The Preliminary Hearing

August 3, 2016 Webinar

WEBINAR QUESTIONS/SPEAKER RESPONSES

Q: How common is it for Arbitrator(s) to contact the Attorneys before the Preliminary Hearing?

A: I don't know. I personally have never done it.

Q: If all counsel will not agree to limited discovery, how do you handle this?

A: I require the exchange of documents, and nothing more, unless it is a large complex case, in which the rules provide for more.

Q: Why would E-Discovery not be allowed since there is a great likelihood that relevant documents would be in electronic form?

A: E-disovery is allowed. I can see how the slide might be confusing. The point is to limit the type of E-disovery if cost is an issue.

Q: Do you see lot of requests for E-disovery? For dispositive motions? What is your opinion about dispositive motions?

A: No, to both questions. Regarding dispositive motions, they are rarely properly granted, because of the danger of having an award overturned for failure to hear pertinent evidence. One of the few grounds for overturning an award.

Q: R-33 is vague, and suggests that the moving party would need to make a "showing" in support of a dispositive motion. What would be the nature of the "showing?"

A: Evidence in the form of documents that establishes the point asserted.

Q: If a dispositive motion will be filed do you discuss setting a hearing date for the motion at the prem. hearing?

A: Yes. Absolutely.

Q: Do dispositive motions serve as briefs for hearing?

A: They can.

Q: How do you approach disputes between the parties regarding setting of hearing dates; i.e., one party's counsel says (s)he is so busy they can't possibly have a hearing for 9 + months, and the other party (most often the Claimant) wants a hearing sooner.

A: I have a lot of success cajoling counsel into finding earlier dates. One technique I use is to ask who in their firm could handle this case either with them, or for them.

Q: What input do you have as an arbitrator if all counsel want to put the final hearing of a simple case off for an extended period?

A: I make sure that the parties know that the lawyers are the ones responsible for this decision, not the arbitrator. I do this by having another preliminary hearing at which the parties appear by phone as well.

Q: Do you as the arbitrator have any say so on moving the process along...one party dragging out choosing a date for the hearing?

A: Yes. There is no dragging out the process for choosing. We choose the date at the preliminary hearing.

Q: Please comment on subpoenas for documents and testimony from nonparties.

A: I have never found a need to address this in a preliminary hearing, with one exception. Sometimes we provide in the order that any one of the three arbitrators may sign a subpoena, not just the chair.

Q: What about 3rd party subpoenas for depositions?

A: I have never found a need to address this in a preliminary hearing, with one exception. Sometimes we provide in the order that any one of the three arbitrators may sign a subpoena, not just the chair.

Q: What are the reasons to have a court reporter?

A: Generally speaking, when there will be other litigation or arbitration involving the same witnesses or issues, either with the same parties or with other parties, or when there is a lot of money at stake, and either the case will extend over a long period of time and the parties want to be able to refer the arbitrators back to testimony, or the parties want daily transcript in order to more effectively examine or cross examine witnesses.

Q: Even If the parties agree to a court reporter, I assume you would not ever have it (or want it) in drafting the award, even in a complex case?

A: I have only needed transcripts one time in drafting an award.

Q: Does the arbitrator communicate the same way or does that fall on the counsel to keep the other party in the loop?

A: The arbitrator may communicate only with all parties at the same time.

Q: How do we check for conflicts?

A: By providing the arbitrator with the list of all people with any knowledge of the facts, as discussed in slide #11.

Q: I have tried when allowing deposition, to a time limit for each witness - what are your thoughts?

A: I think that is a good idea.

Q: I always see this unified exhibit request but the parties never do it, how do you handle this.

A: I've only had that happen once, and there is really nothing to be done about it at that point. I just ignore it. I see no point in chastising them.

Q: What about exclusion of experts?

A: It is a really, really bad idea, because failure to hear relevant evidence is one of the few reasons for overturning an award. I never exclude evidence from any witness, regardless of non-compliance with disclosure requirements. I always find some way to accommodate the surprised party with an extension of time to take some action, or a postponement of cross examination, or some other way to mitigate the damage done by nondisclosure.

Q: Are arbitrators likely to allow in deposing experts, especially in large and complex cases?

A: They will likely allow the deposition of experts.

Q: I recently arbitrated a matter where one of the witnesses was challenged on legal grounds before the hearing began. How would you handle this? Would you render a written decision or oral? Deny it as untimely? Other?

A: Let the parties brief it and then decide before the witness is testifies (this could delay the hearing). I cannot imagine ever excluding the testimony of a witness for any reason, because failure to hear relevant evidence is one of the few reasons for overturning an award.

Q: I did not understand what you said about submitting briefs during hearing on topics of any subject that might come up during the hearing?

A: I said I like to have all briefs submitted at the beginning of the hearing. But if some unexpected issue arises during the hearing, I am open to receiving post hearing briefs on that issue.

Q: Do you believe moving from information exchange to hearing dates reduces requests for continuances? Any tips at preliminary hearing for reducing the number of continuance requests later.

A: Yes I do. I don't have any other tips, and my experience has been that I very rarely get requests for continuance, other than joint requests.

Q: Since we are talking about preliminary hearings, if the arbitrator knows there is going to be a question of law, what is your opinion on briefs.

A: I would ask for them if I didn't already have a firm grasp of what the law requires on the subject.

Q: I disagree with not having post hearing briefs. In my experience, issues not addressed in pre hearing briefs almost always arise, and alleged facts often change as well. Post hearing briefs may be more helpful than pre-hearing briefs because of this. I would also ask counsel to submit proposed award where the award is a reasoned one. Thoughts?

A: I have an entirely different experience than you do with briefs. I almost never see a need for post hearing briefs, even in the most complex case. But I think submission of proposed awards is a very good idea, and I routinely do that.

Q: If the parties' agreement requires a "reasoned" award, what would be your basis for not writing one?

A: If the arbitration agreement provides for a reasoned award then I am required to give a reasoned award.

Q: Do you differentiate between a simple award and a breakdown award?

A: If by breakdown award, you mean the type of award required by the construction rules, then no I don't.

Q: Why not a reasoned award - specifically why is it nor recommended?

A: Because the more that is said about the reason for the award, the greater the likelihood that a party will find some reason to try to have the award set aside in court.

Q: Do you state the key facts of the case in the preamble to the Award?

A: Not if it is a simple award.

Q: How do you deal with post award requests for "explanation" of a simple award by unhappy party?

A: I do not respond at all.

Q: What happens when one party issued a motion to compel production prior to the hearing? In the case I had (I am an arbitrator), we set forth a schedule for reply and a hearing. Comments?

A: That is what I would do too.

Q: Any suggestion about the use of written statements for testimony, with only cross in person or by phone at the hearing.

A: I think it is a great idea to streamline cases.

Q: What about the mandatory mediation requirement - how is that dealt with at the prelim hearing?

A: I have never had a need to deal with it, other than to disallow any attempt to slow down the arbitration process to accommodate it. I require parallel tracks.

Q: Is mediation required?

A: Not unless the parties' contract provides for it. The AAA rules now require mediation as part of the process, but any party can opt out.

Q: Please speak briefly about handling Pro Se parties (i.e. not knowing the Rules and abusive conduct during hearing).

A: I have a way of being with people that has them not be abusive, and if they don't know the rules, I politely tell them that the rules don't allow what they are doing, and we move on.
But I will add that I have had very little experience with pro se parties. The cases I handle typically have plenty of lawyers.

Q: I came in late but did the issue of whether have 1 or 3 arbitrators discussed. Pros and cons.

A: The issue was not discussed, but the pros and cons are pretty simple. Cost vs. the quality of decision making by 3 heads being better than 1.

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