not an invitation to any party to re-argue the merits of the award made or to seek reconsideration.

C. Cases in Which a Party May be Entitled to Attorneys’ Fees

In cases where a party may be entitled to an award of attorneys’ fees, I will ordinarily close the Hearing as to the merits of the dispute and make a partial or interim award reflecting my decision on the merits of the dispute before me, handling issues concerning attorneys’ fees after the partial award has been made.

If there is a contractual or statutory basis for awarding attorneys' fees, I will ask all parties to give me, and exchange with each other (generally within a week or two after the conclusion of the Hearing), very basic information concerning the amount of attorney/paralegal time (and the book value of same) incurred through the last day of the Hearing. For example:

Time-keeper	Hours	Rate	Book Value
Richard Roe (associate)	125 hrs.	\$200/hr	\$25,000
Jane Doe (partner)	<u>200 hrs.</u>	\$250/hr	<u>\$50,000</u>
Totals	325 hrs		\$75,000

A schedule for submitting a formal fee application and papers in opposition will be established at the close of the Hearing or after I have made a decision on the merits. Your formal attorneys' fee submission should give me sufficient information to evaluate the reasonableness of the attorneys' fees requested. The opposing party will be afforded an opportunity to comment on any request for attorneys' fees.

I ordinarily handle attorneys' fee issues by affidavit or declaration; if you desire to present oral testimony, I will expect you to show me why oral testimony is necessary. Regardless of the form of the "hearing" on attorneys' fees, you will have an opportunity to argue your views.

Following my receipt of your material on attorneys' fee issues, I will ordinarily enter a written order dealing with the matter. In any event, my decision on attorneys' fees will be incorporated in the ***final award*** entered in the case.

XI. POST-AWARD PROCEEDINGS

Delivery of my Final Award ordinarily terminates the arbitration and my authority to act. Grounds for an arbitrator to modify or correct an award, once made, are set out in the Federal Arbitration Act (9 U.S.C.) and its state law equivalent. *See also* AAA Rule R-50.

XII. MISCELLANEOUS

A. Settlement/Mediation

I encourage all parties to attempt to resolve the dispute by settlement—either through direct party-to-party (or lawyer-to-lawyer) negotiation or with the assistance of a neutral third-party mediator. I

will not, however, be involved in any aspect of your settlement negotiations and ask that you not even advise me of them, except insofar as they may potentially impact the schedule of case events established. Your Case Manager can supply you with information about mediation services and mediators. Obviously, if your case is resolved by settlement prior to the arbitration hearing, you should promptly call your Case Manager so that I can be advised and take the hearing date(s) off my calendar.

B. Service by Fax

In the absence of an objection by a party, I generally allow documents required to be served or filed (except original process) to be sent by confirmed fax transmission, provided that the number of pages to be faxed is *15 pages or less*; I generally permit lengthier documents to be served by fax only with the prior consent of the recipient.

C. Service by Email

In the absence of an objection by a party or a contrary rule or policy, I encourage that documents required to be served or filed (except original process) be sent by email. Any such documents should be sent in PDF format. Attachments (such as briefs, declarations, exhibits) may be sent to me by email only if the attachments do not exceed (in the aggregate) 2MB of data. Lengthier or larger attachments should be sent in hard-copy form only—by mail, messenger or other form of expedited delivery. Regardless of whether attachments are sent to me by email, I ask that you send me a hard-copy by mail or messenger so that I have a paper copy in my file as well.

D. Direct Service of Case Papers on Me

With your agreement and my approval, we will follow the “direct communication” protocol: a copy of all case papers may be served on me directly at the same time they are served on other parties. The document must nonetheless be filed with the arbitration-administering organization (except for cases under Washington’s Mandatory Arbitration Act), with proof of service on all other parties and me noted. Oral communications with me are prohibited unless all parties participate.

E. Familiarity with Rules and Policies

Counsel and unrepresented parties are expected to be familiar and comply with any arbitration-administering organization's rules applicable to the case. Please contact your Case Manager if you do not have a copy of these documents.

F. Questions?

Your Case Manager is extremely knowledgeable about case administration issues; please do not hesitate to call on him or her if you have questions or concerns about the administration of your case. My office staff is similarly knowledgeable for private cases. If you have any questions or concerns about the applicability of these policies to your case, please either raise them with your Case Manager (who will bring them to my attention, if appropriate, or arrange a telephone conference call hearing) or bring them to my attention during our initial preliminary scheduling hearing.