



# Preliminary Hearing/Scheduling Order

## Exchange of Exhibits



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# Exchange of Exhibits

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## AAA Preliminary Hearing Procedures

### P-2. Checklist

(a) The following checklist suggests **subjects that the parties and the arbitrator should address at the preliminary hearing**, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:

(xii) whether, according to a schedule set by the arbitrator, the parties will:

- (a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;
- (b) exchange and pre-mark documents that each party intends to submit; and
- (c) exchange pre-hearing submissions, **including exhibits**;



# Exchange of Exhibits

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- **JAMS Rule 16. Preliminary Conference**

At the request of any Party or at the direction of the Arbitrator, a Preliminary Conference shall be conducted with the Parties or their counsel or representatives. The Preliminary Conference may address any or all of the following subjects:

(g) The pre-marking of exhibits, the preparation of joint exhibit lists and the resolution of the admissibility of exhibits;



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# Exchange of Exhibits

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- The Scheduling Order will establish a date for the exchange of all exhibits
  - Typically takes place within one to two weeks before the hearing between/among parties
  - Panel's exhibits brought to hearing
  - Witness copy
  
- Exhibits will be pre-marked for identification
  - Claimant                    C\_\_\_
  - Respondent                R\_\_\_
  - Joint Exhibits            J\_\_\_



# Exchange of Exhibits

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- Issues to address during the Preliminary Hearing
  - Demonstrative exhibits
  - Cross-examination exhibits
  - Format for Arbitrators' exhibits
    - If paper
      - » Tabbed ring binder
      - » Include a few extra tabs
      - » Index
    - If electronic
      - » Confirm the electronic format (pdf, tiff etc.)
      - » Permit annotation
      - » Bookmarks

# Exchange of Exhibits

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- Organization of Exhibits
  - Separate binder of core exhibits
  - Meet and confer to identify joint exhibits
  - Put the balance of the exhibits in an order that makes sense
  - Consider summary exhibits



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# Preliminary Hearing/Scheduling Order

## Hearing Dates/Venue



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# Hearing Dates/Venue

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## **AAA Rule 13. Date, Time and Place of Hearing**

The arbitrator shall set the date, time, and place for each hearing and/or conference. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall provide notice of hearing to the parties at least seven calendar days in advance of the hearing



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# Hearing Dates/Venue

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- **JAMS Rule 19. Scheduling and Location of Hearing**

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date, unless the law of the relevant jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third-party witness.

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# Hearing Dates/Venue


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- Issues to address at the Preliminary Hearing
  - Required number of hearing days
    - Don't underestimate
  - Whether hearing days will be consecutive
    - Consider client and witness availability
  - Location of hearings
    - Be mindful of number of people you anticipate attending



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# Preliminary Hearing/Scheduling Order Communications with Arbitrator(s)



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# Communications with Arbitrator(s)

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## **AAA Construction Industry Arbitration Rule 21. Communication with Arbitrator and the AAA**

- (a) No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator except as follows: A party or anyone acting on behalf of a party may communicate *ex parte* with a candidate for direct appointment pursuant to Section R-15 in order to advise the candidate of the general nature of the controversy, and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.
  - (b) R-21(a) does not apply to arbitrators directly appointed by the parties who, pursuant to R-20(a), the parties have agreed in writing are non-neutral. Where the parties have so agreed under R-20(a), the AAA shall as an administrative practice suggest to the parties that they agree further that R-21(a) should nonetheless apply prospectively.
  - (c) In the course of administering an arbitration, the AAA and the parties or anyone acting on behalf of any of the parties may communicate with each other either jointly or individually.
  - (d) As set forth in R-44, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.
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# Communications with Arbitrator(s)

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- **JAMS Rule 14. *Ex Parte* Communications**

(a) No Party may have any *ex parte* communication with a neutral Arbitrator, except as provided in section (b) of this Rule. The Arbitrator(s) may authorize any Party to communicate directly with the Arbitrator(s) by email or other written means as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have *ex parte* communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator's services and to assure the absence of conflicts, as well as in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive *ex parte* communication between a Party and a non-neutral Arbitrator. More extensive communication with a non-neutral Arbitrator may also be permitted by applicable law and rules of ethics.

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# Communications with Arbitrator(s)

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- Lessons Learned from *Star Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 15-1403, 2016 BL 267734 (6th Cir. Aug. 18, 2016).



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# Preliminary Hearing/Scheduling Order

## Prehearing Briefs



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# Prehearing Briefs

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- (c) **exchange pre-hearing submissions**, including exhibits;





# Prehearing Briefs

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## **JAMS Rule 20. Pre-Hearing Submissions**

(b) The Arbitrator may require that each Party submit concise written statements of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties, at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.



# Prehearing Briefs

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- Issues to address during the Preliminary Hearing
  - Timing of brief
  - Content of brief
  - Page restrictions



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