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Scott C. Denlinger

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## JAMS PROVIDES NAVIGATION THROUGH THE OBSTACLE COURSE OF DISCOVERY

By  
Scott C. Denlinger \*

### I. JAMS RECOMMENDS DISCOVERY PROTOCOLS FOR USE IN ARBITRATION

Through the creation of the Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases (“Discovery Protocols”), JAMS aims to provide its arbitrators “with an effective tool that will help them exercise their sound judgment in furtherance of achieving an efficient, cost-effective process which affords the parties a fair opportunity to be heard.”<sup>1</sup> Attorneys, especially those more familiar with litigation procedures, often impede the arbitration process with overly burdensome discovery gathering techniques.<sup>2</sup> The Discovery Protocols are an attempt by JAMS “to help attorneys better manage arbitration” and “avoid undue expense and delay.”<sup>3</sup> The Discovery Protocols, which became effective January 6, 2010,<sup>4</sup> provide JAMS arbitrators with twenty-seven factors to “consider when determining the appropriate scope of discovery.”<sup>5</sup> Through the publication of discovery procedures which balance efficiency with the protection of due process, JAMS hopes that the Discovery Protocols will serve as an archetype for the alternative dispute resolution community.<sup>6</sup>

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\* Scott Denlinger is a 2012 Juris Doctor candidate at the Pennsylvania State University, Dickinson School of Law.

<sup>1</sup> JAMS, Recommended Arbitration Discovery Protocols for Domestic Commercial Cases 2 (Jan. 6, 2010), *available at* [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Arbitration\\_Discovery\\_Protocols.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf) [hereinafter Discovery Protocols].

<sup>2</sup> See e.g. Ed Gluklick, *Stick with the AAA: The Best Chance for a Fair Resolution that Saves Time and Money*, 58 DISP. RES. J. 2, 3 (May/July 2003) (discussing discovery in the context of construction arbitration).

<sup>3</sup> Press Release, JAMS, JAMS Increases Arbitration Efficiency Through Adoption of Arbitration Discovery Principles (Jan. 6, 2010), *available at* <http://www.jamsadr.com/jams-increases-arbitration-efficiency-through-adoption-of-arbitration-discovery-protocols-01-06-2010/> [hereinafter Press Release].

<sup>4</sup> Discovery Protocols, *supra* note 1.

<sup>5</sup> Press Release, *supra* note 3.

<sup>6</sup> *Id.*

## II. LIMITING THE ROLE OF DISCOVERY TO INCREASE THE EFFICIENCY OF ARBITRATION

Through the Discovery Protocols, JAMS is attempting to prevent parties from using certain procedures that provide little benefit to the arbitration and which inadvertently retard the arbitral process. Through the drafting of their arbitration agreement and the selection of an arbitration service provider, the parties are the ultimate sovereigns of their arbitration and its discovery procedures. Because of their substantial role in the arbitral proceedings, the parties must be careful not to implement overly broad discovery processes.<sup>7</sup> It is second nature for experienced litigators to conduct in-depth discovery.<sup>8</sup> Parties enter arbitration, however, to increase the speed of the dispute resolution process and avoid costly litigation fees.<sup>9</sup> Therefore, counsel representing parties to an arbitration should make certain that discovery is limited to necessary information.<sup>10</sup> One way to ensure a streamlined discovery process is to provide guidelines and limitations in the parties' arbitration agreement.<sup>11</sup> Although parties may find it easier to agree to timelines or other restrictions before a dispute arises, projecting the amount of time that will be necessary for a potential dispute is difficult.<sup>12</sup> Attorneys with experience in the arbitral process should "be involved in the drafting process" to ensure that the limitations are reasonable.<sup>13</sup>

The selection of the arbitrator or arbitrators is integral to the determination of many procedural issues, including the scope of discovery.<sup>14</sup> As discussed in the Discovery Protocols, JAMS arbitrators should "adapt arbitration discovery to meet the unique characteristics of the particular case."<sup>15</sup> Therefore, the good judgment of

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<sup>7</sup> Discovery Protocols, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> Gluklick, *supra* note 2, at 2.

<sup>10</sup> *See* Discovery Protocols, *supra* note 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2.

<sup>15</sup> Discovery Protocols, *supra* note 1, at 2.

the arbitrator or arbitrators is a key component to the resolution of a discovery dispute.<sup>16</sup> According to JAMS, arbitrators should utilize their arbitration experience and their knowledge of a specific industry.<sup>17</sup> They may also look to trade practices and customs and the expectations and preferences of the parties to make their decisions.<sup>18</sup> To assist in this process, Exhibit A of the Discovery Protocol includes factors that an arbitrator should consider when determining the scope of discovery.<sup>19</sup> The twenty-seven factors are grouped into five categories, including: Nature of the Dispute, Agreement of the Parties, Relevance and Reasonable Need for Requested Discovery, Privilege and Confidentiality, and Characteristics and Needs of the Parties.<sup>20</sup>

The Discover Protocols counsel that the arbitrator or arbitrators must attend to discovery questions early in the arbitration and establish appropriate regulations that inform the parties about discovery limitations from the beginning.<sup>21</sup> To achieve this, the arbitrator must “promptly study the facts and issues” of the dispute.<sup>22</sup> The rules for discovery should be addressed and solidified in the first pre-hearing conference.<sup>23</sup> The arbitrator should limit discovery to only directly relevant documents and exclude the use of broad language that allows for an expansive discovery process, such as a provision that admits “all documents directly or indirectly related to” the dispute.<sup>24</sup> The arbitrator should also set a time frame for the completion of discovery.<sup>25</sup> Additionally, the arbitrator or arbitrators should establish a protocol by which discovery disputes are to be resolved.<sup>26</sup> The

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 8-11.

<sup>20</sup> Discovery Protocols, *supra* note 1, at 8-11.

<sup>21</sup> *Id.* at 3-4.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 3-4.

<sup>25</sup> Discovery Protocols, *supra* note 1, at 3-4.

<sup>26</sup> *Id.* at 6.

process should ensure prompt resolution. To accomplish timely resolution, the procedure should generally not permit lengthy briefing and should provide for only a short discussion; if there are three arbitrators, the neutral arbitrator could also be designated to solve discovery issues unilaterally.<sup>27</sup> In addition, the Discovery Protocols advise that the discovery dispute “should not impede the progress of discovery where there are no discovery differences.”<sup>28</sup>

E-discovery and depositions may save time and money when used correctly, but abuse of such procedures may lead to significant increases in costs and delays.<sup>29</sup> Although electronic media has made information much more readily accessible, its technical nature has complicated the discovery process.<sup>30</sup> JAMS trains its arbitrators to handle the technical issues that may arise during e-discovery.<sup>31</sup> Several limitations are proposed by the Discovery Protocols in order to reduce the burden and increase the benefit of using e-discovery.<sup>32</sup> One such limitation restricts e-discovery to documents “used in the ordinary course of business,” and only requires the production of documents from back-up servers upon a showing of a compelling need.<sup>33</sup> By not requiring the production of metadata, besides email, absent a showing of a compelling need serves to reduce e-discovery costs.<sup>34</sup> “Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute,” the Discovery Protocols permit the arbitrator to deny the request or require “the requesting party [to pay] the reasonable costs of production to the other side . . .”<sup>35</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 4-5.

<sup>30</sup> Discovery Protocols, *supra* note 1, at 4-5.

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 4-5.

<sup>35</sup> Discovery Protocols, *supra* note 1, at 5.

JAMS allows each party to take a single deposition, although the parties “may apply for the taking additional depositions, if necessary.”<sup>36</sup> In commercial litigation, depositions may significantly shorten or eliminate the need for in-person witness testimony.<sup>37</sup> If unrestricted, however, the process of taking depositions may become unwieldy and expensive.<sup>38</sup> Arbitrators should discuss the need for depositions at the pre-hearing conference and impose appropriate limitations on depositions.<sup>39</sup> For example, the length of a single deposition, the time period in which all depositions must occur, and the nature of voicing objections during a deposition may all be limited.<sup>40</sup>

Adjournments and dispositive motions may also delay an arbitration.<sup>41</sup> Pursuant to the Discovery Protocols, if there is a mutual request for adjournment by the parties, the arbitrator must grant the adjournment; the arbitrator also has a duty to inform the parties of “the implications in time and cost.”<sup>42</sup> If a request for adjournment is unilateral, the arbitrator has the ability to grant or deny the request, depending on the rationale of the moving party and the circumstances of the dispute.<sup>43</sup> Dispositive motions may lead to lengthy delay, but may also prove beneficial if they eliminate a portion of the dispute.<sup>44</sup> Generally, arbitrators deny requests to introduce dispositive motions.<sup>45</sup> However, the arbitrator has the discretion to grant the motion if the moving party shows that the introduction of the motion may increase the speed of the hearing and “make it more cost-effective.”<sup>46</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 5-6.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 6.

<sup>40</sup> Discovery Protocols, *supra* note 1, at 6.

<sup>41</sup> *Id.* at 7-8.

<sup>42</sup> *Id.* at 7.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Discovery Protocols, *supra* note 1, at 8.

<sup>46</sup> *Id.*

### III. THE IMPACT OF THE DISCOVERY PROTOCOLS WITHIN AND WITHOUT JAMS

The Discovery Protocols serve as a useful guide for all arbitrators and parties to an arbitration, not solely those involved in a JAMS administered arbitration, especially if those individuals wish to combat the judicialization of arbitral procedures.<sup>47</sup> Even though these protocols are recommendations, the parties to an arbitration would be wise to heed the Discovery Protocols' message and content. The parties' goal of a cost-effective and expeditious dispute resolution process can only be met if they can avoid falling into the trap of complex discovery procedures. By publishing standards, JAMS has attempted to make the discovery process simpler.<sup>48</sup> The JAMS Discovery Protocols provide the arbitrator or arbitrators with a significant amount of discretion, rendering even more imperative the selection of an appropriate arbitrator. On the other hand, parties wary of providing an arbitrator with too much discretion may look to the Discovery Protocols to inform the drafting of their arbitration agreement.

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<sup>47</sup> *See Id.*

<sup>48</sup> Press Release, *supra* note 3.