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

I was a trial lawyer for over twenty-five years. Over the last two decades, my practice has been pretty much full-time as an arbitrator and mediator. While my experience as a lawyer, mediator and arbitrator has taught me much, I also have learned a great deal both from advocates and from other arbitrators with whom I have served. Most especially I have learned:

- parties to a dispute choose arbitration for the advantages it has over traditional civil litigation, particularly (1) because it provides an early opportunity to present their evidence and get a resolution and (2) is 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 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 knowing that information about how individual arbitrators conduct proceedings is hard to come by – and generally anecdotal – I want to summarize my arbitration philosophy and share with you the principles which govern my management of cases. So that the parties to cases in which I serve as arbitrator are aware of how I generally conduct arbitrations, I wrote this paper. Please understand that these are *guidelines* – not a contract to hold against me.

I follow these policies in American Arbitration Association ("AAA"), American Health Lawyers Association ("AHLA"), College of Commercial Arbitrators ("CCA"), CPR and JAMS arbitrations where I am the sole arbitrator and, where I am the Chair of an Arbitration Panel, with the consent of the other members of the Panel. While I am flexible and will tailor pre-hearing, hearing and post-hearing procedures to suit the needs of a particular case, my written policies give the parties at least a fair idea of my philosophy toward arbitration and case management. These policies are intended 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. Yet, if the parties' arbitration agreement specifies particular rules or addresses one or more of the subjects discussed below, 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 policies with their clients.

Here they are.

THE ARBITRATION PROCESS

The purpose of **arbitration** is to resolve a dispute privately using the services of an independent, neutral decision-maker – the *Arbitrator.* Although the **Arbitrator** is not a judge, he or she functions in much the same manner as does a judge and **determines whether or not a claim should be allowed and, if so, in what amount or under what circumstances**. The Arbitrator's award is most often final and binding. An arbitration award may generally be filed in court and, once *confirmed* by the court, becomes a judgment with the same force and effect as a judgment that results from a trial.

Although the arbitration process is similar to a court proceeding – and the hearing similar to a trial – there are several key differences. First, the time from case filing to issuance of the arbitration award is generally faster than in court proceedings. With the AAA, the average is around 285 days. Second, the sort of broad, wide-ranging "discovery" common in court proceedings is generally not available unless the parties agree and the Arbitrator permits it. Third, the rules of evidence that govern court trials are generally not followed in arbitration hearings: trustworthy evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs ordinarily will be received, regardless of whether a court would admit it. Finally, there is, as a practical matter, no appeal from an arbitration award. The grounds for vacating an arbitration award are generally very limited.

My job as Arbitrator is to hear your "proofs" . . . the evidence you present, both by way of testimony and by way of documents . . . and to decide the case. The "award" that I will make after hearing your case is my decision.

DIRECT CONTACTS WITH ME ARE PROHIBITED

Direct contacts with me concerning any matter involved in your arbitration, other than in a hearing at which all parties are present or represented, are not permitted following confirmation of my appointment as arbitrator. *See* Rule R-19, AAA Commercial Arbitration Rules.* All contact should be with the AAA Case Administrator (sometimes called Manager of ADR Services or Case Manager) assigned to your case. He or she functions, in essence, as my "bailiff" or "clerk," and will contact me if appropriate and when needed. The only exceptions are communications to which the AAA's *Accelerated Exchange Program* applies – generally motions, briefs and other similar matters. A copy of any such paper delivered to me must be contemporaneously served on all other parties, and a copy filed with the Case Administrator.

DISCLOSURES

The integrity of the arbitration process depends in large part on the parties and counsel having faith in the impartiality of the arbitrator. I take my disclosure obligations very seriously (*see* Revised Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA, March 1, 2004

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* References are to the AAA Commercial Arbitration Rules (October 1, 2013). Often, I hear cases under the Employment Arbitration Rules (effective November 1, 2009). The Rules are very similar. Look at www.adr.org.

and Section 12 of the *Revised Uniform Arbitration Act*) and I make more than a good faith effort to make all appropriate disclosures in a timely fashion. I disclose everything. I also will supplement those disclosures whenever necessary. I urge you to share my disclosures with your clients, and to immediately bring to the attention of the Case Administrator any concerns that you or they might have as to any disclosure I make or any independent information they or you might have that could appear to affect partiality.

Do not copy me on any disclosure-related communications you have with the AAA – I have no role or influence in any decision to remove me, or continue me, as your Arbitrator.

LIST OF RELATED ENTITIES AND CONFLICT LISTS

To the extent you have not provided the AAA with a list of related entities and key potential witnesses, please do so as soon as possible. These lists are for my use only, and do not go to opposing counsel. I rely on them to determine whether there are any potential conflicts of interest or appearance of fairness issues. Your lists should be seasonably supplemented as necessary. It is important that I know, at the earliest possible time, whether any additional disclosures need to be made. I need to know if one of your witnesses is my best golfing buddy. I watch this very carefully. Please also understand that thinly disguised attempts to use the disclosure process as a way to change Arbitrators is rarely effective, and generally backfire. Just retaining my former law firm – or a close friend – as co-counsel will not automatically lead me to recuse myself from your case. That is a decision that you made, not that I made.

PRE-HEARING CONFERENCES

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 Administrator, who will contact me. You may assume that I will have received any papers submitted in connection with such a conference and that I will 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, not to your opposition; avoid personalizing your comments; only one person speaks at a time. What should you call me? I am simply Mr. Lemons – I am not a judge. I read everything that is submitted, and will make every effort to remember what you and the parties tell me from the initial conference to the final day of hearing.

PRELIMINARY SCHEDULING CONFERENCE

My preference is to have a preliminary scheduling hearing in every case because it is beneficial for us to discuss procedural matters in a preliminary scheduling hearing (a/k/a arbitration management conference). The Rules contemplate this, and I think the preliminary hearing should be used in every case. Most preliminary hearings are satisfactorily handled by telephone conference call, although in an appropriate case, an in-person hearing will be arranged.

I expect you to invite and encourage your client/client representative to attend or participate in the initial preliminary scheduling conference, either in person or by phone.

Why do I want the client/party/party representative on the initial conference call? Indications are that the "end user" (i.e. the entity that writes a check for what we do) prefers to see and be allowed to select from our menu of items to be devoured in this process. They pay the check. The client can empower counsel to proceed without a need to engage in broad discovery and turn over every rock. When counsel reports that "the very earliest I could be ready for this trial is in the fall two years hence," often after a short recess, the hearing date becomes possible at a time much less remote. A time and date which the party wants.

The Case Administrator will contact you to schedule such a hearing. You may expect that in our initial preliminary hearing, I will ask the parties to confirm that all conditions precedent to arbitration have been waived or satisfied, that their statements of claims and defenses are sufficient to enable them to prepare for the hearing on the merits and that the claims asserted in the arbitration are arbitrable. I will also 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. Please be prepared to discuss these matters. A comprehensive list of topics is set forth in Commercial Rules Procedures P-1 and P-2. I will enter a "Scheduling Order" following the initial preliminary scheduling hearing, modeled after the sample Scheduling Order the Case Administrator always sends to counsel beforehand.

I expect that ***prior to the date of our preliminary hearing***, you will have discussed with the other parties:

- the adequacy of the operative pleadings (demand/complaint, answer) to prepare a discovery plan and otherwise prepare for the Arbitration Hearing,

- the parties' need (note, I did not say desire) for discovery (types of discovery and the time necessary to complete such discovery) [***please see the below discussion of "discovery***," including the section on Expert Witnesses],

- whether any party foresees any dispositive motions, need for a Protective Order or other requests for interim relief, and

- the anticipated length of the Arbitration Hearing and a timeframe when the parties, their counsel, and their witnesses will be available for that hearing.

- In sum, a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient and economical resolution of the dispute – yet at the same time, promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

Please be prepared to discuss each of these matters and the topics contained within my draft Scheduling Order during our arbitration management conference. It has become increasingly common, and most appreciated, for counsel to confer and work together in adopting my sample Scheduling Order and making it theirs, and simply providing it to the Case Administrator in lieu of a telephone hearing/conference. I really like when that happens.

MOTIONS AND INTERIM RELIEF

The AAA Commercial Rules do not expressly provide for the type of broad motion practice that is common in traditional court proceedings. My contemplation is that the only papers that will be filed will be the Statement of Claims and the Answering Statement. I suggest that filing a *Motion in Limine* or *Special Exceptions* or *Motion for More Definite Statement* will only indicate to me that this is, indeed, your first arbitration.

Nonetheless, I recognize that in an appropriate case, the parties may have matters that they need to raise by motion. The parties should be prepared at the arbitration management conference to advise me what (if any) motions, dispositive or otherwise, they anticipate making and whether any party anticipates seeking any interim relief *(see, e.g.,* Rule R-37, AAA Commercial Rules). If you do have a motion you wish to make, don't just draft and file the motion, hoping that I will allow it or that it will be necessary. Please first contact your Case Administrator. He or she will contact me and arrange for a telephone conference to discuss the subject matter of your not-yet-filed motion. If the motion does become necessary, we can establish a response deadline and a hearing date. Note that I have adopted the JAMS procedure that requires that counsel first confer before a motion is filed, and that a certificate of conference be included in the body of any motion.

AMENDMENT OF A CLAIM

If the AAA Commercial Rules apply to your case, please know that 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* Rule R-6, AAA Commercial Rules. If you desire to amend your claim (or counterclaim) to assert another or different claim, please let us discuss that notion first by telephone conference. If necessary, we can more fully consider your desire by allowing a formal motion served on all other parties and filed with the AAA. Your motion should set forth the nature of the new claim you wish to present and 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 – after a hearing at which all other parties will be given an opportunity to comment and reply. You are reminded that monetary claims should be quantified at the earliest practicable time and that once a claim has been quantified, payment of the appropriate AAA filing fee for that level of claim made so that your party's claim – to the extent it exceeds the amount of the claim originally quantified – may be heard in the arbitration.

Often, the Demand for Arbitration only specifies a category designation or provides a one-line description of the claim(s). By a date established in our Scheduling Order, a party seeking affirmative relief must provide particularized factual allegations and the legal theory underlying any claim asserted, as well as a damage model. While this is not an invitation to enlarge or change the claim (which may only be done upon motion and approval), it would be an opportunity for a party to delete or withdraw any claim the party no longer desired to pursue.

DISCOVERY

One of the most attractive features of arbitration as a method of dispute resolution is its general economy as compared to traditional litigation. Experience has shown that discovery is

ordinarily the single most expensive aspect of litigation. While a limited amount of information exchange is generally appropriate in arbitrations (and often, the parties will have expressly restricted discovery in their arbitration agreement or program), the amount and nature of appropriate information exchange is dependent upon many factors, including the amount in controversy and the issues and claims presented. Note that I do not use the word "discovery." Nor do the Commercial Rules. I require all parties at the outset to develop a mutually-agreeable plan for the exchange of information which is appropriate to the case. I also expect counsel to cooperate in its implementation. 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-1 and L-3) shall apply to your case. *Generally, no party in arbitration has a* ***right*** *to discovery. There will no longer be traditional "courthouse discovery. There will be nothing other than "exchange of information"* ***unless*** *(a) all parties agree to what looks like additional discovery, (b) the arbitration agreement and applicable law provides such a right, or (c) I enter an order expressly approving or directing what may be described as discovery.* Rule R-22, AAA Commercial Rules. But don't plan on bringing your federal court form book to my arbitration.

Because I am committed to the principle that commercial arbitration should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to traditional courts under traditional discovery regimes, I often use the *Guidelines for Arbitrators Concerning Exchanges of Information ("Guidelines")*, as promulgated by the International Centre for Dispute Resolution ("ICDR"), the international arm of the AAA, effective May 31, 2008. Those *Guidelines* are set forth on Appendix "A." Yet, I try to be flexible and you may attempt, in an appropriate case, to persuade me to deviate from the *Guidelines* and allow more traditional discovery if there is a demonstrable need to do that.

Counsel should also understand that even where the dispute justifies more traditional discovery to some extent, I will encourage the parties to agree to reasonable discovery limitations such as are suggested in CPR's General Provisions of its *Economic Litigation Agreement* protocol, found at www.cpradr.org/ClausesRules/EconomicalLitigationAgreements/ A summary table of CPR's suggested written discovery limitations, based upon the amount in dispute, is found in Appendix B.

These policies will be followed *in the absence* of an agreement or applicable law or rule concerning discovery that provides otherwise. I will not tolerate discovery abuse of any kind. This includes refusal to comply with reasonable discovery requests and other discovery games that lawyers like to play. I will remember the games that counsel play, and unlike some state district court judicial districts, I stay throughout the proceeding.

E-Discovery

If you foresee the need for e-discovery, please discuss it with the other party. Ordinarily, I will impose limits on e-discovery along the following lines:

- Production of electronic documents is 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.

Documents

I require the timely, voluntary and mutual exchange of relevant documents, including particularly all documents upon which a party relies. I ask the parties to cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information relevant to the dispute or claim immediately after the entry of my Scheduling Order. Contemporaneous with the disclosures referenced below, I expect them to complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control ***on which they rely in support of their positions***, and names of all individuals whom they may call as witnesses at the arbitration hearing. Chances are very good that if this information has not been voluntarily exchanged, it will not be admitted into evidence at the evidentiary hearing. Rule R-23, AAA Commercial Rules, vests in me certain new enforcement powers as may be necessary to accomplish the goals of a fair and efficient arbitration process. This includes the ability to allocate the costs of producing documentation, and to take certain actions in the case of willful non-compliance with any Order.

Written Discovery

Lengthy and detailed interrogatories – on any subject, but particularly about "facts" or "contentions" – are inappropriate and will not be allowed. If you wish to use interrogatories, please discuss the issue with all other parties. I encourage you to limit what interrogatories you may contemplate to inquiries regarding the existence and whereabouts of documents, and witnesses with knowledge or information, relevant to issues in the case. Requests for admissions are rarely effective in arbitration. If you want to use them, consider using them to pin down what deposition discovery has found. Requests for production of documents are seldom effective but do lead to most of the discovery disputes that I hear. If counsel knows that a particular document that is germane to the issues exists, why not ask me to subpoena it?

Identification of Potential Fact Witnesses

I generally will require you to exchange pertinent identifying information (name, address, telephone number) about persons with knowledge or information concerning issues in this case and to agree on a time for delivery of this information. I generally find that counsel appreciates using either the Federal Rules of Civil Procedure initial disclosures (Rule 26) or Texas Rules of Civil Procedure disclosures (Rule 194). 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 deadline to enable other parties to prepare. *See* my comments below concerning late-identified witnesses and exhibits. But you can count on my requiring within the first thirty days of the case the exchange of either FRCP Rule 26 or TRCP Rule 194 "initial disclosures."

Expert Witnesses

Expert witnesses are not required in every case. In fact, they are normally not helpful. Where you anticipate presenting "expert" testimony at the arbitration 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 deadline to allow any necessary expert discovery. I also expect that you will promptly (by a date certain) provide all other parties with a copy of your expert's report or analysis and a narrative statement of (a) the subject matter on which your expert is expected to testify, (b) the substance of the facts and opinions to which the expert is expected to testify, and (c) a summary of the grounds for each opinion. 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 will require that a copy of the expert's report be furnished to all other parties well prior to the deposition.

Depositions

Numerous and/or lengthy depositions are inappropriate in most arbitrations and will not be allowed. I encourage you to realistically evaluate both your deposition needs and those of the other parties to your dispute and to work cooperatively to (a) agree on a deposition schedule and (b) utilize less formal — and less expensive — witness interviews, when appropriate. Again, consider agreeing to the limits set forth on Appendix "B." The new Commercial Rules do allow me to travel to a location where a potential witness would be subject to compulsory process.

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, please call your Case Administrator. He or she will contact me and arrange a hearing on the matter. I have quite a collection of

protective orders that we could use. I generally issue a standard Protective Order in every employment case and every case involving real or perceived proprietary or confidential information.

Discovery Disputes

If you and the other parties are unable to agree on the exchange of information (formerly called a discovery plan), the appropriateness of particular discovery devices, or particular discovery requests or responses to same, please contact your Case Administrator to schedule a telephone conference call (or, in an appropriate case, an in-person) hearing with me. A formal, written motion is not ordinarily required, nor is a formal, written response or objection, but you should be prepared to succinctly demonstrate to me the necessity of the discovery requested (or, in the case of an objection, the reasons why the requested discovery should not be granted). If particular discovery requests (or responses to same) are at issue, you should probably provide me with a copy of the pertinent parts or subparts in controversy so that I may place the dispute(s) in context. I will rule promptly on any discovery disputes brought to me for resolution. ***Do not wait until just weeks or days before our arbitration hearing to raise a discovery dispute or to seek additional discovery.*** I generally will find that is not sufficient cause or grounds for postponing our hearing. Also, except in the case of an actual discovery dispute, please do not file discovery requests or responses with either the Case Administrator or me. Such is not evidence, and I really should not see it.

DISPOSITIVE MOTIONS

Arbitrators in employment cases have long had authority to entertain and act upon dispositive motions – the traditional motion for summary judgment. Well, Arbitrators in commercial cases now have that same authority under new Rule R-33, AAA Commercial Rules. But first, there must be a showing that the motion is likely to succeed and dispose of or narrow the issues in the case. In light of this new Rule, I have adopted the procedure from my employment cases, and that section of the Scheduling Order will likely read like this:

> While the Arbitrator neither encourages nor discourages dispositive motions, in the event such may aid in the disposition of this matter and/or in narrowing the issues, a Motion for Summary Judgment may be filed on or before **May 3, 2019**. The movant must also file a brief statement pursuant to Rule R-33 establishing substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case, and attest that any remaining deposits that have been invoiced have then been paid. The Arbitrator will make a preliminary determination under Rule R-33 on or before **May 10, 2019**. If this preliminary determination is made in favor of the movant, and only in such event, a Response to any such timely filed Motion for Summary Judgment shall be filed on or before **May 24, 2019**. Assuming timely filing and to the extent feasible, the Arbitrator shall rule on any such Motion for Summary Judgment by **May 31, 2019**. Any such motion shall be filed and determined pursuant to the Federal Rules of Civil Procedure.

So it cannot now be said that commercial Arbitrators will never even entertain a dispositive motion. We have long had authority to do that, and the new Rules now confirm that. I have granted many. But generally, the ones that have been successful have involved something that is measurably black and white, did not involve ultimate state of mind or motivation issues, and were governed by a definitive statement of law – waiver, release, limitations and the like. If you file a motion for summary judgment simply to "educate" me, or because you need to bill more time on that file, I most likely will pick that up and not even require the other side to respond. Remember: even if the technical requirements of FRCP Rule 56 are met, I have the discretion to deny the dispositive motion if I feel I really need to hear evidence and have a hearing. Perhaps Abraham Lincoln best summarized this philosophy:

> "We better know there is a fire whence we see much smoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot." *Hopkins v. Andaya,* 958 F.2d 881, 888 (10th Cir. 1992)(*quoting* ABRAHAM LINCOLN, *Unsent Letter to J.R. Underwood and Henry Grider,* from *The Quotable Lawyer,* at 323 (1986)(Schrager and Frost Editions).

WITNESSES AND EXHIBITS

A reasonable time prior to the Arbitration Hearing, I expect you to exchange lists of witnesses who are expected to or will testify at the hearing and lists (and a copy) of all documents that will be offered (or reasonably are expected to be offered) at the hearing. I encourage you to agree on when the exchange will take place, and we will include the dates(s) in our Scheduling Order. I generally require that the parties exchange preliminary witness and exhibit lists early in the case and final lists at least two weeks prior to the Arbitration Hearing. Witnesses disclosed *for the first time* on the date set for exchange of final witness lists will ordinarily not be permitted to testify over the objection of an opposing party, although I will evaluate any potential 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 Arbitration Hearing). Don't hide behind privilege or use it as a sword.

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 in most cases indicate how the witness will testify at the hearing (in-person, by telephone, by video deposition, by written deposition or by affidavit or declaration). If the witness is expected to testify by affidavit or declaration, a copy of the affidavit or declaration should be delivered to all other parties at least one month before the arbitration hearing, unless a different date is established by our Scheduling Order. A copy of your witness list should be delivered to your Case Administrator at the same time as you deliver it to your opponent. In complex cases and cases where the parties expect the hearing to last several days, I may require that party-controlled witnesses' direct testimony be presented in writing or that counsel may "proffer" direct testimony – in ether 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 and the other party is entitled to cross-examine the witness so proffered. *See* my comments below concerning hearing management procedures.

Although a witness's testimony may (theoretically) be presented by declaration or affidavit *(see* Rule R-32(c), AAA Commercial Rules), I strongly encourage the offeror to have the witness available live or by telephone for cross-examination. 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), 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 month prior to the arbitration 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.

Under the Rules and pursuant to the Arbitrator's inherent authority to provide the parties an opportunity for a full and complete hearing, the Arbitrator has the authority to require the attendance of any witness or other person necessary to a full and complete hearing. If that witness or person is employed by or under the control of a party, I expect voluntary compliance.

Exhibits

Each party's exhibit list should at the very least list, and by number or letter identify, all documents that party expects to offer at the hearing. A legible copy of each exhibit must be provided to all other parties along with the list. Please confer with your opponent regarding the number and numbering of exhibits; *use this opportunity to eliminate duplicate exhibits.* It pleases the Arbitrator a great deal if the parties use a *Joint Exhibit Notebook.* Exhibits should be pre-marked to the extent possible and should be numbered sequentially. *If you can't agree on joint exhibits, use letter or party designations (e.g,* A-l, C-33 (or Claimant's 33), Respondent: R-1-200). *See also* the discussion below concerning exhibits and use of exhibits. Because I am going to decide your case, I suggest that you please highlight relevant portions of your exhibits in my exhibit book. I am not normally going to attempt to look for "hidden" or "surprise" exhibits in a six-inch thick exhibit notebook.

To put it another way, it is the parties' responsibility not only to produce the required evidence, but also to specifically point it out for the Arbitrator. This Arbitrator will not pick through hundreds of pages of exhibits searching for evidence to help one of the parties. *See Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1296 n.16 (5th Cir. 1994) ("Judges [Arbitrators] are not like pigs, hunting for truffles buried in briefs.")*; Georgen-Saad v. Texas Mut. Ins. Co.,* 195 F.Supp.2d 853, 859 n. 5 (W.D.Tex. 2002)(Nowlin, Judge). I will consider all the evidence that is properly before me and that is brought to my attention, but I have no duty to comb the entire record looking for relevant evidence. *Ruben Hernandez, et al. v. Yellow Transportation, Incorporated,* 641 F.3d 118 (5th Cir. 2011).

Supplementation

I recognize that even the most skilled and diligent among us cannot anticipate every eventuality, and that supplementation of witness or exhibit lists may be necessary and appropriate. Counsel is, however, expected to make a totally 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. Normally, such will come in but after a reasonable period of time to overcome the element of surprise. Please don't make me do that.

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), please 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 only issue a subpoena to a third party if I conclude, after hearing from the other parties to the case, that I should do so. 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. Remember that enforcement of subpoenas to non-parties is for the appropriate court. Remember, too, that the use of discovery subpoenas in cases subject to the Federal Arbitration Act is not permitted in all circuits, but that while there is currently a split of authority among the circuits concerning my authority to issue subpoenas for discovery depositions or document production, I normally feel that I can.

Please request subpoenas through your Case Administrator. I will not normally issue a subpoena for a deposition unless all parties have agreed to the deposition. I normally will issue subpoenas *ex parte,* unless you promptly ask the Case Administrator for an opportunity to be heard. I will again state that I have little, if any, power to enforce a subpoena – that is clearly for a court of competent jurisdiction. Please also do not use subpoenas as a weapon. For example, don't subpoena all production personnel, or senior management, to be at my hearing at 9:00 the morning of some hearing day. That is neither practical nor realistic.

CLAIMS AND CONTENTIONS — NARROWING THE ISSUES

I generally find it helpful if the parties provide me (and all other parties) – fairly early in the arbitration process – a short "plain English" (5 pages or less) outline of the principal claims and issues involved in the arbitration, a statement of their respective contentions and a plain statement of the relief sought. We will discuss whether such claims statement should be submitted – and, if so, when – at our initial preliminary hearing and scheduling conference.

I also find it most helpful (and generally will require) that the parties furnish me with a pre-hearing stipulation (preferably a joint statement) setting forth those facts which are agreed or stipulated to. While I do not require, or expect, a pre-hearing stipulation of uncontested facts in *every* case, I would appreciate it if you would consider preparing such a document and furnishing it to me with your pre-hearing briefs (discussed below). In any event, I encourage all parties to stipulate to matters, facts, dates, and claims and contentions not in controversy so that we may make the most of the time set aside for our Arbitration Hearing. Unfortunately, this happens in less than 25% of my cases. It is certainly nice when it happens

ARBITRATION BRIEFS

Although no party is required by either the Commercial Rules or the Employment Rules to submit an arbitration brief, I normally encourage the submission of *succinct* briefs addressing relevant issues (legal and factual) in the case. Briefs that apply the law to critical factual issues are particularly helpful. Any party desiring to submit an arbitration brief should provide a copy to all other parties and to me directly at least ten (10) business days before the Arbitration Hearing, unless a different date is established by my Scheduling Order. The original of any brief should be filed with the Case Administrator. Unless I have specifically set another page limit, ***briefs should not exceed thirty pages in length.*** That is why we call them "briefs."

String citations to authority (case or otherwise) are discouraged. Please include with your brief a copy of any key decisional or other authority on which you rely. I don't have much of a library. You will aid my understanding of your position and the decision's relevance to it if you highlight pertinent portions of the case or other authority. Do not cite me to bad law or overruled authority. I did top my class in legal research and will check out what you refer me to.

ARBITRATION HEARING

Hearing Date; Continuances; Cancellation Fee

A true advantage of arbitration is that once the hearing date(s) is chosen (and we allow counsel and the parties to select it/them), this will be the only matter set and counsel only will have to prepare for trial once. And so the date of the Arbitration Hearing is only set after consultation with the parties and their counsel. Because everyone has committed to that date(s) early on, the hearing date(s) will ordinarily be changed only for good cause shown. Even then, I may require that all ***parties*** agree in writing to a postponement (note well that I said ***parties*** and not *counsel*). That is what Rule R-30, AAA Commercial Rules, requires. A telephonic hearing is nearly always held, and selection of a new date(s) for the hearing will always be first on the agenda. Please confer with the other parties and be prepared to discuss (1) when this 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) your availability for a hearing during the 30 day period surrounding the time when this case is anticipated to be ready for hearing. Counsel should have their calendars readily available at the preliminary hearing.

Please be aware that the *AAA* imposes a fee for rescheduling. I do as well. When you set your Arbitration Hearing date(s), I block out that date (or dates) on my calendar and schedule other matters around it. In virtually every instance, I turn down other arbitration or mediation assignments. As a consequence, I also impose a fee for canceling or rescheduling a hearing. That fee is set forth on my biographical data on file with the AAA. If the hearing is cancelled within the cancellation period, the deposit is considered earned in accordance with my cancellation policy. If the dates are re-scheduled, I may allow a refund to cover those dates. So as a courtesy to me and to your opponent, and to save money for your client, if you foresee a need for a continuance, please notify your Case Administrator as soon as the need becomes apparent. I normally will not allow a continuance unless and until counsel and the parties have agreed on new dates for the hearing. We will not leave the new hearing schedule in limbo.

Decorum and Facilities

I generally try to hold arbitration hearings in the office of the AAA nearest to the situs of the dispute or where the arbitration agreement provides. If the AAA facilities are unavailable, I will hold hearings in my large conference room or in another *neutral* location. The Notice of Arbitration Hearing will identify the location of the arbitration hearing in your case. While the setting is less formal than a courtroom, I expect counsel, parties, and witnesses to observe proper decorum. Direct your objections and argument to me, not to opposing counsel. Do not use purple prose or engage in *ad hominen* attacks on opposing parties or their counsel; you will not advance your cause by doing so. Cell phones must be turned off 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 your Case Administrator as soon as possible so that appropriate arrangements can be made.

The Arbitration "Day"

The Notice of Hearing issued by the AAA will identify the starting time for the arbitration. I expect everyone to be ready at the appointed time. That means arriving *before* the time set for us to begin. Morning "starts" will ordinarily begin at 9:00 a.m. The arbitration day will ordinarily conclude between 4:30 and 5:30 p.m. We will take reasonable breaks throughout the day. I normally set the lunch recess to be from 12 noon until 1:30 p.m. not because I like a leisurely lunch – but rather 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 AAA's facilities are available), I am ordinarily prepared to continue the hearing through the lunch recess and/or for a limited time beyond 5:30 p.m. I do know how to turn out the lights. Indeed, I have had hearings begin in mid-afternoon and go to after 10:00 p.m. A true advantage of arbitration is that we can make the hearing times meet any need.

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 Administrator and the opposing party. *See* Rule R-28, AAA Commercial Rules. I generally require that the parties stipulate that the court reporter's transcript will be the Official Record of the hearing. I normally ask that the court reporter maintain the "official" exhibits. As a general rule, where the parties require the issuance of a Reasoned Award or certainly where there are to be Findings of Fact and Conclusions of Law, I will insist on being provided an Official Record to refer to. Practice hint: if it is a serious and complicated case, and you want my undivided attention, get a court reporter and have a transcript made. It is hard to study demeanor and take notes at the same time.

Exhibits and Use of Exhibits

I prefer that a week or so before the hearing, you provide me a full set of your exhibits, appropriately marked, along with a current exhibit "list," for my use during the hearing. I will

review them. **It would be a remarkable thing for all the exhibits to be produced and exhibited electronically, such as on a thumb drive or other digital media**. It would seem that if one had to run the exhibits through a copier, wouldn't it be just as easy to *scan them* on digital media?

You should also have a full set of your exhibits for use by witnesses (we will normally give this to the court reporter) and another full set for yourself. You will, of course, already have provided opposing counsel/all other parties with a full and complete set of your exhibits. Please use a tabbed 3-ring binder for your exhibits; include a few extra number tabs at the end of the binder to accommodate the inevitable "additional" exhibits. If, as inevitably happens, additional exhibits are offered at the hearing, be sure they are side-hole-punched for the exhibit books. You are encouraged to highlight the relevant portions of documents in the arbitrators' set of exhibits. I encourage the parties to agree on the admissibility of as many exhibits as possible. We will cover admissibility of all exhibits at the beginning of the arbitration hearing. Please don't play *exhibit games* with me – I may have done that (as a lawyer) – you will only lose credibility.

Opening Statement

Counsel may give a brief opening statement if desired. The opening statement will ordinarily be given immediately after the opening of the hearing and, except in unusual circumstances or complex cases, will be limited in time. Ten minutes is long. Fifteen minutes is excruciating. Five minutes is appreciated. Your opening statement should be non-argumentative and should focus on (a) the issues, (b) the proof you anticipate will be presented, and (3) the specific relief you seek. Tell me what you are going to tell me. Tell me what you really want me to do. I am not going to speculate on damages or relief. If I have significant questions in my own mind as to what is being asked of me, I have a pretty simple solution.

Presentation of Evidence

You should come to the arbitration hearing fully prepared to put on all of your evidence. 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. You are encouraged to focus your questions, and witnesses are encouraged to focus their answers, on substantive matters and to dispense with lengthy preliminaries. I really do not care where the witness went to high school. Cross-examination and reasonable re-direct and re-cross examination will normally 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 and my experience is that this is rarely the case. Please observe my instructions if I say "let's move on. I get it." Otherwise, I will feel like you don't think I am very smart.

Hearing Management Procedures

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

- Our 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.); 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 (it comes from international arbitration rules and doctrine), the party "presenting" the witness is ordinarily given an opportunity to "introduce" the witness by a short *(e.g.,* 30 minutes) live direct examination to "introduce" the witness and highlight portions of the witness's written narrative. Normal cross and re-direct examination then follows. Most international arbitrations use this procedure.

I generally raise this subject in our initial arbitration management conference. 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.

Order of Witnesses

If a witness's availability is limited to certain times or dates, an advantage of arbitration is that we can handle that. 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 prejudice. I encourage you 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. And so on . . .

Rules of Evidence

Under Rule R-34(a), AAA Commercial Rules, strict adherence to state or federal Rules of Evidence is not required. Having said this, 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 arbitration hearing 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). Hearsay evidence will normally be admitted if it is of the sort that business people and others commonly regard as trustworthy and rely on. The key word there is *trustworthy.* Double-and triple-hearsay will not normally be admitted. Bring anticipated evidentiary problems to my attention (through your Case Administrator) prior to the hearing so that they may be resolved with minimal interruption to the proceeding. If you feel compelled to object to a question at the arbitration hearing, please make your point succinctly. Do not object merely because you are in the habit of doing so in state court. 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 (or mine) niggling over minor variations.

Cumulative Evidence

Common mistake. A parade of witnesses who all say the same thing is a waste of time – mine, yours, and that of the other parties and lawyers. This is not to say that corroborating evidence will be excluded, however. It can be important. If a witness will corroborate evidence given by others, establish that fact quickly and move on.

Use of Depositions

It is the responsibility of the party desiring to offer deposition testimony to provide other parties with a copy of the transcript, clearly marking/highlighting those portions that party desires to offer. Other parties may then mark/highlight the portions of the deposition they wish to offer. You may simply submit the marked/highlighted transcript to me. Often, the entire transcript then is highlighted, so I read it all. Unless you ask me to read a transcript before the hearing, I normally will read it afterwards as I consider the record and exhibits. If the deposition is lengthy, I will normally ask counsel to provide an oral summary of the key points for which the witness's deposition is being offered. But we do not need to burn hearing time reading deposition excerpts into the record. Same rule for DVD's and other recorded forms of depositions.

Use of Technology in the Presentation of Evidence

I prefer that counsel use Power Point© presentations and overhead projectors only rarely and sparingly. Do not try to impress me with your mastery of technology. It may detract from your sincerity. About half of the time, the technology does not work, and we lose time. In the other half, the Power Point© presentation is a Hollywood production – fiction rather than fact – of *what the proponent really wanted the evidence to be*. Yet in a big case, a complicated case, technology can be very helpful. Practice hint: if you do use technology, be sure you know how to use it efficiently and effectively, making transitions seamless.

Arbitration Hearing is a "Closed" Proceeding

The arbitration hearing is not open to the public and will not be opened to the public, unless required by applicable law. *See* Rule R-25, AAA Commercial Rules. Ordinarily, the only persons permitted to be present during the Arbitration Hearing 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 during the Arbitration Hearing only where the opposition has no objection ("The Rule").

Closing Argument

You may expect that a reasonable amount of time will be afforded for closing argument. Closing argument will ordinarily take place immediately following the close of the presentation of evidence. If necessary, we will take a short recess following the close of the evidence in order

to permit counsel to organize themselves for closing argument. I encourage you to focus your argument on the evidentiary support for your case and the legal principles you believe apply. Tell me what you have told me, but in terms of what you told me you were going to tell me. I expect you to precisely identify the relief you seek. Precisely. Don't make me speculate. Often, "argument" is 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 post-hearing argument or other submission desired (oral or written).

"Close" of the Arbitration Hearing

Ordinarily, I will "close" the arbitration hearing upon completion of the parties' closing argument and/or actual receipt of post-hearing submissions. *See* Rule R-39, AAA Commercial Rules. I will ask whether there are further proofs to offer, or witnesses to hear. Please be candid with me. Any party who proceeds with the arbitration with knowledge that any provision of the Rules has not been complied with, without objection, will be deemed to have waived any such objection. Rule R-41, AAA Commercial Rules. So you had better "tweet or get off the branch."

Normally, this formal "closure" begins the time within which I may make my award. Sometimes, for good cause shown, I may *bifurcate* a hearing or reserve attorney's fees and litigation costs for later. But once closed, a hearing rarely will be reopened. *See* Rule R-40.

Hearing Record

Because more and more often, I am called upon to write a *Reasoned Award,* I generally insist that the arbitration hearing be "reported" by a court reporter and that the parties stipulate, or I determine, that the stenographic record will be the "Official Record" of the proceeding *(see* Rule R-28, AAA Commercial Rules). Please don't *ever* try to subpoena my notes from the hearing. The Case Administrator will usually make a copy of the "Official Record" available to all parties. I will ***not*** normally prepare a separate Hearing Record.

AWARD

As an aid to preparation of the Award in your case, I reserve the right to require that each party provide me, generally on the first day of hearing but in any event prior to closing argument, with the substance of the award (claim-by-claim) each party proposes that I enter.

Unless your arbitration agreement provides for a different time, I will make my written award within the time permitted by the AAA 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, AAA Commercial Rules.

Also, please carefully understand that unless your arbitration agreement requires otherwise or all parties have timely requested a "*Reasoned Award*" *(see* Rule R-46(b), AAA Commercial Rules, requiring that such request be made prior to appointment of the arbitrator), my Award will be very short and simply make an "Award" based on the evidence presented. To say it another way, unless absolutely required, *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 entry of findings of fact and conclusions of law, I will require that each party provide me, in MSWord format, its form of proposed findings and conclusions prior to conclusion of the arbitration 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 agree that I should provide them with a statement of my reasons for an award, or if, after discussing the issues with the parties, I determine that doing so would be appropriate, I will do so. My statement of reasons generally will be brief and set forth as part of my Award. Remember: This is a "cost" item.

In cases where a party may be entitled to an award of attorneys' fees, I will frequently close the hearing on the merits of the dispute and make *an interim or partial* award on the merits, handling issues concerning attorneys' fees after the partial award on the merits has been made. If there is a contractual or statutory basis for awarding attorneys' fees, and normally there must be, I will ask *all parties* to give me, and exchange with each other, very basic information concerning the amount of attorney time (and the book value of same) incurred through the last day of the arbitration hearing. I have served as a Chapter 11 Trustee and an Examiner for attorney's fee, and thus normally do not require testimony on this subject.

The schedule for submitting a fee application and papers in opposition will be established at the close of the Arbitration 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 may 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 the hearing 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 Aw*ard entered in the case.

POST-AWARD PROCEEDINGS

Delivery of my *Final Award* will generally terminate the arbitration and my involvement with the arbitration. Indeed, I lose jurisdiction. Please do not invoke the "modification" rule (Rule R-50, AAA Commercial Rules) by asking me to modify the Award such that your client wins when previously it did not. The very limited grounds for an arbitrator to modify or correct an award, once made, are set forth in the Federal Arbitration Act (9 U.S.C.), its state law equivalent and recent Supreme Court and Fifth Circuit case authority. Generally, I cannot (and will not) become involved in post-arbitration efforts to enforce or to vacate the Award.

MISCELLANEOUS

Settlement/Mediation

I have always encouraged 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. The revised Commercial Rules now require that, absent unilateral opt-out, cases in which the amount in controversy exceeds $75,000.00 must go through a mediation step. The AAA has a panel of experienced, skilled and very well-regarded mediators available to assist in that regard.

With the new Rule R-9, I now do not get involved in stressing the importance of or otherwise harping on mediation. I do build into my Scheduling Order a period when that could logically take place. Your Case Administrator can supply you with information about the AAA's mediation services and mediators. Obviously, if your case is resolved by settlement prior to the arbitration hearing, you should promptly call your Case Administrator.

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 continued fax transmission or by email, provided that the number of pages to be faxed is 15 pages or less. I generally permit lengthier documents to be served by fax or email only with my prior consent. If it is going to tie up my PC or fax machine all afternoon, please overnight a "hard copy" to me. Please don't do both email and hard copy. When I receive an email or .pdf delivery via email, I will acknowledge receipt.

Direct Service of Case Papers on the Arbitrator.

Normal procedure is for all papers to be filed with the Case Administrator, with sufficient copies for he or she to transmit to the arbitrator. With your agreement and my approval, we will follow the AAA's "*Accelerated Exchange*" protocol: a copy of all case papers may be served on me directly at the same time it is served on other parties. The document must nonetheless be filed with the AAA (with proof of service on all other parties and me noted). At no time should you serve papers on me by certified mail – return receipt requested, or FedEx requiring my signature. I am often away from my office and do not want to have to go find what you have sent me.

AAA Rules and Policies

Counsel and unrepresented parties are expected to be familiar and comply with the AAA Rules applicable to the case (generally the most recent revision of the AAA Commercial Arbitration Rules or Employment Arbitration Rules) and with applicable AAA policies and procedures. You will find them on the AAA's website: www.adr.org. I expect everyone to comply with any request by the Case Administrator, including the timely remittance of any deposit or other amount that she might invoice. While I do not get involved in any financial

matter, I will not let *deposit games* interfere with the process. Under the revised Rule R-57, AAA Commercial Rules, I am authorized to take certain actions in the event of non-payment of financial obligations by one party. This may include limiting the non-paying party's ability to pursue or present a claim. I cannot default a party, or preclude that party from presenting a defense, simply because of non-compliance with monetary obligations, and have to hear sufficient proof of the claim in order to rule affirmatively. I may suspend the proceedings, or actually terminate the case, for various degrees of culpability in respect of default of financial obligations.

Document Retention

Arbitration is confidential and the proceedings are private. You cannot imagine how many exhibits and other submissions I receive from case to case. I will always do my best to try to treat the exhibits, the pleadings and the Award in confidence. At the conclusion of the case, you have the option of my returning all papers to you, or my having them professionally shredded. Either option will be at your cost.

Questions?

Your Case Administrator is extremely knowledgeable about case administration issues. You should call him or her if you have questions or concerns about the administration of your case. If you have any questions or concerns about the applicability of these policies to your case, please either raise them with your Case Administrator (who will bring them to my attention, if appropriate and as needed, and/or arrange a telephone conference call hearing) or bring them to my attention during our preliminary scheduling hearing.

This article borrows a lot of thoughts from a paper originally written by Phil Cutler, a very fine lawyer-mediator-arbitrator with the **CUTLER NYLANDER & HAYTON** firm in Seattle, Washington. Phil let me do that. Arbitration and mediation comprise about two-thirds of Phil's practice. The balance of his practice includes trial and appellate work and advice and counsel to clients in complex commercial and business matters covering a wide variety of substantive law areas. Phil and his firm can be reached at philcutler@cnhlaw.com. The views in this article reflect my personal views as an arbitrator in light of my own preferences and experiences, and should not be construed to be the policy of the American Arbitration Association or any other administering agency, or taken as gospel in any way.

APPENDIX "A"

GUIDELINES CONCERNING EXCHANGES OF INFORMATION

This Arbitrator is committed to the principle that commercial arbitration should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to traditional courts.

While arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, which may be considered conducive to fairness within those systems, but which are not appropriate to the conduct of arbitrations in a commercial context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive and more expeditious. One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation.

These guidelines are to make it clear that I have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive and more expeditious process. Because of the authority under the *Commercial Arbitration Rules* and my inherent authority to manage the process before me, these *Guidelines* are generally applicable in appropriate domestic commercial cases.

GUIDELINES ON THE EXCHANGE OF EVIDENCE

1. In General

a. As sole Arbitrator, I shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The Arbitrator and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.

b. The parties may provide the Arbitrator with their views on the appropriate level of information exchange for this case, but I retain final authority to apply the above standard. To the extent that the parties wish to depart from this standard, they may do so only on the basis of an express agreement among all of them in writing and in consultation with the Arbitrator.

2. Documents on which a Party Relies.

Parties shall exchange, in advance of the hearing, all documents upon which each intends to rely.

3. Documents in the Possession of Another Party

a. In addition to any disclosure pursuant to paragraph 2, I may, upon application, require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case. As a general rule, I discourage the broad form of written requests for production of documents and may be disinclined to compel compliance therewith.

b. I may condition any exchange of documents subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

4. Electronic Documents

When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless I determine, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The Arbitrator may direct testing or other means of focusing and limiting any search.

5. Inspections.

The Arbitrator may, on application and for good cause, require a party to permit inspection on reasonable notice of relevant premises or objects.

6. Other Procedures.

a. As Arbitrator, I should be receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these *Guidelines*.

b. Interrogatories, requests for production of documents and requests to admit, as developed in American court procedures, are generally not appropriate or effective procedures for obtaining information in most commercial arbitrations.

7. Privileges and Professional Ethics.

I will respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, I should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection.

8. Costs and Compliance.

a. In resolving any dispute about pre-hearing exchanges of information, I shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such request on the payment of part or all of the cost by the party seeking the information. I may also allocate the costs of providing information among the parties, either in an interim order or in an award.

b. In the event any party fails to comply with an order for information exchange, this Arbitrator may draw adverse inferences and may take such failure into account in allocating costs.

Appendix "B"

International Institute for Conflict Prevention & Resolution ("CPR") – Economical Litigation Agreements

TABLE 1: **PAPER DISCOVERY LIMITS**					
	Interrogatories	Document Requests	RFAs	Depositions	Interviews
Up to $400,000	5	7	6	2	3
Up to $1,000,000	10	14	12	4	6
Up to $10,000,000	15	21	18	6	9
$10,000,000 or more	20+	28+	24+	8+	12+

[+ = Additional paper discovery found by the Arbitrator to be necessary to prepare for dispositive motion or trial, and thus authorized by specific Order after notice and opportunity to be heard.]

TABLE 2: **E-DISCOVERY LIMITS**				
	Requests for Specific E-Documents	Key Word Custodians	Key Word Time Period	Key Words Number
Up to $400,000	4	0	0	0
Up to $1,000,000	7	4	6 months	6
Up to $10,000,000	15	8	1 year	18
$10,000,000 or more	25+	16+	3 years+	40+

[+ = Additional E-discovery found by the Arbitrator to be necessary to prepare for dispositive motion or trial, and thus authorized by specific Order after notice and opportunity to be heard.]