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AAA PRACTICE GUIDE: CONTROLLING E-DISCOVERY BURDENS IN ARBITRATION

This Practice Guide supplements the Commercial Arbitration Rules (the "Rules," cited herein as R-1 et seq.) of the American Arbitration Association, together with the Preliminary Hearing Procedures (the "Preliminary Procedures," cited herein as P-1 et seq.) and the Procedures for Large, Complex Disputes (the "Large Case Procedures," cited herein as L-1 et seq.). The procedures outlined in this Guide are not mandatory; they are meant to illustrate some of the steps that may help the Arbitrator, and the Parties, "achieve a fair, efficient and economical resolution" of an arbitration case, R-23, through effective control of the e-discovery process. See also P-1(a) (goal to "help the parties and arbitrator "organize the proceeding in a manner that will maximize efficiency and economy, and will provide each a party fair opportunity to present its case").

Introduction: Discovery, and e-discovery in particular, is often a chief source of cost and delay in arbitration proceedings. At the same time, effective discovery can be key in providing fair resolution of disputes. Arbitrators can and should encourage Parties to focus on "proportionality" in the discovery process, such that the scope and forms of discovery are proportional to the stakes and issues involved in the case. The procedures outlined herein are intended to provide Arbitrators and Parties an array of tools that may help "right-size" the process in an individual case.

Preliminary Hearing: The AAA recognizes that "[i]n all but the simplest cases, holding a preliminary hearing as early in the process as possible" is desirable. P-1(a). In Large Cases, such hearings are mandatory. L-3(b). Even where no preliminary hearing is mandated by rule, the Parties may request, or the Arbitrator may schedule, such a hearing as an aid (among other things) to organizing the discovery process. See R-21(a).

To maximize the efficiency of the preliminary hearing, the Parties should "meet and confer" in advance of the hearing. A principal topic of such discussion is categorization of the matter, in rough terms, as either "small," "medium" or "large" (in terms of the scope of discovery expected in the case). Scope does not depend entirely on the monetary value at issue in the case. Instead, such issues as the number of custodians and hard drives, the available storage and retrieval systems, and the forms in which information is maintained, may be key to determining the size of the discovery burden. Categorization of the matter, in term, may help the Parties and Arbitrator determine appropriate deadlines for completion of discovery, and plan for efficient staging of the discovery process.

Parties and Arbitrators should recognize that the "meet and confer" and preliminary hearing process is not a one-time "check-the-box" event. Good faith efforts by the Parties to address discovery should include discussion of methods of search for and production of information. See R-22(b)(iv). The scope and methods of preservation of information, maintenance of confidentiality, and preservation of privileges, are also appropriate topics for discussion. These topics can be quite technical. Often, discussion of e-discovery processes may require several "meet and confer" sessions. The Parties should attempt to resolve as many discovery issues as possible, voluntarily, in advance of the preliminary hearing with the Arbitrator. The Arbitrator may postpone the preliminary hearing until the Parties have had an opportunity to complete the "meet and confer" process. The Arbitrator may also provide the

Parties with a draft form of Preliminary Hearing Order, and require that the Parties discuss the specific issues outlined in the draft Order, in advance of the preliminary hearing.

Where it appears that the Parties have not conferred in good faith, the Arbitrator may direct the Parties to confer on specific topics, and schedule one or more further preliminary hearings (on discovery issues) to permit the Arbitrator to monitor and guide the discovery process. Such hearings, even if only brief "check-in" calls, may tend to focus the attention of the Parties on the discovery planning process.

Discovery Deadline: The establishment of a discovery deadline is a matter of balance between efficiency and fairness. See R-22(a). Discovery deadlines, in turn, relate to the establishment of firm dates for any evidentiary hearings in the case. See R-24. Setting a reasonable, but short, deadline for the completion of discovery, and holding firm to that deadline may be one of the most effective methods of focusing the parties on the discovery processes that actually need to be undertaken. One essential goal of the "meet and confer" and preliminary hearing process should be establishment of a discovery deadline that will not change absent a compelling showing of need.

Categories Of Information: Information managers generally differentiate between "active," online and "near-line" information (generally the easiest information to retrieve) and backup information (stored for disaster recovery, rather than as a record-keeping practice), and deleted information (often, the hardest information to retrieve). Requests for the latter categories of information tend to produce undue burden and cost (compared to preservation and search of the easier categories). Thus, the Parties may agree upon (or the Arbitrator may order) a discovery protocol that excludes backup/deleted information categories altogether, or provide that requests for such information should only be granted if some heightened showing of need is provided (and, perhaps, if the requesting party pays the cost of such efforts). See R-22(b)(iv) (arbitrator may determine "reasonable search parameters" to balance need for information against "cost of locating and producing" the information). Additional specific categories of information may be excluded, or at least subject to a presumption of exclusion, with a high standard for showing clear relevance and materiality, versus the costs and burden of discovery. Related to this approach is the use of "staged" discovery, wherein Parties may be required to focus on one set of information (considered clearly relevant to the dispute) before they move on to less relevant sources or categories of information, or categories that are more burdensome to obtain, and search.

Search Procedures: The Rules contemplate that Parties will "attempt to agree in advance" upon "reasonable search parameters" to "balance" the need for production against cost, and that, in the absence of agreement, the Arbitrator may "determine" that balance. R-22(b)(iv). As the Parties themselves best know their needs and technological capabilities, an Arbitrator should strongly encourage the Parties to reach agreement on search parameters. Simple search limitations (in addition to excluding specific categories of information, see above) may include agreement on a fixed number of document custodians, and a fixed number of locations (or types of media). In addition, certain forms of software features have become increasingly common in e-discovery. One common feature, for example, is the use of de-duplication (and near-duplication) filters (which remove extra copies of the same document from a search population), and email "threading" (which eliminates the multiple copies of underlying emails, allowing

review of only the "final" form of an email chain). Many of these features could be authorized as elements of a search protocol. As a means to facilitate agreement on the adequacy of search, moreover, some form of testing of search methodologies may be required. Thus, a party claiming excessive results from too-broad search terms may be required to provide the requesting party with relatively detailed information about the search results.

Technology-Assisted Review ("TAR"): TAR, which involves the application of artificial intelligence software to search and retrieve voluminous amounts of electronically stored information ("ESI") that would be extremely costly for manual human review. TAR has been defined as "a process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter experts on a smaller set of documents and then extrapolates those judgments to the remaining document collection." *See The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 Fed. Courts L. Rev. 1, 32 (2013). A TAR process known as "predictive coding" is described as "the use of a machine learning algorithm to distinguish relevant from non-relevant documents, based on subject matter expert(s) coding of a training set of documents." *Id* at 26. The first published judicial decision approving the use of TAR to reduce the massive amount of ESI that would have otherwise required expensive and extensive human review was *Da Silva Moore v. Publicis Groupe*, 287 F.R.D 182 (S.D.N.Y. 2012). The *Da Silva Moore* case is an example of the use of TAR where the burden and expense of human search, retrieval and review would have been extremely burdensome to the producing party. For a survey of ten of the earliest published court decisions on TAR, *see* Paul E. Burns and Mindy M. Morton, *Technology-Assisted Review: The Judicial Pioneers*, 15 Sedona Conf. J. 35 (2014) (click here). Indeed, in two of the surveyed cases, the court ordered the use of predictive coding over objection of a party. In two other cases, the court suggested the use of predictive coding *sua sponte*. These early cases manifested a virtual unanimous consensus of support for TAR, based on (a) empirical data that appeared to show that TAR equals or exceeds human review in reliability, and (b) the resulting substantial cost savings, especially in cases involving many terabytes or more data to be searched. In large complex cases with voluminous ESI, the arbitrators and counsel should be aware of the TAR option, which could facilitate arbitration's goal of more efficient, expeditious and cost-effective dispute resolution.

Cost Allocation: Arbitrators are empowered to "allocate[e] costs of producing documentation, including electronically stored documentation." R-23(b). The allocation of costs can be an effective means to encourage Parties to act reasonably in requesting information, to focus on what they truly need. Parties may agree (or the Arbitrator may direct), that the ordinary "American Rule" in discovery (that each party bears its own costs, win or lose) will be modified, in whole or in part. Even if the American Rule is not wholly reversed, such that the requesting party must pay the costs of any discovery requested, the Parties may agree, or the Arbitrator may direct, that the requesting party will pay if (ultimately) it loses the case, or where the results in the case are not in line with the costs of the proceedings. Another version of the rule might provide that, whenever a party requests information outside the scope of discovery (as agreed or directed after the preliminary hearing) the presumption of "requesting party pays" would apply. The Arbitrator always retains authority to impose costs for non-compliance with any discovery orders the Arbitrator may issue. See R-23(d).

Preservation Obligations: The duty to preserve evidence for use in litigation (or arbitration) generally derives from a common law obligation to avoid "spoliation" of evidence. Determining when the duty to preserve attaches, and the scope of document preservation obligations, are among the most difficult aspects of the discovery process. The costs of preservation can be substantial, and parties and counsel often "over-preserve," as a result of concern that they may guess wrong as to the scope of their obligations. Parties should "meet and confer" regarding their preservation obligations, and seek specific direction from the Arbitrator, where necessary to clarify those obligations. Parties and Arbitrators should generally operate on the assumption that, absent a showing of bad faith, a party's use of its ordinary methods of record-keeping and archiving will not form the basis for a claim of spoliation. Cf. R-22(iv) (arbitrator may require parties to make documents available in the form "most convenient and economical" for the producing party).

Privilege Protection: Costs associated with review of documents for privilege, and the generation of related privilege logs, can be substantial. The establishment, at the outset of a case, of less burdensome forms of privilege review and logging can help ensure that parties do not "over-designate" documents to be withheld from production, on grounds of privilege. Further, the creation of presumptive (or mandatory) protocols for privilege review and logging can reduce the uncertainty parties may face in determining what their privilege protection obligations may be. Thus, discussion of the scope and process of privilege protection should be part of the "meet and confer" and preliminary hearing issues addressed by the Parties and the Arbitrator. See P-2(x). The Parties may prepare, or the Arbitrator may suggest, a form of Protective Order to govern the exchange of information. As a means to reduce the risks of inadvertent production of privileged information (and thus reduce the incentive to over-designate privileged documents), the Order may incorporate a "claw-back" provision, such that no privilege waiver would occur from inadvertent production. Further, the Order may approve less burdensome forms of privilege logs, including "categorical" privilege listings, wherein categories of documents may be grouped, and privilege asserted on a group basis; and email thread logging, where each uninterrupted email chain would constitute a single entry (versus individual logging of every part of a lengthy email chain).

Cooperation: The efficiency value of cooperation in discovery cannot be overstated. When the Parties cooperate, they may avoid mistakes in the production of information, more easily focus on information that matters most to resolution of the dispute, and (in many instances) reduce the cost of information exchange, through shared protocols and platforms for information processing. The Arbitrator should encourage the Parties to cooperate in the discovery process. When discovery disputes arise, the Arbitrator may require that Parties "meet and confer" in an attempt to resolve the dispute, before raising the issue with the tribunal. Specification of an efficient process (such as short letters explaining the issue, followed by a swift telephone with the tribunal) may further reduce costs (as many disputes can be resolved quickly, with a minimum of submissions to the tribunal).

Single Arbitrator For Discovery Management: Three-arbitrator tribunals are expensive; and when all three arbitrators must participate in resolving any discovery dispute, the cost of discovery can be inflated. As a response, in three-arbitrator cases, the designation of the tribunal Chair (or another of the individual arbitrators) to rule on discovery disputes may be a

simple, efficient method for reducing discovery costs. The Parties may so agree, or the tribunal (without objection) may designate the Chair to decide all such issues. See R-44(b).

AAA ClauseBuilder Assistance: The AAA ClauseBuilder tool, available at **https://clausebuilder.org/cb/faces/options/standardreview,** offers the option, in drafting an arbitration clause, to provide "additional guidance" to Parties and Arbitrators on e-discovery issues, by referencing a "recognized set of standards" that can help assist with the "appropriate scope of exchange of electronically stored information ("ESI") in a case. The ClauseBuilder tool incorporates a "widely recognized" set of standards in *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for addressing Electronic Document Production*. The ClauseBuilder tool includes the text of the *Sedona Principles*, "along with the AAA's recommendations" for how Parties and Arbitrators may adapt the Principles as appropriate.