

# Arbitration for Arbitrators: Cradle to Grave

## Session 2: The Discovery Process

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# Overview (1)

1. Initial Discovery Schedules And Orders [Mike]
2. Discovery Disputes
  - A. Scope, Relevance, And Burden [Wes]
  - B. Privilege [Wes]
  - C. Impact On Schedule [Mike]

**DRAFT NOTE** -- We have indicated here the sections as to which each of you is likely to take the lead. Of course, you're all welcome to comment on any topic, subject to time constraints.

## Overview (2)

3. Discovery Rulings [Paul]
4. Panel Subpoena Power [Paul]
5. Use of Special Masters [Paul]

# Initial Discovery Schedules & Orders (1)

- Should “**extra**” time be built into the arbitration schedule?
- Two approaches:
  - Allow “extra” time for disputes and unexpected delays.
  - Enter an efficient schedule and seek to avoid protracted extensions.



## Initial Discovery Schedules & Orders (2)

- How much should the Panel ask the parties to **reveal** in their Position Statements and at the Organizational Meeting?
- Considerations:
  - The Panel's ability to understand the dispute and tailor discovery.
  - The parties'/counsel's latitude to conduct discovery and build their cases before becoming tethered to positions.



## Discovery Disputes: Scope (1)



- The scope of discovery depends on the scope of the dispute:
  - Just one claim in dispute  
→ narrower discovery.
  - Numerous claims at issue with the parties seeking prospective/declaratory rulings  
→ broader discovery.

## Discovery Disputes: Scope (2)

- Should there be discovery concerning a reinsurer's **other cedents** and/or a cedent's **other reinsurers**?
- Considerations:
  - Privacy of third parties.
  - Proprietary information of arbitration parties.
  - Relevance -- e.g., ex gratia payments.
  - Burden relative to yield.



## Discovery Disputes: Scope (3)

- How much discovery re: **underwriting intent**?
  - E.g., should there be discovery concerning the drafting of all contract language, without regard for the particular contract at play or the issues in dispute?
- Considerations:
  - Relevance -- Is interpretation of the contract language a determinative issue?
  - Burden -- How hard/burdensome is it to locate any “general” documents requested?



## Discovery Disputes: Privilege (1)



### **Attorney-client privilege:**

Communications between a client and a **lawyer** for the purpose of **obtaining or providing legal advice.**

- Potential for confusion/error:
  - Not everyone with a J.D. is acting as a “lawyer”.
  - Not every communication involving a lawyer is made for the purpose of obtaining/providing legal advice.
  - “Waiver” is sometimes overrated in reinsurance arbitration.

## Discovery Disputes: Privilege (2)

- By communicating privileged information from an underlying dispute to a reinsurer, a **cedent** may **waive** the attorney-client privilege.
- *See, e.g., Regence Group v. TIG* (D. Ore. May 1, 2009);  
*Progressive Casualty Ins. Co. v. FDIC* (N.D. Iowa Oct. 3, 2014).
- Discovery of privileged communications from the underlying suit is particularly perilous if **counsel crosses over** from the direct-side to the reinsurance dispute.



## Discovery Disputes: Schedule

- When creating (or revising) the schedule, should time be **built in** for discovery **disputes**?
- If discovery disputes delay completion of discovery tasks, what should be done?
  - Amend the schedule.
  - “Dual track” the case -- e.g., document discovery and depositions, or expert discovery and summary adjudication briefing, may -- in some cases -- occur simultaneously .



## Discovery Rulings

- At the polarities, a Panel may issue a **one-time** proclamation or implement a system for the “**micro-administration**” of discovery over the duration of the matter.
- Considerations:
  - Efficiency for the Panel.
  - Efficiency for the parties.
  - Certainty for the parties moving forward.
  - “Getting it right” -- and having enough information to “get it right”.

## Panel Subpoena Power (1)

- Under the Federal Arbitration Act (“FAA”):

The arbitrators . . . may summon in writing any person **to attend** before them or any of them as a witness and **in a proper case to bring** with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . .

See FAA § 7 (9 U.S.C. § 7)

## Panel Subpoena Power (2)

- Federal courts are **split** on whether Panels can issue non-party **document** subpoenas. For example:
  - *American Fed’n of TV & Radio Artists v. WJBK-TV* (6th Cir. 1999) allowed pre-hearing non-party discovery.
  - *COMSAT Corp. v. Nat’l Sci. Found.* (4th Cir. 1999) allowed pre-hearing non-party discovery, but only on a showing of a “special need or hardship”.
  - *Hay Grp., Inc. v. EBS Acquisition Corp.* (3d Cir. 2004) held FAA § 7 did not authorize Panels to issue pre-hearing non-party document subpoenas.
    - A “**work-around**”: convene a special hearing to compel attendance and obtain documents.

## Use Of Special Masters

- Under what **circumstances** should a Panel/parties consider use of a **special master**?
  - Numerous parties/issues to keep straight during discovery disputes -- e.g., multiple reinsurers involved in a single arbitration?
  - The Panel wishes appropriately to insulate itself from “thorny issues” -- e.g., sensitive documents to be reviewed *in camera*?
  - Others?

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