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II. TRANSACTIONAL ISSUES
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Implementing Alternative Dispute Resolution Concepts in Healthcare

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I. WHAT IS ADR AND WHAT DOES THIS ARTICLE ADDRESS ABOUT IT?

This article addresses the effective use of alternative dispute resolution ("ADR") concepts in the healthcare context. To do that, we must first define ADR. That may seem too simplistic for the sophisticated reader of this article, but many an experienced attorney confuses ADR concepts such as mediation and arbitration. In order to deal with ADR concepts and provisions, and write and interpret those effectively, one must clearly understand ADR's parameters.

Let's start with the difference between mediation and arbitration. Mediation is just a formalized way of viewing settlement discussions. Arbitration is a private, and often binding, adjudication of a dispute that supplants judicial resolution. The two concepts are worlds apart and understanding that is necessary to draft meaningful ADR provisions.

In some contexts, mediation can be broader than that prior description. Most of the time it is not. Under the vast majority of mediation rules (assuming any mediation rules even apply), a mediator is simply someone chosen by the parties to facilitate a settlement discussion. In most instances, the mediator has no authority to force the parties to do anything. Some mediation rules require the mediator to report to the court or arbitration service with jurisdiction over the case about: (a) whether the parties' made a good faith effort to seek potential resolution; and (b) whether the matter settled.

As described throughout this article, where the parties have agreed to arbitrate their dispute, that is the provision and process that needs the most attention because arbitration is where such parties either win or lose their case. Thus, throughout this article, we will pay much more attention to arbitration than mediation.

This article is primarily focused on:

1. Why parties might want to contractually select arbitration as opposed to resolving their dispute in court; and
2. Various considerations and options parties should examine when drafting ADR provisions, particularly arbitration clauses.

Part II of this article addresses threshold questions of what law and provisions govern whether and how parties arbitrate. Part III then explores why parties might want to agree to arbitrate their disputes rather than litigate in court. Finally, Part IV

explains various ways to plan for and tailor ADR clauses to best serve the parties' objectives.

II. WHAT GOVERNS ARBITRATION

Before we jump into specific benefits of choosing arbitration as a dispute resolution mechanism and selecting particular arbitration clauses, we will spend a moment discussing the basics of what laws and provisions govern arbitrations.

A. Arbitration is the Mode of Dispute Resolution Only If the Parties Agree to It

Arbitration is not a common law right in the United States. Rather, arbitration is a matter of contract (the scope of which is then governed by statute). Thus, arbitration only occurs if the parties agree to arbitrate, either: (a) in the contract at issue; or (b) by post-dispute agreement of all parties. Most lawyers are very familiar with arbitrations resulting from an arbitration clause in a contract, but most lawyers do not think about the option of stipulating to arbitration after a dispute arises. This option should be carefully examined once a healthcare dispute becomes apparent if there is no pre-existing contractual arbitration mandate.

B. What Law or Rules Govern Arbitration

Generally, the parties must look at the following three places to determine whether they are required to arbitrate their dispute and, if so, where and how:

- The agreement of the parties about arbitration;
- The relevant statute governing arbitration; and
- The relevant rules governing arbitration (if any).

We discuss each of these elements in turn.

1. The Agreement

Any question about the arbitration proceeding always goes back to the arbitration agreement language, including: (a) whether arbitration is mandated; and (b) how to arbitrate. Many agreements specify at least which (a) arbitration statute applies; and (b) arbitration rules apply. The same dispute resolution provisions that require arbitration may also contain prerequisites to filing the arbitration demand. Such prerequisites may just be a mandatory notice provision, or may range from required mediation to more liberal meet-and-confer requirements. The drafter of the ADR provision should make sure that any steps and processes flow together and are internally consistent. The ADR provision should make clear when a party is free to initiate arbitration and how it must be initiated.

2. Statutes

The Federal Arbitration Act ("FAA") applies when the commerce clause is implicated. Application of the FAA is therefore very broad and is much more expansive than federal court jurisdiction. With judicial federalism, state courts have default jurisdiction over most disputes and federal courts are courts of limited jurisdiction, hearing only cases that are authorized by the United States Constitution or federal statutes. It is practically the inverse in the arbitration context. Accordingly, state courts are often left to interpret and apply the FAA.[1] Under the FAA, there is a judicial presumption in favor of arbitration.[2]

Most states have adopted either (a) the Uniform Arbitration Act ("UAA"); or (b) the Revised Uniform Arbitration Act ("RUAA"). As with the FAA, there is a judicial presumption in favor of arbitration under most states' arbitration statutes. Some jurisdictions may preclude arbitration in certain subject matter areas. Thus, make sure you are aware of the arbitration-related public policy in relevant jurisdictions when drafting an arbitration clause.

3. Rules

Arbitration agreements can specify a wide range of rules that apply to the arbitration process and whether a service provider will administer the arbitration. The most prevalent healthcare arbitration service providers are: (a) the American Health Law Association ("AHLA"), (b) the American Arbitration Association ("AAA"); and (c) JAMS (formerly Judicial Arbitration and Mediation Services, Inc.). Both AHLA and AAA have specific payor / provider rules that can be chosen to govern those

unique healthcare disputes. Part IV(F) of this article discusses rule and service provider options in detail.

III. WHETHER TO CHOOSE ARBITRATION

A. Why You Might Want to Select Arbitration vs. Court Litigation

Before we discuss how parties might craft their ADR provisions (including any arbitration clauses), it is helpful to explore why arbitration might be preferred over litigation in court under certain circumstances. Here, we discuss some reasons why parties might elect arbitration over litigation, and thus provide for arbitration in their contract or deal document ADR provisions.

1. Expert Tribunal

Arbitration may be preferable if the parties would benefit from an expert tribunal and perhaps even special rules governing the process. For example, AHLA's arbitrator panel is exclusively comprised of healthcare arbitrators. Similarly, AAA has a designated healthcare panel of arbitrators. Parties can also build in a process for selecting an expert healthcare arbitrator with specific attributes or skill sets by delineating certain qualifications.

Specialty rules also exist. For example, the newly revised AHLA Commercial Arbitration Rules are designed exclusively for healthcare matters and have supplemental provisions that can be selected for payor / provider disputes. Similarly, AAA has specific payor / provider rules. Parts IV(F) and (G) of this article elucidate such options and considerations in more detail.

2. Expedited Process

In arbitration, the discovery and hearing process is designed to move quicker than the judicial process. Most administered arbitration rules require an award within a certain number of days after the hearing is closed and encourage truncated discovery and hearings. One example of how to expedite the entire arbitration process is contained in the following sample AAA standard clause:

> The **award shall be made within nine months** of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of the parties or by the arbitrator(s) if necessary.[3]

3. Finality

The finality element of arbitration tends to expedite the arbitration process even if the discovery and trial level process is no shorter than court litigation. Importantly, parties may not appeal an arbitration award absent (a) a court vacatur; or (b) an arbitration agreement provision specifying appeals.

Under the FAA (and most state arbitration statutes), a court will vacate an arbitration award only under the following four limited circumstances:

1. Where the award was procured by corruption, fraud, or undue means;
2. Where there was evident partiality or corruption in the arbitrators;
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.[4]

As to Subpart (4) above, in determining whether an arbitrator has exceeded the authority granted under the contract, courts have provided guidance and context. For example, a court cannot base a vacatur decision on whether the court would have awarded the same relief, or whether or not the arbitrator correctly interpreted the contract.[5] The court must instead focus on whether the arbitrator had authority to reach a certain issue, not whether that issue was correctly decided.[6] As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of authority, the award must be

enforced. The arbitrator's decision cannot be overturned even if the court is convinced that the arbitrator committed serious error.[7]

Many state and federal courts have recognized non-statutory grounds for vacating an arbitral award. The non-statutory grounds include: (a) the arbitrator's manifest disregard of the law;[8] (b) the award conflicts with a strong public policy; (c) the award being arbitrary and capricious; (d) the award being completely irrational; or (e) the award's failure to draw its essence from the underlying contract.

As a general rule, judicial deference is accorded to arbitration awards in state and federal courts. Judicial review of arbitration awards is narrowly limited and the FAA presumes that arbitration awards will be confirmed.[9]

4. Providing Award Flexibility.

Arbitration may be more beneficial if you want the tribunal to have flexibility in shaping the award. For example, do the contracting parties want the award focusing on equity or damages, or perhaps reforming the contract? There are myriad approaches and almost unlimited ways in which the parties may shape the parameters of the award in advance. Parts IV(I) and (J) of this article discuss specific considerations in this regard.

5. Limiting Award Flexibility.

If the parties wish to limit the tribunal's flexibility in shaping the award, arbitration still may be more beneficial. If you want to include or exclude certain remedies, parties are free to agree to such limitations in the arbitration clause assuming that your jurisdiction does not have substantive law limiting the parties' discretion to expand or limit the available remedies.

6. Confidentiality.

If the parties value confidentiality, arbitration may be more beneficial than traditional litigation. There is more opportunity for confidentiality in arbitration than in judicial proceedings. First, the arbitrator is often required to maintain the confidentiality of proceedings.[10] Also, some arbitration agreements specifically require that the arbitration proceedings be confidential. Some arbitration clauses even make confidential the very existence of the dispute and any arbitration stemming therefrom. Thus, the confidentiality element can be a benefit of arbitration—if desired—if enough safeguards are in place.

However, it is a significant mistake to assume that all arbitrations are necessarily confidential. Contrary to what is often cited as conventional wisdom, information about an arbitration can sometimes be made public. There are many features that can render all or parts of an arbitration non-confidential.

a. First, under many arbitration statutes, the parties are not bound to keep the proceedings confidential absent a specific confidentiality agreement or arbitral order. Thus, even if the arbitrator is bound to confidentiality, that accomplishes little if the parties are free to disclose anything they wish about the arbitration, including the award.

b. Second, the arbitration case record presumptively becomes public record if one of the parties: (a) applies to the court to confirm the arbitration award; or (b) appeals to the courts seeking to vacate the award. Although arbitrators generally honor the parties' confidentiality agreement without a "good cause" showing during the arbitration proceeding, the standard for a court to seal records once a court receives jurisdiction is typically stringent.[11] Therefore, even a previously confidential arbitration can sometimes be made public if it reaches the courts. Parties can seek to minimize this concern by contracting for a bare award (with as little detail as possible). However, that might not eliminate the arbitration record itself becoming public record at the judicial stage.

c. Finally, even if the parties agree to confidentiality, a non-party fact witness who refuses to sign a confidentiality agreement would be free to disclose aspects of an arbitration proceeding. Further, the parties to the arbitration cannot preclude non-parties from obtaining, through subpoena, the arbitration record if a court holds there is a legitimate need for the information.[12]

Therefore, it is important to realize that arbitration is safely confidential only if all the foregoing elements are addressed in a way that preserves such confidentiality. However, at the very least, arbitration tends to be less public than court in many ways, even if not always entirely confidential.

7. Allocating Costs and Attorneys' Fees

Arbitration also may be more beneficial than traditional litigation if you want to address how attorneys' fees or costs should be allocated. As Part IV(J) of this article discusses, the parties have wide latitude to tailor this aspect of the dispute if they desire.

8. Creative Methods Such as Baseball Arbitration

Baseball Arbitration is a method used in various contexts, including baseball salary disputes, and may be effective when parties have a long-term relationship and the dispute is exclusively about the size of a monetary award. The procedure involves the following:

- Each party submits a number to the arbitrator as a proposed monetary award (and serves the number on the opposing party).
- Following a hearing, the arbitrator will pick one of the submitted numbers, nothing else, as the monetary award.

Parties are incentivized to submit a highly reasonable number, since this increases the likelihood that the arbitrator will select that number. In some instances, the process of submitting the numbers moves the parties so close together that the dispute is settled without a hearing. Sample language providing for "baseball" arbitration is set forth below.

> Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers. The arbitrator shall be limited to awarding only one or the other of the two figures submitted.[13]

B. Why You Might Want Court Litigation vs. Arbitration

Part III(A) has focused on numerous reasons why arbitration is sometimes a preferable choice over leaving the dispute to judicial resolution. After all, the thrust of this article is focused on tailoring ADR provisions to your needs, and in a manner that avoids court.

However, we would be remiss not to remind the reader of the obvious proposition that competing considerations sometimes militate in favor of judicial proceedings over arbitration. Here are some examples of when that might be the case:

1. If a potentially more expert tribunal might be a detriment or simply not necessary, one or both parties may want a judge or a jury.
2. If you want the right to appeal any initial determination to an appeals court, then arbitration may not be the best option. Even though arbitration appeal provisions have become more common over time, those typically provide that the appeal is to another arbitrator or arbitration panel, with the same high deference level applied, and thus the initial decision never receives full judicial scrutiny regarding the merits of the dispute and potential errors of law.
3. Likewise, if you think you will need more extensive discovery, including numerous depositions, then litigation is usually the preferred option (although discovery can also be tailored significantly in the arbitration process, per our Part IV(H) discussion so long as all contracting parties agree).
4. Finally, if a speedy process is either not a concern or a particular desire, then consider whether litigation better fits your needs.

IV. HOW TO TAILOR YOUR ADR

As underscored at the beginning of this article, there are two main opportunities for the parties to choose ADR. The first is at the outset of their relationship. Alternatively, the parties still can agree to employ an ADR process after a specific dispute arises, even if they did not include an ADR clause in their original agreement. In either scenario, parties should consider numerous factors in entering into an ADR agreement.

The beginning of a relationship is the optimal (and most common) time to enter an ADR agreement. Once a dispute has arisen between the parties, at least one party is likely to feel sufficiently aggrieved or otherwise believe it advantageous to elect a traditional litigation process. Entering an ADR agreement before a dispute arises allows both parties to consider the terms of such an agreement and its implications with a clear head, uninfluenced by an already percolating disagreement.

At the beginning of their relationship, parties tend to be more focused on the opportunities presented by their new endeavor

than future disputes. Thus, it is tempting to make an ADR clause short and simple, deferring the details for later consideration. Indeed, this is how the most basic model arbitration clauses are constructed. For example, AHLA's standard arbitration clause states:

> Any dispute arising out of or relating to this contract or the subject matter thereof, or any breach of this contract, including any dispute regarding the scope of this clause, will be resolved through arbitration administered by the American Health Law Association Dispute Resolution Service and conducted pursuant to the AHLA Rules of Procedure for Arbitration. Judgment on the award may be entered and enforced in any court having jurisdiction.[14]

The AAA's standard clause is similar:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.[15]

It is the same for JAMS's Standard Arbitration Clause for Domestic Commercial Contracts.

> Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration] before [one/three] arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures [and in accordance with the Expedited Procedures in those Rules] [or pursuant to JAMS' Streamlined Arbitration Rules and Procedures]. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.[16]

The problem with this basic approach is that it increases the number of potential arguments down the road. That said, noted science-fiction philosopher Montgomery Scott ("Scotty") once said, "The more they overthink the plumbing, the easier it is to stop up the drain."[17] It is not reasonable or possible to try to address all aspects of an ADR process before a dispute arises, and doing so may cause significant stress in the formation of an initial agreement. This is why the standard arbitration clauses referenced above are so often employed in one form or another.

But if the parties agree on (or the drafting party appreciates) the nature of the business relationship being initiated and the aspects of that relationship that are likely to result in disputes, it may be wise to consider expanding upon a basic contract clause with some additional details addressing some of the aspects of ADR listed in this article. This may be why some major ADR providers offer ADR clause generators to help parties draft an appropriate arbitration clause for their situation.[18]

The absence of an ADR clause in the parties' agreement does not foreclose them agreeing to employ ADR—mediation, arbitration, or both—once a dispute arises. As pointed out in Part II(A) above, though the use of mediation (often at the behest of a judge) is fairly common post-dispute, most lawyers fail to consider post-dispute submissions to arbitration in the absence of an arbitration clause in the governing contract. However, this option should be examined once a dispute becomes apparent in the absence of a pre-existing contractual arbitration mandate. This can be achieved by a simple agreement or stipulation. Remember, since arbitration is just an agreement of the parties to privately adjudicate their disputes, all the options and flexibilities discussed below are equally applicable to an arbitration agreement once a dispute has arisen (with the obvious exception of an opt-out clause, which would not make sense in a post-dispute agreement or submission). Some service providers have specific arbitration submission forms to complete and file with the Arbitration Demand as proof of the agreement to arbitrate in lieu of a conventional pre-dispute arbitration clause. Check with the service provider that you choose to determine any special filing requirements in this type of scenario.

Whether part of their original agreement or as a cooperative effort to resolve a pending dispute, parties can always agree to an

ADR process. The subsections below address some specific clauses that the parties may wish to consider when entering their arbitration agreement.

A. Mandatory or Opt-Out ADR

1. Options

An ADR agreement does not need to be a strait jacket. For example, parties can agree to a potential ADR procedure but include an opt-out provision that allows either party (or both upon agreement), to opt out of the ADR process and into more traditional litigation by some set time. Some contracts permit a party to opt out of the ADR clause within 30 days after execution of the agreement. These provisions are most commonly found in consumer or financial institution agreements, though they can be included in any context if the parties so desire. ADR agreements also can allow for one party, unilaterally—or both parties, upon agreement—to opt out of the ADR process within, say, 30 days after notice of a dispute relating to the contract.

2. Considerations

An opt out provision may seem appealing to avoid buyer's remorse. For example, as we discussed in Part III(A)(6), all or part of an ADR process may be confidential. When a dispute arises, a party may become angry and want to air its grievances publicly, or otherwise determine that a public, traditional litigation process will better serve its purposes in the context of the particular disagreement. Of course, this is also the primary reason not to include an opt-out provision in an ADR agreement. As discussed above, one of the benefits of including an ADR agreement in the original contract is to commit both parties to a preferred process before the nature of the dispute changes the incentives for one or both of them. Opt-out provisions can sometimes negate that benefit.

3. Recommendations

If both parties agree that ADR is a preferred method of dispute resolution at the inception of the relationship, then it is likely best to fully commit to that course of action and agree on how the parties will implement that process when necessary. That said, it is worth noting that, in a renewed or amended business relationship, there may be occasions when including an opt-out clause is necessary to protect the validity of a new arbitration agreement between the parties. *Lipsett v. Banco Popular North America*,[19] provides an example of such a situation.

In *Lipsett*, an individual opened an account with a bank in 2004.[20] The original agreement between the bank and its customer did not contain an arbitration clause, but permitted the bank to change the agreement, effectively at its discretion.[21] In 2008, the bank amended the agreement, incorporating an arbitration clause and allowing the customer to opt out "[w]ithin 45 days after the date we open [the customers] deposit account."[22] The bank amended the agreement on additional occasions, and after one subsequent amendment the customer attempted to opt out of the arbitration clause.[23] The bank denied the validity of the opt out and, in court, moved to compel arbitration.[24]

After significant analysis of the language in the original agreement and the subsequent amendments, the court denied the bank's motion to compel arbitration. It reasoned that, under New York law, because the customer "had no meaningful opportunity to opt out of arbitration in 2008, in other words to clearly manifest assent to arbitration at that time, no contract to arbitrate was formed."[25] Under these circumstances, the court ruled that enforcement of the arbitration clause would be unconscionable.[26]

The *Lipsett* court's rationale would be inapplicable to most arbitration agreements between sophisticated entities in the healthcare space, but one can imagine scenarios where transactional counsel should be aware of this potential issue with the enforceability of a new ADR clause. For example, a hospital or medical practice could find itself in a similar scenario with a patient as the bank in *Lipsett* did with its customer. The parties may have an existing contractual relationship governing the provision of services that is devoid of an ADR provision. Alternatively, the facility could enter a similar type of relationship with a vendor that allows the facility to amend the agreement from time to time at its discretion. In those situations, should the facility wish to amend the agreements to incorporate an ADR clause, it would be prudent for the facility's counsel to review applicable state law and determine whether it must provide the patient or vendor with a reasonable opportunity to opt out of a new arbitration clause—and what a reasonable opportunity looks like in that jurisdiction—in order to enhance the

probability of its subsequent enforceability.

B. Statement of Purpose

1. Options

Many written agreements contain statements regarding their purpose—an explanation of why the parties enter the contract. These often take the form of whereas clauses at the beginning of the agreement that provide background on the parties' relationship and explain what they hope to accomplish in their business endeavors. Though often perfunctory, these clauses can be important in interpreting the contract depending on the applicable law.[27]

Similar statements also may be useful in an ADR clause within a larger agreement. Because ADR, and arbitration in particular, is a creature of contract, an explanation of the parties' purpose in choosing ADR may be valuable—and possibly legally binding—in a future proceeding. As discussed above, there are several potential benefits that ADR offers parties compared to traditional litigation, including greater confidentiality, limits on the scope and costs of discovery, expedited processes, and expert adjudication. The parties to a particular contract may truly value some, but not all, of these features. If the parties tell a future neutral why they chose ADR and what key benefits they want from it, then the neutral will be better equipped to meet their expectations.

2. Considerations

A couple of examples will be illustrative. For instance, parties to a payor/provider agreement may know in advance that millions of dollars will likely be at issue in any potential dispute between them. Given the value of the potentially disputed claims, they may understand that substantial discovery will be necessary to fairly address the issues involved. They may also know that they likely will wish to continue their relationship during any dispute, and thus not want to burden themselves with artificially tight deadlines that could lead to further tensions in their business relationship. For such parties, the key motivation for ADR may be that they do not want their disagreement to be public to avoid reputational harm with mutual consumers.

In contrast, a physician practice and a physical therapist negotiating an arbitration clause in an employment agreement may not care much about the confidentiality of their dispute. They also may know that the value of the disagreement is likely to be low enough that they will want to save money and opportunity costs on a drawn-out discovery process and obtain an expedited resolution to control legal fees. Although the payor/provider and practice/therapist parties both have reasons to agree to ADR, those motivations differ. A statement of purpose in the arbitration clause can be a reliable source of information that allows a neutral to tailor the ADR experience to the original goals of the contracting parties. In the payor/provider context, an arbitrator may be more forgiving of a longer discovery period than in other disputes but may pay particular attention to issues like the parties' proposed protective order, cybersecurity measures, and disputes regarding third-party discovery. In the employment dispute, an arbitrator educated by the parties' written desire for an expedited process and finality may be more likely to draft a scheduling order that keeps their lawyers' feet to the fire.

3. Recommendations

Parties need not incorporate 15 whereas clauses into the ADR section of their agreement. A statement of purpose in an ADR agreement can be simple and to the point, serving only to highlight the parties' primary motivations for choosing ADR. For example, the parties to the payor/provider agreement referenced above may want to incorporate something akin to this language:

> The parties to this Agreement possess confidential and sensitive information regarding each other's business and business practices, as well as information about patients that is protected by the Health Insurance Portability and Accountability Act ("HIPAA"). The parties' primary motivation for the inclusion of this ADR clause in this Agreement is maintaining the confidentiality of this information in the event of a dispute, and the confidentiality provisions of this Agreement and the rules governing any future dispute shall be strictly enforced.

In contrast, a healthcare provider crafting an arbitration clause for inclusion in an employment agreement may wish to include a statement that:

> The parties to this Agreement adopt this ADR clause with the purpose of providing an expedited process for the resolution of any future disputes. The parties wish to take advantage of the streamlined discovery process offered by arbitration and anticipate that the arbitrator will assist the parties in setting an appropriate schedule for exchange of the information needed to address the dispute while obtaining resolution on an expedited basis.

With this approach, the parties and their counsel can guide their future neutral's conduct consistent with their priorities when entering their agreement.

C. Venue and Applicable Law

1. Options

As discussed throughout this article, ADR often affords the parties more control over their dispute than they might otherwise have in litigation. Critical to maintaining that control is addressing where a future dispute will be resolved and what law a neutral will apply to resolve it. These issues are addressed through venue and choice of law clauses incorporated into the arbitration agreement. Although these provisions can often be included in contracts regardless of whether the parties agree to ADR, their absence in an ADR agreement can have significant ramifications.

A venue or forum clause is exactly what it sounds like—a provision that addresses where any ADR process will take place. For example, will the parties be holding their mediation at the claimant's offices in Newark, or will the mediation take place via Zoom? Will the arbitration hearing be at Respondent's law firm in Chicago, or Claimant's headquarters in Delaware, or held virtually? A venue provision can give the parties a chance to control where future disputes will be addressed, which is an issue often out of the control of at least one party to a case in court.

In the arbitration context, choice of law provisions address the procedural and substantive law to be applied to the dispute. While that may sound simple enough, there are complications to be considered when drafting these provisions.

2. Considerations

Obviously, the party initially drafting the venue and choice-of-law terms of the agreement will want to craft them to their advantage as much as possible. With venue, for example, it is wise not to underestimate the time, cost, and toll on personnel associated with mediating or (especially) arbitrating a dispute in a jurisdiction away from home. Of course, drafting a clause naming your company's home city of Washington, D.C. as the forum for an arbitration when the other party is based in Rochester, New York may result in some arguments. It also could require repeated changes to the language of your standard contract if your company has offices in multiple cities. One way to address these concerns is to consider which party is most likely to be a claimant and which a respondent in a potential dispute. If your company or client is most likely going to be a claimant, it may be wise to draft the standard language to give the claimant the right to determine the venue for the ADR procedure. On the other hand, if your company or client is most likely going to be a respondent, then draft the standard language to give the respondent the right to determine the venue for the ADR procedure. One also should consider that the choice of the forum for the dispute also may affect the choice of law.[28]

With regard to choice of law provisions, the parties can specify what jurisdiction's substantive law governs the dispute, most commonly an arbitration.[29] If all of the parties and relevant conduct will be located in one state, it may be sufficient to simply specify that state's law will govern the dispute, if that is your wish. If the agreement involves interstate commerce, it may be prudent for the parties to acknowledge that the ADR clause is governed by the Federal Arbitration Act and by the substantive

law of a particular state. In either case, if the parties agree on an ADR provider to manage the dispute, as discussed further below, it may also be wise to identify that provider's procedural rules as governing a future dispute.

This may again be obvious, but the party drafting an arbitration agreement will want to select the substantive law of a state that is favorable to that party to the extent that can be determined before an actual dispute arises. But it is not always that simple. There are at least two potential complications to be considered when drafting a choice-of-law provision in an ADR agreement. First, be sure that the substantive law you choose allows likely types of disputes to be arbitrated. This is less likely to be an issue in the healthcare space than in other areas of life—issues like criminal violations, family law matters, immigration disputes, and testamentary issues, which are not generally arbitrable, are unlikely to arise from healthcare contracts. That said, if your agreement deals with anything out of the ordinary, a quick check of the substantive law of your proposed jurisdiction is prudent.

Second, choice of law provisions are not always enforceable. For example, case law in many states requires that the contracting parties' proposed state law have a substantial connection to the transaction at issue, or other similar conditions, even if the parties agreed on the substantive law to be applied.[30] When choosing what substantive law should apply to future ADR proceedings, be sure to confirm that your choice will be honored under the law of the forum state that you selected.

3. Recommendations

Precautionary considerations notwithstanding, the actual drafting of forum and choice-of-law clauses is relatively simple. For example, a venue clause can just state where the ADR procedure will take place. Although the AAA provides such an example that reads, "The place of arbitration shall be [city], [state], or [country],"[31] and that provision is arguably sufficient given the context, it would be prudent to add language specifying that the chosen location "constitutes the 'sole' or 'only' or 'exclusive' forum" in order to ensure that a court would find the clause to be mandatory instead of permissive.[32] The clause also can give the parties a chance to agree on a location once the dispute arises to allow for changing circumstances between the execution of the contract and the dispute, but set a default location should the parties not agree. For example, "If the Parties are unable to agree on the location of the arbitration within thirty (30) days after service of the arbitration demand, the Parties agree the arbitration will take place in Vancouver, Washington." Again, inclusion of explicitly exclusionary language may be prudent depending on the law in your jurisdiction.

A choice of law provision also can be relatively simple. For example, in a dispute that crosses state lines, JAMS proposes:

> This Agreement and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of the State of _____, exclusive of conflict or choice of law rules.
>
> The parties acknowledge that this Agreement evidences a transaction involving interstate commerce. Notwithstanding the provision in the preceding paragraph with respect to applicable substantive law, any arbitration conducted pursuant to the terms of this Agreement shall be governed by the Federal Arbitration Act (9 U.S.C., Secs. 1–16).

While it may be harmless to include the language noting that the choice of law provision is controlling "exclusive of conflict or choice of law rules," parties should be aware that such a clause does not necessarily foreclose at least a limited choice of law analysis under state law.[33] A party wishing to expressly include the procedural rules of a particular ADR organization, as discussed further in Subsection F below, may employ something like, "Disputes under this clause shall be resolved by arbitration in accordance with Title 9 of the United States Code and the Commercial Rules of the American Health Law Association."

D. Scope of ADR clause

1. Options

Because contracting parties can decide whether to agree to use an ADR process, it stands to reason that the parties can determine the scope of the claims that will be subject to that process. For example, it is conceivable that a revenue cycle management company may want to employ ADR in a dispute over a failure by one of its clients to pay for its services, but litigate alleged deficiencies in its billing services in court. With some limitations addressed below, the parties can contract as to which potential claims they will submit to ADR.

2. Considerations

A party drafting an arbitration clause should assess whether it wants to define the scope of claims subject to that clause by considering the types of claims it might bring and be forced to defend in the future. It can then analyze the pros and cons of ADR for each type of claim and put the claims in ADR and non-ADR buckets.

Of course, there are practical limitations to how finely one can parse a business relationship, and those limitations can inhibit the enforceability of scope clauses in ADR agreements. Even matters that do not fall within the scope of the ADR agreement may ultimately be subject to ADR in many jurisdictions if they are "inextricably interwoven" with claims within the scope of the agreement, in which case "the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where … the determination of issues in arbitration may well dispose of nonarbitrable matters."[34] In *Cohen*, a dispute about unpaid legal fees was arbitrable, while a legal malpractice claim was not. The appellate court ultimately ordered a stay of the malpractice claim, as those issues had to be considered in the first instance in the inextricably interwoven arbitration on the unpaid legal fees. Although the precise tests vary, the general concept remains the same in many jurisdictions,[35] and drafters should consider that when drafting a scope of ADR provision.

3. Recommendations

Again, the potential language of a scope of ADR provision ranges from the very general to the intricate. A broad provision may state something like, "[A]ny controversy or claim arising out of or relating to this Agreement or any breach of this Agreement will be settled by binding arbitration to be held before three arbitrators and conducted in accordance with the Employment Arbitration Rules and Mediation Procedures of the [AAA] in the City of Cleveland, Ohio."[36] Depending on the situation, this language may be sufficient. That said, if employing such broad language, a drafter should research how terms like "arising out of or relating to this Agreement" have been construed in the substantive law jurisdiction designated in the contract or in which the parties' business transactions take place.

To have the best chance of a court enforcing these choices, the drafter should consider being more specific about what kinds of disputes the parties wish to include and exclude from ADR. For example, citing specific types of statutory claims may limit the scope of the ADR agreement and the chances of ending up with inextricably tied claims outside the intended scope of ADR. Take an employment agreement between a corporation and one of its executives:

> The Executive expressly understands and agrees that claims subject to arbitration under this section include asserted violations of the Employee Retirement and Income Security Act of 1974; the Age Discrimination in Employment Act; the Older Worker's Benefit Protection Act; the Americans with Disabilities Act; Title VII of the Civil Rights Act of 1964 (as amended); the Family and Medical Leave Act; and any law prohibiting discrimination, harassment or retaliation in employment ….[37]

By incorporating this kind of specific inclusive or exclusive language into these provisions, a corporation may be able to subject employment-style claims to the ADR process while preserving its ability to bring, for example, corporate governance malfeasance claims against its executive in court, should such an unfortunate event become necessary.

E. Mediation

1. Options

ADR can take numerous forms, but the two most common, as discussed in Section I, are mediation and arbitration. Most ADR clauses in healthcare contracts provide for arbitration as an alternative to litigation in federal or state court, but they can also provide either an optional or mandatory mediation process before or during the arbitration, thereby committing the

contracting parties to make every effort to resolve their disputes amicably. This can not only preserve the parties' relationship, but save time and money, as mediation (when successful) is usually the most efficient of these dispute resolution mechanisms.

Parties to an ADR clause can approach mediation in several ways. As a threshold matter, mediation can be optional or mandatory. Relatedly, a mediation provision may be invocable by one party or require the consent of both. The parties can also address the timing of the mediation—will they want to mediate as soon as the dispute arises, or will they provide themselves with more flexibility by requiring a mediation only before an arbitration hearing or trial.

2. Considerations

Mandatory mediation often seems like a reasonable approach—after all, what is the harm in trying? The harm is that mediation can result in a waste of time and resources if it turns out that one or both sides are not serious about compromising to resolve the conflict. On the other hand, even a failed mediation can help the parties to learn more about their dispute, and having more information about the facts and law at issue may result in better decisions about whether and how to pursue arbitration or litigation. Moreover, mediation gives each party the opportunity to have their position analyzed by a third-party neutral, which can provide a unique perspective and change the way one or both parties view their case.

If the parties' relationship is such that both sides will have significant information about their dispute as it arises, mediation in advance of arbitration or litigation may be the most efficient approach. Should an early attempt at resolution fail, the parties can always try a second mediation, or as many as they deem appropriate. To the contrary, if the parties' work under the agreement is less collaborative, some period of fact discovery in a more adversarial process may be useful to provide each party—and the mediator—with sufficient facts to appropriately weigh the strengths and weaknesses of the parties' positions.

3. Recommendations

Whether to include optional or mandatory mediation in an ADR clause, and when to require it, will depend on the nature of the parties' relationship and the substance of the potential disputes. An attorney drafting an ADR clause for a healthcare contract should consider these variables in crafting an appropriate clause. Fortunately, numerous models are readily available for drafters to use as a baseline. For example, the AAA provides a basic standard mediation clause–

> [i]f a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.[38]

JAMS also provides multiple examples of mediation clauses depending on, for example, whether the parties wish to require a private negotiation in advance of mediation or simply require mediation before arbitration.[39] Either of these or numerous other models can be tweaked to fit the particular situation.

F. <u>Applicable Rules/ADR Provider</u>

1. Options

ADR clauses can specify both the rules that will apply to the parties' arbitration and what service provider or providers may administer the arbitration. The two usually come as a package. For example, if the parties decide that the AAA will administer their arbitration, they will often choose a set of AAA arbitration rules, such as the AAA's Commercial Rules, to apply to the dispute. Similarly, if the parties select JAMS as their administrator, they will often specify that the JAMS Comprehensive Arbitration Rules and Procedures will apply to the proceedings. But an ADR clause need not follow this well-trodden path. For example, if, as discussed above, the parties choose ADR to protect the confidentiality of their disagreement but do not wish to sacrifice the discovery and other processes afforded by the courts—arbitrators often frown upon discovery mechanisms like interrogatories and requests for admission—they could select an ADR provider but agree that the Federal Rules of Civil Procedure or similar state court rules will govern their arbitration.

There are numerous options in choosing an ADR service provider. As mentioned above, AHLA's Dispute Resolution Service

specializes in healthcare disputes and has a roster of neutrals with different types of healthcare experience. Other organizations provide other industry or subject-matter specific ADR services and administration. On a more general level, AAA and JAMS, along with their sets of mediation and arbitration rules, are two of the most prevalent domestic ADR providers, along with the International Institute for Conflict Preservation and Resolution ("CPR"). AAA and CPR are non-profit entities, while JAMS is a for-profit company. JAMS neutrals have made ADR 100% of their practice, while other for-profit organizations offer neutrals who may also work as advocates.

2. Considerations

The choice of ADR rules is often intertwined with the reasons the parties elected ADR in the first place and the likely nature of their dispute. For example, as already discussed, parties who value confidentiality but also covet the fulsome motions practice and discovery procedures provided in court litigation may choose to proceed under a chosen court's rules. In contrast, parties that desire a speedy resolution may look for specific expedited rules and procedures offered by many service providers in addition to their standard, streamlined rules. These rules often eschew or limit the parties' abilities to file dispositive motions in favor of their expedited procedures, and arbitrators are often hesitant to foreclose a party from presenting part of its case at an arbitration hearing for fear of vacatur. Parties should consider the tradeoffs inherent in these characteristics when selecting the applicable rules.

Healthcare entities who anticipate healthcare law-related disputes may opt for AHLA to administer their ADR process, while companies drafting ADR provisions for their employment contracts may gravitate toward providers that offer employment-specific rules and/or procedures, like AAA, JAMS, and CPR. Beyond the rules they offer, there is often no substitute for experience in choosing the ADR services provider that will administer your mediation or arbitration. Some lawyers have had good experiences with one service provider, while others may have nightmare stories about that same service and swear by another. It may be worth researching the strength of a given provider's neutral panel in the forum for your ADR proceeding. For example, a service provider may have experienced healthcare neutrals, but does it have them in your state or region? If not, you may incur additional costs in getting your chosen neutral to hearings.

It is also worth noting that many ADR clauses do not specify a service provider for mediations. Mediations require significantly less administration than arbitrations. If the parties can successfully agree on a mediator and contract directly with that neutral, it may save them the administrative costs that come with a service provider.

3. Recommendations

The simplest and most common course of action is to draft an ADR clause applying the appropriate set of rules from the provider you ultimately select—if you choose AHLA as your service provider, let the AHLA rules apply. This may well be the correct choice, and it is not the purpose of this article to recommend any particular ADR service provider. That said, it is wise to consider why you are choosing ADR when selecting the applicable rules and service provider. If you want full discovery, choosing AAA's Commercial Expedited Procedures makes little sense. Similarly, if you know that most disputes that will arise from an agreement will benefit from healthcare law expertise, you may wish to avoid organizations deficient in neutrals with that knowledge and experience.

If you are an in-house counsel drafting or revising your ADR clauses, talk to outside counsel with experience practicing before various arbitrators and ADR service providers. Consider consulting with neutrals who are on rosters of multiple organizations (but keep in mind that doing so may disqualify that neutral from future service as your mediator or arbitrator). There are always unknown variables, but hearing about the experiences of these practitioners may maximize your chances of making the best choice possible before a dispute ever arises.

G. <u>Arbitrator Selection</u>

1. Options

The drafter of an ADR clause can exercise control not only over who administers the proceedings and the rules that will apply to them, but what kind of neutral will preside. In the context of arbitration, the parties can elect to have a single arbitrator, a three-arbitrator panel, or provide for a choice between the two depending on any number of factors, including the value of the case. Most ADR service providers' rules contain procedures for selecting the neutral or neutrals. For example,

under the AAA Commercial Rules, arbitrator selection is governed by Rule R-12, which states that AAA shall provide the parties with a list of ten arbitrators from its National Roster, at which point the parties will be allowed to offer strikes and preference rankings. Other organizations have similar procedures. These rules apply if the parties do not provide for a more specific neutral selection process.

But the parties can agree to a more detailed or specific selection process and/or additional qualifications for neutrals. For example, an ADR clause can require a sole mediator or arbitrator to be a "retired judge from a particular court" or a "lawyer with 10 years of active practice in a specified area," such as healthcare.[40] With a three-arbitrator panel, an ADR clause can vary the panel experience by requiring that "the Chair be an attorney with at least 20 years of active litigation experience" and "one of the wing arbitrators be an expert in an area such as construction or be an accountant or a particular type of engineer."[41] More generally, for an arbitration before AAA, the clause could require that the arbitrator or panel of arbitrators be selected from one of AAA's specialty panels—which include subjects like healthcare, cannabis, energy, and sports—as opposed to its National Roster.[42]

2. Considerations

Although having a single mediator is a common practice (there are other models utilizing two or more mediators), one of the first questions to consider in arbitration is whether you want to have a single arbitrator or a three-arbitrator panel. A single arbitrator will certainly hold down costs. This is an appealing benefit of proceeding with a single arbitrator. But as with most cost-cutting measures, a single arbitrator involves risks. Many advocates consider one individual more likely to commit legal error than three. This can be particularly problematic if the ADR clause at issue does not provide for an appeal, given the judicial hesitancy to vacate arbitration awards.[43] One arbitrator may also be more inclined toward "baby-splitting" awards than a three-arbitrator panel, which can be problematic if one party's claims, even of dubious merit, allege significantly more in damages than another party's claims. Any single arbitrator may also turn out to be particularly susceptible to sympathetic or emotional appeals in a way not predictable from their résumé. These added risks can make a strong case feel weaker and vice versa, and have a material impact on the settlement value of an arbitration.[44]

One characteristic of a contractual relationship that may make ADR processes appealing is where potential disputes will benefit from an expert tribunal. For example, an agreement between a medical provider and an insurance company may result in disputes best addressed by mediators and/or arbitrators with healthcare industry experience, particularly lawyers with experience in payor/provider disputes or healthcare fraud cases. A dispute over the building of an addition to a hospital may be best resolved by an arbitrator with construction law experience. A judge, particularly a new judge, though well versed in the law generally, may have little or no experience in determining the correct standard of care in a medical malpractice action or resolving disagreements over the drawing of a statistically valid random sample.

Although subject matter expertise and judicial experience are commonly desired neutral characteristics, the drafter of an ADR clause should be careful not to be too specific in dictating neutral qualifications. Too many requirements may "significantly narrow the number of available, competent and qualified arbitrators."[45] Too many restrictions may also deprive the parties of a valuable outsider perspective on a dispute.

The parties may also factor other considerations into arbitrator selection. For example, in selecting a three-arbitrator panel, the parties sometimes agree that each party will select one arbitrator and the service provider will then appoint the panel chair. This procedure allows each party to ensure that at least one panel member brings the characteristics and perspectives they desire to the panel. The parties can also choose to include a diversity provision in the neutral selection clause. For example, JAMS provides a sample diversity provision for arbitrator or arbitrator panel selection that states, "The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees."[46]

3. Recommendations

A single neutral is fairly standard practice for mediation. In arbitration, a single arbitrator may act more quickly and keep down costs, but this is not without risks. One of the authors of this article was recently an advocate in an arbitration where the sole arbitrator—a former judge—issued an order so outside of the norm and so objectionable that two parties that had not agreed on anything in years agreed to dismiss the arbitration and refile it with another service provider. Figuring out too late

that your arbitrator is prone to such rulings can have unfortunate results at an arbitration hearing, and courts in the United States are loathe to vacate arbitration awards.[47]

Having three arbitrators can mitigate against such risks. On the other hand, the dynamics of a three-arbitrator panel can themselves be unpredictable and the parties may not have transparency into panel deliberations. Providing for an appellate arbitration process, as discussed later, can also provide a check against a runaway arbitrator, at least at the award stage. Accordingly, the decision between one arbitrator and three arbitrators can depend on a number of factors, including: (1) the complexity and specialty of the legal issues involved in the dispute; (2) the chosen rules, discovery process, and procedures applying to the arbitration; (3) the value of the claims and counterclaims at issue; (4) whether the parties make the arbitration award appealable; and (5) the costs the parties are prepared to incur during the course of the proceeding.

The ability to provide the parties with input into the qualifications of their neutral, particularly in disputes where subject-matter expertise will be valuable, is a significant advantage of ADR proceedings over litigation. It can be a frustrating experience to put significant effort and resources into pursuing litigation only to draw a judge at random who lacks any experience in the relevant industry. Whether or not specialized knowledge is a primary factor in selecting ADR, the drafter of an ADR clause should consider including at least some specific criteria for the selection of a future neutral or neutrals, particularly when selecting a three-arbitrator panel.

But listing qualifications for neutrals in an ADR clause requires careful consideration of what knowledge and experience is desirable. For example, prior judicial experience is often valuable in a neutral—it can provide a mediator with experiences to draw upon in discussing the strengths and weaknesses of a case with the parties and can help an arbitrator in resolving complex discovery disputes. A former judge also brings a sense of gravitas and credibility to any ADR proceeding. At the same time, twenty years of state criminal court experience may not help a judge in deciding substantive issues in a medical malpractice or payor/provider dispute. But being too specific about the type of judge you want may significantly narrow the field of qualified neutrals available for your dispute, particularly if you plan to have your mediation or arbitration in a more rural area as opposed to a major city. It may also make the mediation or arbitration more expensive.

In disputes involving significant damages, it is often wise to provide at least some qualifications for a neutral or neutrals, particularly when planning an arbitration with a three-arbitrator panel, but give some thought into the criteria you employ. Failing to do so may narrow your field of qualified neutral candidates (particularly in disputes involving large parties that may present conflicts issues in selecting neutrals) without providing real added value to neutral selection.

H. Scope of Discovery

1. Options

As discussed above, one way in which arbitration often differs from court litigation is the scope of discovery. By design, discovery in arbitration is generally streamlined in order the manage costs. Under the AAA Commercial Rules, for example, Rule R-22 expressly contemplates only some form of document exchange between the parties to be managed in a just and efficient manner by the arbitrator(s). Though arbitrators have broad discretion under most arbitration rules—and the parties can do much by agreement—AAA's Commercial Rules only expressly contemplate depositions in large, complex cases.[48] Absent agreement of the parties or a request granted by the arbitrator in the interests of allowing a party to properly present its case, interrogatories and requests for admission are not contemplated under the AAA Commercial Rules. Rule 17 of the JAMS Comprehensive Arbitration Rules & Procedures is similar, but contemplates one deposition of an opposing party or witness.

But as we know, parties to an ADR clause do not have to abide by the rules of any particular arbitration service provider—they can choose or create their own. If the parties want more discovery than is generally contemplated in arbitration, they can agree that the Federal Rules of Civil Procedure or a given state's civil procedure rules will apply in their arbitration. They can also agree to a hybrid discovery process where, for example, the parties are permitted up to 15 document requests and 10 interrogatories, but there are no requests for admission. AAA has a sample clause that allows the parties to agree to a limited number of depositions:

> At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of [three] [insert number] per party and shall be held within 30 days of the

> making of a request. Additional depositions may be scheduled only with the permission of the [arbitrator(s)] [chair of the arbitration panel], and for good cause shown. Each deposition shall be limited to a maximum of [three hours] [six hours] [one day's] duration. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.[49]

Agreeing to such specific discovery mechanisms limits the discretion of an arbitrator.

2. Considerations

The narrow scope of discovery provided for in most sets of arbitration rules sounds appealing, and it can be a central reason for choosing ADR over litigation. After all, who likes discovery? But limited discovery, though theoretically controlling costs, attorneys' fees, and party inconvenience, comes with risks. Restrictions on discovery lead to a less complete factual record, which results in incomplete information about the strengths and weaknesses of both your case and the opposing party's case. Less information can make it more difficult to resolve a dispute through mediation. It can cause surprises during the arbitration hearing, which can be pleasant or unpleasant depending on which side of the surprise you are on. Think of it this way: if an opposing party had 15 employees working on your contract but you can only depose one, or even three of them, are you going to wish you could have deposed the other five who pop up on their witness list two weeks before the arbitration hearing?

Moreover, there is often a direct correlation between thorough discovery (particularly depositions) and efficient cross examinations in a trial or arbitration hearing. Less discovery tends to result in less crisp cross examinations at the arbitration hearing. The more a deposition questioner fishes for answers in a deposition, the less they will need to fish for answers in an arbitration hearing. As the great Irving Younger counseled, "Don't ask a question to which you do not know the answer."[50] That may be impossible advice to follow in an arbitration with truncated discovery.

When deciding what discovery rules and procedures to apply—at the risk of sounding like a broken record—consider the nature of the disputes likely to arise from the agreement. A run-of-the-mill employment dispute may be simple enough that cost-controlling limits on discovery are beneficial to all parties involved. By contrast, parties to a multi-million-dollar healthcare services agreement may value their privacy and the aspects of arbitration that allow them to continue their working together, but also agree that they are both likely to benefit from robust discovery procedures in the event of a future disagreement.

And it is not always just about money, efficiencies, or preparation. The attorneys drafting the agreement should consider if their client will have more (valuable) information in most potential disputes than the opposing party. If so, even in complex, high value cases, opting for limited discovery in drafting your ADR clause may have strategic advantages. In contrast, even a relatively small dollar contract may address important issues if it involves, for example, agreements between long term business partners. In such circumstances, lawyers should discuss with their clients what they will value in resolving a dispute—do they want maximum protection for each party's privacy or fulsome disclosures and discovery to make it difficult for one party to hide information from the others? Strategic and value questions about the proper scope of discovery in future disputes are an additional reason to give real thought to the content of your ADR clause rather than simply opting for whatever standard clause pops up first on Google just to avoid the courtroom.

3. Recommendations

It is often easier in negotiating a contract—and often a perfectly acceptable choice—to default to the rules of the ADR provider you select and the accompanying discretion of the mediator to dictate the scope of discovery in a future arbitration. But before taking the easy way out, consider the circumstances of your contractual relationship and whether it merits a more nuanced approach. Ask yourself questions like:

- How much will be at issue in a possible future dispute and does that amount significantly outweigh the cost savings of limited discovery?
- Does the parties' desire for an expedited process and award require more streamlined discovery procedures?
- Will certain discovery mechanisms be more valuable than others in such a dispute?
- Is there an information disparity between the two parties to this agreement and can I use that to my party's strategic advantage by choosing a particular approach to discovery?

- Are there personal issues involved in this relationship in addition to the business/financial aspects of it that counsel in favor or broader or narrowed discovery?

All other things being equal, smaller value disputes—under $500,000 and potentially under $1,000,000—often warrant more traditional limitations on discovery in an ADR process. In contrast, disputes in the seven or eight-figures may benefit from the more thorough discovery processes provided by court rules while benefiting from the other attributes of arbitration, such as confidentiality and specialized neutrals.

I. Form and Scope of Award

1. Options

Parties to an arbitration have some control over the form and content of the award to be issued by the arbitrator(s). Arbitration awards typically take one of three forms, ranging from simplest (and least expensive for the arbitrator to prepare) to most complex (and providing the most information to an appellate arbitration panel or judge in a subsequent vacatur action): (1) a short form award; (2) a reasoned award; or (3) a reasoned award containing findings of fact and conclusions of law.

Concerning scope, the parties can place limits on the kinds of remedies awarded by the arbitrator beyond those imposed by law. For example, the parties can bar the arbitrator from issuing injunctive relief. They also can limit the types of damages the arbitrator can award by including a clause such as, “The arbitrators will have no authority to award punitive or other damages not measured by the prevailing party’s actual damages, except as may be required by statute.” The parties cannot only limit the form of damages, but the amount of damages by placing a cap on any award that the arbitrator(s) can issue. They can also stipulate to pre- and /or post-judgment interest on any monetary award.

2. Considerations

The factors that go into choosing the form of the award are pretty straight forward. A short form award resolves the dispute as quickly and cheaply as possible, but provides almost no insight into the arbitrator’s rationale. It is a necessary mechanism for making an award, but relatively useless to a reviewing appellate panel, a judge, or parties who may want to understand why they won or lost an arbitration. A reasoned award puts some meat on the bones and requires the arbitrator(s) to at least give the reasons for their decision. Finally, a reasoned award containing findings of fact and conclusions of law requires the most detail of the three. It is the most expensive form of award to secure but provides the best understanding of the arbitrator(s) decision and the most specific foundation for crafting an appeal or motion for vacatur of the award.

As much as any other possible component of an ADR clause, choosing the scope of an arbitration award requires careful consideration of your client’s position in the business relationship at issue. Which party to the ADR agreement is most likely to seek injunctive relief? For example, if the agreement includes the licensing of the right to use another party’s name, the party whose name is being used may want the ability to enjoin further use of their name in the event of an alleged breach. Is one side likely to have disproportionately sized damages claims relative to the other? If so, depending on which side of that divide your client falls on, including a cap on damages that can be awarded may be a good call—just be careful to research the governing substantive law and make sure it does not bar or place limitations on such caps.[51]

3. Recommendations

Human beings want to know why.[52] So do your corporate clients. So do insurance companies and any number of other people to whom you or your client may want or need to explain the outcome of an arbitration. For this reason alone, short form awards should be chosen only in limited contexts. Reasoned awards are the most common form of arbitration award and can “answer why” while saving your client some costs. But in situations where an ADR clause contains a right to an appeal, or where a party is likely to be willing to invest the time and effort to seek vacatur of a perceived wrongful award, having specific findings of fact and conclusions of law may be worth the added expense.

Giving serious consideration to the scope of the award can separate a quality arbitration clause from one that places your client at significant risk. Special forms of relief like injunctions or punitive damages can significantly raise the stakes in a dispute. To the extent allowed by the applicable law, an astute transactional attorney can mitigate those risks in an ADR clause with careful thought about the nature of the party’s business relationship and the kinds of disputes that may arise from

it. Drafters should consider limitations on awards that will prevent other parties from manufacturing disproportionate arbitration risks to insulate their own bad conduct. Of course, such provisions will be subject to review and negotiation by the contracting party—your business team may not want to draw out those negotiations or make a potential customer hesitant to sign on the usually-not dotted line.

J. Allocation of fees and costs

1. Options

In litigation, the allocation of attorneys' fees and costs is often governed by the controlling statute or the rules of the applicable court. In an ADR clause, the parties can agree on an allocation of attorneys' fees and costs in advance of any proceeding. In mediation, the parties generally bear their own attorneys' fees and split the costs of the mediator, although there is nothing preventing them from changing that practice to facilitate a final resolution.

There are numerous options in the arbitration context, as demonstrated by the below basic examples from the AAA Practical Guide.

- The prevailing party shall be entitled to an award of reasonable attorney fees.
- The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees.
- Each party shall bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration.
- The arbitrators may determine how the costs and expenses of the arbitration shall be allocated between the parties, but they shall not award attorneys' fees.[53]

2. Considerations

It's always nice to be vindicated, and a winning party will believe it reasonable that the losing party should pay its attorneys' fees. After all, wasn't it their fault the winner had to incur those fees in the first place? The threat of an attorneys' fees award can deter a party with a relatively weak case from initiating dispute resolution procedures in the first place.

On the other hand, the potential for an attorneys' fees award to a prevailing party can make a dispute harder to settle once it starts. A headstrong party—or law firm—convinced that it is going to win at arbitration may point to a fees provision as another reason to continue through a costly process, assured that it will recoup its attorneys' fees and costs at the end. To a party assured of victory—even if that confidence is misplaced—fee shifting eliminates a motivation to resolve a dispute before a hearing.

3. Recommendation

This one is up to you, but there are guideposts available. Think about the parties to the dispute. Is one a loose cannon, always ready to shoot off at the mouth regardless of the strength of their position? If so, fee shifting may provide the other party with some protection from frivolous claims. Is one of the parties stubborn and never willing to back down once a disagreement starts? In that case, providing that the parties will bear their own attorney's fees may provide a reason for compromise. Again, the most important thing here is to know your options and think about the situation and the parties involved in the business relationship, then make the choice that puts your client in the best possible position given the information you have at the time.

K. Appeal Clause

1. Options

The presumption in arbitration is that an arbitration award is final and cannot be appealed. Absent agreement, neither the FAA nor the UAA (original and revised) allow for appeals of arbitration awards. A party may seek vacatur of an arbitration award from a court, but the circumstances in which most courts will vacate an arbitration award are very limited.

However, nothing in the standard arbitration statutes prevent the parties from agreeing in advance to allow an appeal to a single, second arbitrator or to a three-arbitrator panel. Numerous organizations, including AAA,[54] JAMS,[55] CPR,[56] and AHLA,[57] have adopted rules to accommodate appellate arbitration clauses.

CPR suggests parties wanting an appellate right include a basic appeal clause in their ADR agreement:

> An appeal may be taken under the CPR Arbitration Appeal Procedure from any final award of an arbitral panel in any arbitration arising out of or related to this agreement that is conducted in accordance with the requirements of such Appeal Procedure. Unless otherwise agreed by the parties and the appeal tribunal, the appeal shall be conducted at the place of the original arbitration.[58]

JAMS recommends a similar clause: "The Parties adopt and agree to implement the JAMS Optional Arbitration Appeal Procedure (as it exists on the effective date of this Agreement) with respect to any final award in an arbitration arising out of or related to this Agreement."[59] Just keep in mind, like in many appellate courts, the appellant may bear the costs of an appeal if unsuccessful.[60]

2. Considerations

Much like trial court judges, arbitrators can get it wrong. We have appeals in courts, why not have appeals in arbitrations? The answer is that, traditionally, the finality of an arbitration award has been one of the attributes of a process that is supposed to be speedy and efficient relative to court-based litigation. As Svetlana Gitman put it, "one of the hallmarks of arbitration is finality."[61] Providing for an appeal sacrifices this hallmark of the arbitration process.

But that is not necessarily a bad thing. Much like an appeal in the court system, arbitration appeals provide the parties—or a party—with an opportunity to correct errors. "The arbitration process, while designed to be efficient and cost-effective, is not immune from mistakes. Errors in understanding or applying the law or the facts can occur, and these missteps may have far-reaching implications for the parties involved."[62] An appellate arbitration clause is like an insurance policy that a party to an ADR agreement can avail itself of if it genuinely believes that the initial arbitrator erred.

And again, as with an initial arbitrator or arbitration panel, parties including an appellate provision in their ADR clause can provide for appellate arbitrator qualifications. Such qualifications could pertain to subject-area expertise, judicial experience, or appellate-specific experience. "The Appellate Rules provide an opportunity for another set of eyes—those of experienced appellate judges or practitioners—to review the case and rectify awards based on material errors of law or clearly erroneous determinations of fact."[63]

3. Recommendations

An appeal is not a traditional mechanism in arbitration, and it can undermine the values of expediency and efficiency upon which arbitration was founded. For these reasons, an appellate clause likely is inappropriate for many ADR agreements where the parties will end up in relatively small disputes of manageable value. In these cases, arbitration provides an alternative process allowing the parties to put the dispute behind them and get on with their businesses and lives quickly. An appeal is often an undesirable delay in these situations.

But in more complex, high-dollar disputes, an appellate right in an ADR clause can be critical in correcting errors, particularly of a single arbitrator (though two out of three arbitrators on a panel are by no means immune from committing error). Especially for parties that choose arbitration primarily for the confidentiality that it provides relative to public court dockets, a confidentiality clause and single arbitrator with a right of appeal and selection of the appropriate rules to govern the proceedings basically creates a private, confidential court process that avoids publicity and the creation of legal precedents. Moreover, the parties to the clause can provide for arbitrator qualifications that give them input into who will resolve their dispute. How the parties customize their ADR process depends on what aspects of the available dispute resolution procedures they value.

One question in larger cases may be whether to have a single arbitrator with a right of appeal, or a three-arbitrator panel

whose decision is final—having three arbitrators at each level would be rather costly. The former is akin to a traditional American court process, while the latter is a hybrid approach that, theoretically, can get the parties to the same result faster. The former will likely be more efficient in getting to an award, but then brings the potential of an additional appellate proceeding. Which process a drafter should include in an ADR clause will depend on the business relationship and their client's preferences.

V. CONCLUSION

If this article accomplishes one thing, it should be to encourage contract and deal document drafters not to treat ADR provisions—particularly arbitration clauses—as an afterthought. We understand. It is often the last thing on the minds of drafters, who are dealing with complex negotiations about myriad substantive issues. But remember this: those very same reasons (i.e., the complex issues being negotiated) may spawn very complex disputes that you will want to have treated with the utmost prior contemplation. The most important point to keep in mind is that parties have extremely wide latitude in crafting their ADR provisions to suit their needs. This knowledge is empowering. Arbitration has been grafted into our jurisprudence for 100 years,[64] but it seems that new ways of capturing the parties' ADR objectives are created every day. You are invited to be part of that creative process when you draft ADR provisions.

Footnotes

1 *See, e.g.*, Warbington Const., Inc. v. Franklin Landmark, L.L.C., 66 S.W.3d 853, 856 (Tenn. Ct. App. 2001) ("The provisions of the FAA are to be applied in both state and federal courts.") (citing Frizzell Constr. Co., Inc., v. Gatlinburg, L.L.C., 9 S.W.3d 79, 84 (Tenn. 1999)).

2 *See* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

3 *See* Drafting Dispute Resolution Clauses, A Practical Guide, American Arbitration Association, p. 29 (hereafter "AAA Practical Guide").

4 *See* 9 USC § 10(a).

5 *See* American Nat. Can Co. v. United Steelworkers of America, 120 F.3d 886 (8th Cir. 1997) (emphasis added).

6 *See* DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818 (2d Cir. 1997) (emphasis added).

7 *See* United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987) (emphasis added).

8 While the Fifth and Eight Circuits have completely abandoned the concept of manifest disregard of the law, it

is still a viable doctrine in at least five federal circuits and its status in others is unclear. *See* Jonathan J. Tompkins, "Manifest Disregard of the Law": The Continuing Evolution of an Historically Ambiguous Vacatur Standard, 12 DISP. RESOL. INT'L 145, 154–62 (Oct. 2018).

9 *See* Gianelli Money Purchase Plan and Trust v. ADM Investors Services, Inc., 146 F.3d 1309 (11th Cir. 1998).

10 *See* AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI.

11 *See* Nixon v. Warner Communications, 435 U.S. 589, 597 (1978) (Supreme Court recognizing a general common law right of public access to judicial records); Encyclopedia Brown Prod. v. Home Box Office, 26 F. Supp. 2nd 606, 610 (S.D.N.Y. 1998) (while public access to court records is not absolute, there has been a long-standing presumption in its favor and against sealing the record).

12 *See* Gotham Holdings v. Health Grades, 580 F.3d 664, 665 (7th Cir. 2009).

13 *See* AAA Practical Guide, p. 30.

14 AHLA Dispute Resolution Service Standard Arbitration Clause, *available at* https://www.americanhealthlaw.org/dispute-resolution-services/arbitration.

15 AAA, *Drafting Dispute Resolution Clauses* ("AAA Practical Guide"), Standard Clause 1, at 10, *available at* https://www.adr.org/sites/default/files/document_repository/Drafting_Dispute_Resolution_Clauses-A_Practical_Guide.pdf.

16 JAMS Clause Workbook: A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts ("JAMS Clause Workbook"), at 2, *available at* https://www.jamsadr.com/clauses/.

17 *Star Trek III: The Search for Spock*, Paramount Pictures (1984).

18 *See, e.g.*, https://www.americanhealthlaw.org/dispute-resolution-services/interactive-arbitration-clause-generator; https://www.clausebuilder.org/.

19 Lipsett v. Banco Popular North America, 22 Civ. 3901, 2022 WL 17547444 (S.D.N.Y. Dec. 9, 2022).

[20] *Id.* at *1.

[21] *Id.* at *2.

[22] *Id.*

[23] *Id.* at *3.

[24] *Id.*

[25] *Id.* at *5.

[26] *Id.* at *7-8.

[27] *See, e.g.*, Andrew S. Wong, *Contract recitals: What's in a whereas clause?*, *Daily Journal* (Apr. 12, 2022), *available at* https://www.dailyjournal.com/articles/366899-contract-recitals-what-s-in-a-whereas-clause.

[28] *See, e.g.*, Paulsen v. Abbott Labs., 39 F.4th 473, 477 (7th Cir. 2022) ("When a federal court sits in diversity, as we do here, it looks to the choice-of-law rules of the forum state to determine which state's law applies to the issues before it.") (internal quotation marks omitted); Utica Mut. Ins. Co. v. Abeille Gen. Ins. Co., 206 A.3d 1666, 1668 (N.Y. App. Div. 2022) ("[B]ecause New York is the forum state, i.e., the action was commenced here, New York's choice-of-law principles govern the outcome of this matter.") (internal quotation marks omitted); Williams v. Smith, 465 S.W.3d 150, 153 (Tenn. Ct. App. 2014) ("a choice of law analysis is appropriate using the rules applicable in the forum court's state"); Pounders v. Enserch E & C, Inc., 306 P.3d 9, 11 (Ariz. 2013) ("Arizona is the forum state, and thus its law will govern both procedural issues and the choice of law regarding substantive issues.").

[29] Though not common, one can imagine reasons to include a choice of law provision in an ADR clause addressing mediation as well. For example, state laws often differ as to when exactly a settlement agreement becomes binding. Accordingly, the law that applies to a mediation can be the difference between having a final agreement and ending up back in litigation.

[30] *See, e.g.*, Veucasovic v. Veucasovic, No. 366978, 2024 WL 3548803, at *8-9 (Mich. Ct. App. July 25, 2024 (noting that both Michigan and Massachusetts law "rel[y] on the Restatement Conflict of Laws 2d, §§ 187 and 188 to decide whether to give effect to a contractual choice-of-laws provision") (citing Taylor v E. Connection

Operating, Inc., 988 N.E.2d 408, 410-12 (Mass. 2013)); Leake v. AutoMoney, Inc., 877 S.E.2d 22, 33-34 (N.C. 2022) ("A choice of law provision is binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental public policy of the state or otherwise applicable law.") (internal quotation marks omitted). Blackwell v. Sky High Sports Nashville Operations, LLC, 523 S.W.3d 624, 633 (Tenn. Ct. App. 2017) ("a company's choice of law provision will only be honored where the proposed state's law has a material connection to the transaction at issue"); Landi v. Arkules, 835 P.2d 458, 462 (Ariz. Ct. App. 1992) (Arizona courts apply Restatement (Second) provisions to disputes involving a contract with a choice of law provision)

31 AAA Practical Guide at 24.

32 *See, e.g.*, BAE Sys. Tech. Solution & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin., 884 F.3d 463, 472 (4th Cir. 2018) ("the use of 'shall' in the clause does not render it mandatory … the use of 'shall' in a forum selection clause is not dispositive, because, in context, the clause may still 'permit[ ] jurisdiction in one court but … not prohibit jurisdiction in another.'")

33 *See supra*, n.29.

34 Cohen v. Ark Asset Holdings, 268 A.D.2d 285, 286 (N.Y. App. Div 2000).

35 *See* Mekari v. Access Restoration Servs. US, Inc., No. 23-5362, 2023 WL 9503370, at *4 (E.D. La. Dec. 14, 2023) ("the Fifth Circuit has held that, when it comes to the question whether a particular claim falls within the ambit of an arbitration clause such as the one at issue here, that "it is only necessary that the dispute 'touch' matters covered by the [contract] to be arbitrable") (quoting Pennzoil Expl. & Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1067-68 (5th Cir. 1998)); Okcuoglu v. Hess, Grant & Co., Inc., 580 F. Supp. 749, 752-53 (N.D. Iowa 1984) (claim inextricably linked to arbitrable claims must be arbitrated). *But see* Zhao v. Metals Trading Corp., No. FSTCV196042813S, 2020 WL 1028899, at *7 (Conn. Super. Feb. 4, 2020) (claims involving a non-signatory to an arbitration agreement are not subject to arbitration even if they are inextricably interwoven with arbitrable claims).

36 Law Insider, Scope of Arbitration Sample Clauses, *available at* https://www.lawinsider.com/clause/scope-of-arbitration.

37 *Id.*

38 *See* https://www.adr.org/Clauses.

39 *See* https://www.jamsadr.com/clauses/#Resolution.

[40] *See* https://www.jamsadr.com/clauses/#Arbitrator.

[41] *Id.*

[42] *See* https://www.adr.org/aaa-panel.

[43] *See generally*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (the United States has a "liberal federal policy favoring arbitration"); Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama, 78 F.4th 1252, 1261 (11th Cir. 2023) ("If there is one bedrock rule in the law of arbitration, it is that a federal court can vacate an arbitral award only in exceptional circumstances.") (citing Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 568 (2013)).

[44] It is important to note that while these perceive risks can seem more significant in arbitration, generally considered to be a less formal proceeding, they are also present in court. It is not uncommon to get an adverse (possibly incorrect) pre-trial ruling from a court that cannot be appealed and materially impacts the value of settlement, even with a right to appeal. Indeed, biases or susceptibility to particular arguments are arguably more common—or at least more perceptible—in courts, where judges are appointed by political processes. *See generally* Bruce A. Green & Leslie C. Levin, *How the Politics of Federal Judicial Selection Affect Judicial Diversity and What This Means for Public Confidence in Courts*, 87 L. & CONTEMP. PROBS. 85 (2024); Brett Parker, *Drawing the Due Process Line: Judicial Campaigns and Constitutional Recusal*, 17 HARV. L. & POL'Y REV. 441 (Summer 2022); Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853 (Spring 2008). This is why experienced lawyers do not guarantee their clients success in litigation or arbitration, and why mediators so often emphasize to the parties that mediation is their last chance to have any direct control over the resolution of their dispute.

[45] *See* https://www.jamsadr.com/clauses/#Arbitrator.

[46] *Id.*

[47] *See* Part III(A)(3), *supra*.

[48] *See* AAA Commercial Rules L-3(f).

[49] AAA Practical Guide at 28.

50 *See* Irving Younger's Fourth Commandment of Cross Examination. In 1975, Irving Younger, then a professor at Cornell Law School, gave a talk in which he set forth the "Ten Commandments of Cross-Examination." Younger's advice on cross examination (among other trial and advocacy techniques) are legendary and endure the ages. Younger set forth his Ten Commandments quite often over the years, so citing to a single written source is impossible.

51 There are several states with laws that bar caps on damages in certain types of cases, such as personal injury or other tort claims, at least in the context of court litigation. *See, e.g.*, ARIZ. CONST. art. 2, § 31 ("No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person …"); ARK. CONST. art. 5, § 32 ("no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property"); KY. CONST. § 54 ("The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."); PA CONST. art. 3, § 18 ("in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property …"); WYO. CONST. art 10, § 4(a) ("No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person."). Such bars may be applicable to arbitration agreements. *See* Wilson v. Manor Care of Lancaster, PA, LLC, et al., No. CI-12-07318, 2014 WL 11456251, at *3, *7 (Pa. Ct. Com. Pleas Apr. 4, 2014) (not reaching plaintiff's argument that a damages limit voided an arbitration clause and invalidating the clause on other grounds).

52 *See generally* Alex Lickerman M.D., *Why We Need to Know Why: How knowing the reason for things shapes how we respond to them*, Psychology Today (Nov. 15, 2010), *available at* https://www.psychologytoday.com/us/blog/happiness-in-this-world/201011/why-we-need-to-know-why.

53 AAA Practical Guide at 31-32.

54 AAA Optional Appellate Arbitration Rules, *available at* https://www.adr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf.

55 JAMS Optional Arbitration Appeal Procedures, *available at* https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf.

56 CPR Appellate Arbitration Procedure, *available at* *https://drs.cpradr.org/rules/arbitration/appellate-arbitration-procedure.*

57 https://ahla-website-com-staging-2023.americanhealthlaw.org/dispute-resolution-services/arbitration/rules-of-procedure-for-arbitration/rules-of-procedure-for-arbitration-appeals-effecti

[58] *Supra*, n. 57.

[59] JAMS Clause Workbook at 6.

[60] *See* AAA Optional Appellate Arbitration Rule A-11 ("The Appellant/Cross-Appellant may be assessed the appeal costs, and other reasonable costs of the Appellee/Cross-Appellee, including attorneys' fees (if a statute or the parties' contract provides for an award of attorneys' fees), incurred after the commencement of the appeal if the Appellant/Cross-Appellant is not determined to be the prevailing party by the appeal tribunal.").

[61] Svetlana Gitman, *The Appealing Possibility of Appeals in Arbitration*, American Bar Association (Jan. 18, 2024), *available at* https://www.americanbar.org/groups/litigation/resources/newsletters/appellate-practice/winter2024-appealing-possibility-appeals-arbitration/?login.

[62] *Id.*

[63] Gitman, *supra*, n. _.

[64] The United States Arbitration Act (Pub. L. 68-401, 43 Stat. 883) was enacted February 12, 1925, and codified at 9 U.S.C. ch. 1), more commonly referred to as the Federal Arbitration Act or FAA.

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