



The Prehearing Process

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Rule 5.4 Preliminary Status Conference

- AHLA Rule 5.4 requires a Preliminary Status Conference
- Once appointed, the arbitrator is required to schedule a status conference with the parties “as quickly as possible”
- Rule 5.4 contains requirements for the Preliminary Status Conference
- Arbitrators also need to be familiar with and refer to other applicable AHLA Rules, in order to prepare for and conduct the Preliminary Status Conference
- Examples: Rules on discovery, subpoenas, motions, etc.

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Before the Preliminary Status Conference

- Initial case review by arbitrator
- Arbitrator appointments
- Objections to arbitration, file answer (if any), file counterclaim/third party claim (if any), within 15 days after appointment; deadline may be extended by arbitrator for good cause
- Preliminary awards
 - Arbitrability
 - Interim/emergency relief to maintain status quo
- Deposits; non-payment

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Before the Preliminary Status Conference

- Agenda for Preliminary Status Conference:
 - challenges to arbitrator's jurisdiction
 - discovery and motions
 - the hearing schedule and format
 - witnesses and exhibits
 - the treatment of confidential information and documents
 - the scope and form of the Final Award
 - any other matters that the arbitrator deems appropriate to consider
- Per AHLA Rules, the **parties must confer** regarding subjects to be discussed and seek agreement on as many issues as possible.

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Before the Preliminary Status Conference

- Who will attend
- Non-appearance by a party or delayed response
- Continuance(s) of preliminary status conference
- Pro se parties

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Additional Requirement for Reimbursement Disputes

- Rule 5.4 requires use of a Spreadsheet by the parties as part of the process, prior to the Status Conference:
<https://www.americanhealthlaw.org/getmedia/0e9b1ae2-1aa8-420a-852e-b48d6d065287/Reimbursement-Spreadsheet-Template.xlsx>
- Fields in the Spreadsheet:
 - Provider information, Enrollee information, Patient information, Employer group, Date of service, Billed charges, Payor-calculated allowed amount, Provider-calculated allowed amount, etc.

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Scheduling Order - Hearing

Evidentiary Hearing -- first, look at the parties' agreement to arbitrate.

For example:

*The arbitration of each dispute involving less than One Million Dollars (\$1,000,000) in controversy shall be completed in **no more than three full days**. The arbitration of disputes of One Million Dollars (\$1,000,000) or more shall be conducted **within such times as the Arbitrator allows**, but it is the intention of the Parties that the hearing be as streamlined as possible to avoid cumulative and tangential evidence, and disruption of the Parties' business.*

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Scheduling Order - Hearing

- Hearing date, length in days, start/stop times
- Hearing location and format (Rule 5.7)
- Location – honor the agreement unless applicable law requires otherwise
- Virtual vs. in-person – get party input and consensus, if possible, otherwise strike balance.
- To secure testimony of key witnesses, can have different hearing locations/dates
- Will either party want transcript? (Rule 6.2)
- Pre-Hearing Briefs
- Cancellation policy of Arbitrator

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Scheduling Order - ECM

- Rule 1.3 – the AHLA electronic case management system (ECM) is to be used in the arbitration
- Scheduling order can expand on this:

*Motions, pleadings, and all communications between the parties and the Arbitrator must be uploaded to AHLA's Electronic Case Management System ("ECM") case site for this Arbitration pursuant to AHLA Rule 1.3; **provided, however, the parties and the Arbitrator may, as a courtesy, contemporaneously transmit these uploaded documents to the applicable recipients via email.** Without otherwise modifying the foregoing, hearing exhibits and discovery documents need not be uploaded to ECM.*

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Scheduling Order – Use of ECM

- Example ECM Term that adds additional clarifications:

Use of ECM. Pursuant to AHLA Rule 1.3, the parties will utilize the Electronic Case Management System ("ECM"); provided, however, this does not preclude: (i) the parties or Arbitrator from communicating with one another via **[email]**; and (ii) documents being submitted to the Arbitrator and/or exchanged between the parties utilizing **[insert agreed-upon mechanism]** only to the extent that a document is too long to be uploaded to the ECM case site.

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Scheduling Order - Confidentiality

- AHLA Rule 5.13

*“The **Administrator and the arbitrator** shall maintain the confidential nature of the arbitration proceeding and any award, except as necessary in connection with a judicial challenge to or enforcement of an award, or unless otherwise required by law.”*
- Should address the issue of confidentiality of the proceeding among the parties at Preliminary Status Conference -- first look at the agreement to arbitrate
- Protective orders – for confidential information including additional terms if needed for protected health information (party counsel typically will stipulate and draft these)

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Scheduling Order – Additional Terms

- Joinder of Other Necessary Parties – Rule 5.12

(a) BY AGREEMENT. If the parties to an existing claim, and any additional party or parties to be joined, so agree, the additional party or parties may be added to a claim.

(b) IF OPPOSED. A party may move to join an additional party or parties to an existing claim. The moving party must serve the party or parties to be joined in accordance with Rule 2.2. A motion for joinder should be filed as soon as possible. The arbitrator should consider any disruption or potential unfairness that might result from an unnecessary delay in filing.
- Amendment of claims and filing of cross claims and counterclaims
- Interim relief

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Scheduling Order - Bifurcation

- Case by case determination; examples: deciding jurisdiction first; separating liability from damages
- Benefits – can sometimes increase efficiency; rulings on preliminary issues can lead to early resolution and/or narrowing the issues for the case
- Issues – can sometimes increase time and expense; may be difficult to separate out issues
- Discuss at scheduling conference
- If decision is to bifurcate, include this in Scheduling Order; if not decided, can include a term addressing (for example, specifying deadline date for parties to request and instructing the parties to utilize Rule 5.6 Motions process)

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Scheduling Order - Motions

Dispositive motions - per AHLA Rule 5.6:

“The arbitrator may allow the filing of, and make rulings upon, a dispositive motion **only if** the arbitrator determines that the moving party has shown that, if the motion is successful, it is likely to dispose of or narrow the issues in the case....”

- Scheduling Order should address the procedure and timing for filing of dispositive motions

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Scheduling Order - Motions

Example of dispositive motion term:

Either party may submit to the Arbitrator a request for permission to file a dispositive motion describing why, if successful, the motion is likely to dispose of or narrow the issues in the arbitration, provided the request must be filed no later than sixty (60) days before the Hearing. An opposition to the request may be filed no later than ten (10) days after receipt of the request.

If the dispositive motion request is granted, the moving party will submit its motion and supporting brief within twenty (20) days of being granted leave to file the motion. The non-moving party will have fifteen (15) days to file a response [add additional details re reply, sur-reply, or no additional filings]. All briefs shall be no longer than twenty (20) double-spaced pages, exclusive of exhibits.

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Scheduling Order - Motions

Non-Dispositive Motions

- AHLA Rule 5.6:

“...The arbitrator may allow other motions, including motions in limine, which the arbitrator determines will add to the fair and efficient resolution of the case.”

- Example of non-dispositive motion term:

Either party may submit a non-dispositive motion, not exceed ten (10) double-spaced pages describing the factual and legal basis for the motion and how it will add to the fair and efficient resolution of the case. The submission must state that the requesting party has conferred (or attempted to confer) in good faith with the other party, and state whether the relief sought by the motion has been agreed to by the parties. An opposing party may submit an objection, not to exceed __ pages within __ days of submission of the motion. [Notwithstanding the foregoing, non-dispositive motions may may be made informally by email or joint telephone conference.]

Or can request that the moving party first file a request.

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Scheduling Order - Discovery

- Rule 5.5 states:
“...to promote **speed and efficiency**, the arbitrator in his or her discretion, **should permit discovery that is relevant and is necessary for fair and efficient resolution of a claim.**”
- Under the AHLA Rules, discovery is:
 - more limited than state or federal courts
 - more relaxed than the Civil Rules of Discovery
 - largely at the discretion of the Arbitrator
 - rarely found or addressed in the parties' Arbitration Agreement

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Scheduling Order - Discovery

- Address limits of discovery at Preliminary Status Conference and include in the Scheduling Order
- Example of discovery term:
Exchange of Relevant Documents. *On or before X (date), each party shall provide to the other all nonprivileged documents in its possession or control that are relevant to any dispute between any of the parties which is the subject of this proceeding, including, without limitation, contracts, correspondence and emails, medical records, and other documents whether by handwriting, typewriting, printing, emails, text messages, and every other means of recording upon any tangible thing.*

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Scheduling Order - Discovery

Example of discovery term:

Requests for Production of Documents. Each party shall be allowed to serve on the other up to ____ Requests for Production of Documents.

Interrogatories. Each party shall be allowed to serve on the other up to ____ interrogatories, inclusive of subparts.

Requests for Admission. Each party shall be allowed to serve on the other up to ____ Requests for Admission.

Depositions. Each party shall be allowed to take ____ non-expert depositions. No deposition shall exceed ____ hours, measured as the time spent on the record.

Discovery Cut-Off. Discovery cut-off for nonexpert discovery shall be ____ days before the Hearing.

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Scheduling Order – ESI Discovery

- Rule 4.1(a)(6) – Arbitrator has the power to manage discovery by issuing protective orders, setting search parameters for electronic searches, allocating costs for document searches and production, and other means
- The topic of electronic document discovery will be handled in a separate presentation, “Managing Healthcare Documents in Arbitration”
- Address handling of electronically stored information (ESI) in the Scheduling Order
- Scope will depend on the case, parties, and their ESI systems

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Scheduling Order – Exhibits

- Rule 6.1 Exchange of exhibits at least 20 days before commencement of evidentiary hearing.
- Example provision:

Not later than twenty (20) days before commencement of the Hearing, each party shall submit to the other and to the Arbitrator a list of exhibits which it intends to use at the Hearing (its "Exhibit List"), which shall include Bates-stamp numbers for each of its Exhibits, and shall submit to the other party these Exhibits, and all other schedules, summaries, diagrams, and charts which it intends to use at the Hearing. Each party shall have seven (7) days to submit rebuttal exhibits or exhibits pertaining to unanticipated issues. Each party shall bring sufficient copies of its exhibits, schedules, summaries, diagrams and charts to the Hearing for the opposing party, the Arbitrator, and the applicable witness.

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Scheduling Order– Discovery

- Fact and expert witness discovery and disclosures
- AHLA Rule 5.5

*"To promote speed and efficiency, the arbitrator, in his or her discretion, should permit discovery that is relevant to the claims and defenses at issue and is necessary for the fair resolution of a claim. **Expert discovery shall be specifically addressed, and the disclosure of expert witnesses shall be sequenced in a fashion that will allow fair discovery to proceed.**"*

- Expert reports
- Expert testimony
- Number of expert witnesses

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Scheduling Order – Witness Lists

- Rule 6.1 – Witness Lists
- Must be at least 20 days prior to the Hearing.
- Example term:

Exchange of Witness Lists. On or before twenty (20) days prior to the Hearing, each party shall provide the other and the Arbitrator with a list of all individuals whom it reasonably expects to call as non-expert witnesses at the Hearing. Each witness list shall include the full name of each witness and a short summary of anticipated testimony.

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Scheduling Order - Discovery

- Example of expert and fact witness terms:

The parties will meet and confer regarding the number of fact and expert depositions by _____. Each party will be limited to _____ fact depositions, of no more than 7 hours each. Additional depositions are available only upon a showing of good cause and at the discretion of the Arbitrators. Expert reports are due by _____, and expert rebuttal reports are due by _____. A decision will be made at a later time as to whether the expert reports themselves are admissible into evidence.

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Scheduling Order – Expert Witnesses

- Examples expert witness terms:

Exchange of Expert Witness Lists. *On or before forty __ days prior to the Hearing, each party shall disclose to the other and to the Arbitrator: (i) the name of any person whose expert opinion it reasonably expects to offer into evidence at the Hearing (each an “expert”), (ii) a brief narrative statement of their qualifications, and (iii) an expert report.*

Expert Witnesses. *Any party that intends to use expert testimony at the hearing shall designate testifying experts and serve expert reports on or before [date or __ days prior to the Hearing]. Parties may designate testifying rebuttal experts and serve expert reports on or before [date or __ days prior to the Hearing].*

- Note that Rule 6.1 requires final witness lists at least 20 days prior to Hearing

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Scheduling Order - Discovery

- Depositions

-AHLA Rules do not expressly prohibit, restrict, or limit depositions and number of depositions

-Discretion of Arbitrator to permit or deny any particular deposition or depositions in general

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Scheduling Order – Subpoenas

- Non-party third-party subpoenas:
- Authority of arbitrators to issue third-party subpoenas

Rule 5.8: “To the extent authorized by law, an arbitrator may issue subpoenas for the attendance of witnesses and the production of documents.”

- AHLA-FAQ

Rule 5.8 authorizes arbitrators to issue subpoenas “for the attendance of witnesses or the production of documents.”

AHLA interprets this authority as extending **only to hearings**, not to discovery.

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Scheduling Order – Valuations/Appraisals

New AHLA Rule 5.10:

- Allows Arbitrator to appoint a valuator or appraiser on the AHLA panel to provide an independent assessment of the value or range of values
- Rule applies when the value of goods, property, or services is in dispute **and** all parties consent to a specific valuator or appraiser on the AHLA panel
- Valuator or appraiser subject to examination and cross-examination

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Scheduling Order - AI

- Artificial Intelligence – example AI Term:

Any party that intends to permit an artificial intelligence (“AI”) provider to have access to any information obtained from the other party must first notify the other party and attempt to reach agreement as to how any confidential information will be protected from disclosure. If the parties cannot reach agreement, then they must submit the issue to the Arbitrator, and no information shall be provided to the AI provider without specific permission from the Arbitrator and under appropriate measures and order to protect confidential information.

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Additional Pre-Hearing Topics

- Inspection or Investigation. Rule 5.9 – if parties agree or arbitrator determines it is necessary to inspect/investigate physical site, requirements include notice.
- Consolidation. Rule 5.11 – parties may consolidate claims by agreement; or a party may seek to consolidate; Rule 5.11 lists factors for the “First Arbitrator” to consider.

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General Comments

- Try to reach consensus during the Preliminary Status Conference
- Discuss and use deadlines, including for all discovery
- Be confident in your rulings and decision making
- Memorialize in the Scheduling Order
- Can provide time for parties to object before Scheduling Order (automatically) becomes final.

For example:

The parties shall have [five (5)] days from the date of this Order to object in writing and, if neither party objects, this Order shall become final as of the date issued.

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