

The Preliminary Scheduling Conference: Molding Your Entire Arbitration

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The single greatest tool for achieving fair and efficient commercial arbitration is a well-conducted preliminary conference.

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I. The Arbitrator's Philosophy

A. Hallmarks of an Arbitrator:

knowledgable

respectful

cordial

punctual

experienced

prepared

decisive

professional

humble

patient

attentive listener

organized

B. Firm, thoughtful exercise of discretion.

C. Employment of active case management.

D. Compliance with The Code of Ethics.

CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.

An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding....

We owe as arbitrators a responsibility to the process—a process distinct from litigation.

E. An Arbitrator's Philosophy: Principles to Guide Job Performance

1. An “elastic bias:” the insight of how to handle the repetitive arbitration procedural issues crucial to an actively managed arbitration.

2. The thoughtfulness necessary to mold and adjust that elastic bias to the issues presented;
3. The ability to express decisions in a decisive, meaningful, and neutral manner to the parties; and
4. Compliance with Canon I.

The preliminary hearing is the most significant time for the arbitrator to employ her philosophy toward the process.

II. The Preliminary Hearing

Several sources present “checklists:” *AAA Commercial Rule of Arbitration, Preliminary Hearing Procedures, P-2 Checklist*; *Guide to Best Practices in Commercial Arbitration* at 315 (The College of Commercial Arbitration, 2010); *The Minnesota ADR Handbook* at 153 (Weissman et. al. 2011).

But it is not “fill in the blanks.”

A. Before the Preliminary Hearing, get prepared.

1. Determine who is appearing: experienced counsel; *pro se* party, etc.
2. Understand the claims, defenses, and counterclaims.
3. Preliminarily assess whether threshold issues might exist, e.g., are all claims subject to arbitration; do preconditions to arbitration exist, such as mediation; are there companion cases, etc.

4. Read again the parties' arbitration agreement, noting areas contractually controlling the arbitration, e.g., selection of administering rules, time limits on when the hearing is to take place, permitted discovery, choice of law, evidentiary rules, type of award, etc.
5. Develop a cursory understanding of the applicable law, i.e., procedural arbitration statute (FAA, UAA, or RUAA) and substantive law of the case. Begin to consider whether you will need pre-hearing briefing.

6. Verify that no further disclosures are necessary, especially where additional counsel have been disclosed subsequent to the assignment of the case to you or where you have now recognized that you have previously handled similar issues.
7. Develop your agenda for the preliminary hearing conference call: what needs to be covered will be case dependent; one size does not fit all.
8. If this is to be an *ad hoc* arbitration, draft an agreement to arbitrate that, among other things, provides for a deposit of fees and a method to handle challenges to your appointment.

B. Conduct the Preliminary Hearing:

1. A private conference, usually by phone.
2. Who is on the call.
3. Purpose of the call is to set a schedule.
4. Counsel knows far more about the controversy than you.
5. “Thumbnail” statement of the claims, defenses, and counterclaims.

6. Are more detailed pleadings needed?

a. A date by which pleadings may be amended without leave.

b. A reply to a counterclaim?

7. Are parties raising threshold issues?

8. Set the hearing date (then work back to fill in the schedule).

- a. Parties' stipulation as to date.
- b. The time period necessary to prepare the matter for hearing and the number of days necessary for the hearing.
- c. Any differences.
- d. Negotiate differences.
- e. Make a ruling.

- i. Set consecutive days.

- ii. Neutral turf.

9. Set a discovery schedule.

- a. Ask counsel what discovery they feel to be essential.

- b. Share your philosophy as to the extent of discovery permitted within your arbitration.

- c. Set dates for initiation, response, and cut off.

C. Limit the number of document requests.
Require specific and reasonably restricted in terms of time frame, subject matter, and person to which they pertain.

1. Prohibit phraseology such as “All documents pertaining to directly or indirectly the”
2. Prohibit definitions and instructions.

D. Set—or counsel to provide—a protocol for discovery of electronically stored information, setting out reasonable search parameters.

1. Sources, e.g., email, spreadsheets, etc.
2. Custodians from whom electronic documents must be collected.
3. Incorporation of the concept of proportionality.
4. Cost shifting.

- E. If you permit interrogatories, limit the number and require specificity.
- F. Preclude depositions or, at a minimum, limit depositions.
- G. Objections do not stay or delay a response.
- H. Cajole for a lesser amount of discovery.

10. Set the process to be used for dispositive motion practice.
 - a. Allow or restrict dispositive motions.
 - b. Leave to file a dispositive motion.
 - c. Share your standard whether to grant a dispositive motion.
 - d. Set a schedule.

11. Set a procedure for submission of other motions.
 - a. Certification of attempts to resolve.
 - b. Response time.
 - c. Reply
 - d. Page limits.
 - e. Oral argument.

12. Set the dates for disclosure of witnesses.
 - a. Expert witness disclosure.
 - i. After the close of discovery.
 - ii. Rebutting experts/opinions.
 - iii. No expert depositions.

b. Lay disclosure.

i. Date.

ii. A short synopsis of testimony.

iii. The full name with middle names or initials and address.

13. Address subpoenas.

- a. The request for subpoenas is made to you and copied to opposing counsel.
- b. Objections.
- c. A cut-off date for subpoena requests.

14. Set a date for exchange of exhibits.

15. Address pre-hearing briefs.

16. Determine method of
communications with you.

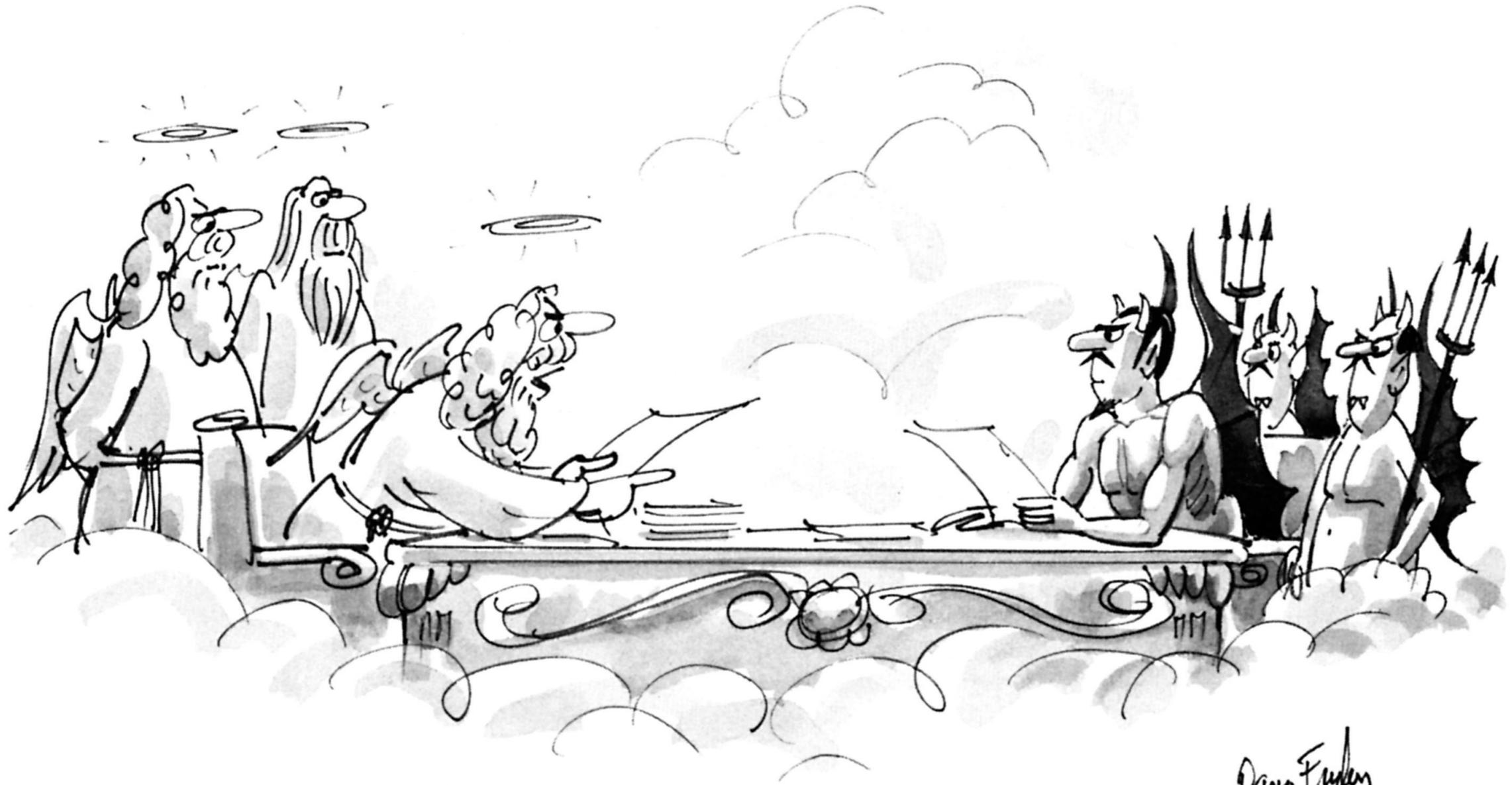
17. Discuss type of award.
18. Seek guidance on post-hearing submissions.
19. Set a date for a further preliminary hearing.
20. Issue a comprehensive scheduling order.

C. Conduct a second Preliminary Hearing.

1. Address parties' agenda.
2. Then your own agenda.
 - a. Opening and/or closing statements.
 - b. Foundation to exhibits.
 - c. Objections to exhibits.

- d. Daily schedule.
- e. The rules of evidence, including privileges and offers of compromise.
- f. Advance notice and order of witnesses.
- g. Final statement of amounts and categories of damages.

- h. Apportionment of time.
- i. Unused exhibits.
- j. Proof of attorney fees.
- k. Testimony by phone, affidavit.
- l. Issue a “Hearing Protocol Order.”



“Then it’s agreed. Watson, Smith, Teller, and Wilson go to Heaven; Jones, Paducci, and Horner go to Hell; and Fenton and Miller go to arbitration.”

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