



## Tips on Preliminary Hearings—Part II

This is the second article in a three-part series on preliminary hearings, usually associated with the early stages of a “unique” ADR method of commercial arbitration, which appears in *CM* magazine from January to March 2002.

In the last tip article, I provided an overview of the preliminary hearing process that is stipulated in Rule 22 of the current American Arbitration Association (AAA) “Commercial Dispute Resolution Procedures.” In that article, I outlined the preliminary hearing process involving a claim/counterclaim under those rules. However, I would be remiss to not also reference the “Optional Procedures for Large, Complex Commercial Disputes,” in particular Rule L-4, which provides a more expanded “agenda” for a preliminary hearing. Parties and representatives, to appreciate the role a preliminary hearing has in the management of a larger arbitration, could also consult these procedures.

In this second part of the series, I want to build upon the earlier article and proceed to the specific “exchange of information” subject discussed in AAA Rule 23. I stated in January’s article that

Although not labeled as such in Rule 23, some view this rule as perhaps being “somewhat equivalent to discovery.” However, the “conditions” in the Section that may activate an exchange must be thoroughly understood by the parties/ representatives *before* the hearing. Depending upon the strategy of the parties, the “potential” exchange of information could range from the minimal to the extensive.

Rule 23 provides the following:

- (a) At the *request* of any party or at the *discretion* of the arbitrator, consistent with the expedited nature of arbitration, *the arbitrator may direct (i) the production of documents and other information, and (ii) the identification of any witnesses* to be called (emphasis added).
- (b) At least five (5) days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
- (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

The “standard” or “threshold” against which the arbitrator exercises his or her authority is “consistent with the expedited



nature of arbitration,” which the parties are deemed to have agreed to by the use of these AAA, or similar, Rules.

First, a certain date for the information exchange is set with a duty to update with reasons for any delay. Which documents and what information can be exchanged by that certain time date? Part (a) of Rule 33 (the Evidence Rule for the Arbitration) provides in part that the parties shall produce evidence that the arbitrator deems “necessary to an understanding and determination of the dispute.” Some may think that only “relevant and material” items shall be exchanged under Rule 23. However, with an expedited hearing as an objective, an understanding of the dispute may call for a broader interpretation.

Accordingly, the exchange could focus on the claim/ counterclaim and defense of the same with rebuttal and impeachment documents exchanged upon identification. It also is important to note that the exchange is not merely of documents but of “information,” too, and that information may come in various formats and media. The increasing use of the Internet through e-mail also could be a subject of information exchange. Here again, the exchange obligation depends in part upon the strategy of the parties

and representatives, as a critical preparation step prior to the preliminary hearing.

Rule 23(b) also provides “the parties shall exchange copies of all exhibits they intend to submit at the hearing” at least five (5) days prior to the hearing. I recommended earlier that this period may be lengthened and should be discussed in the context of the entire scheduling actions at the preliminary hearing. What is included in “exhibits” that must be exchanged? That which is tangible and intended to be introduced as evidence. It also could include applicable declarations and affidavits under Rule 34(a). Surprises and short response times should be avoided if there is to be an expedited arbitration.

The authority specified in Rule 33(d) should not be overlooked, since it provides the following: “An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.” If the parties/representatives decide by agreement or during the preliminary hearing that the exchange process shall *not* involve the exercise of this subpoena authority (to minimize cost), then this should be discussed also at the hearing as a “limitation upon Rule 23.” Cooperation in the production of documents, information, and witnesses is encouraged.

However, if the parties/representatives want to have certain “currently unavailable” evidence introduced at the arbitration, they should be prepared to make an argument

for the production (at the appropriate time) under the auspices of Rule 33(a). The earlier an issue is raised and discussed and documents/information are exchanged the more likely an expedited arbitration will result. The parties/representatives also should be aware of the option provided in Rule 23: When or if the exchange process “slows down,” the applicable case manager should be notified to schedule another hearing with the arbitrator, who then will resolve any disputes in the exchange process.

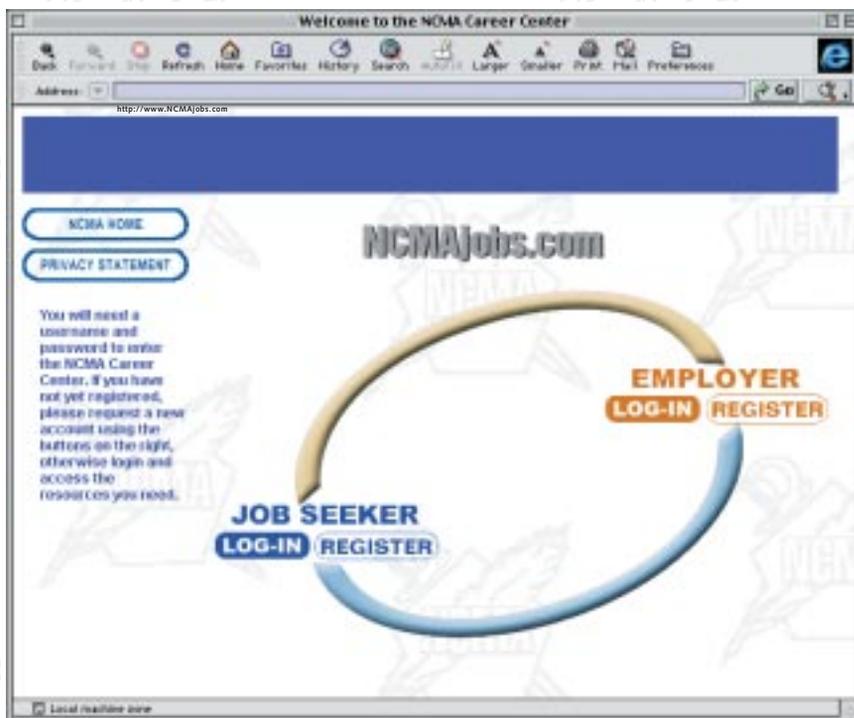
Finally, while a fair hearing is a constant goal, the parties/representatives should be cognizant of the “rules-of-the-road” in exchange to help further the fair hearing precept and ensure an expedited arbitration. The preliminary hearing process is one tool to assist in that endeavor. **CM**

*This article is adapted from an “ADR Tip,” written by Charles Rumbaugh and Michael Powell, published in the April-June 2001 issue of the Dispute Resolution Times by the American Arbitration Association. AAA rules are at [www.adr.org](http://www.adr.org).*

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