

AMERICAN ARBITRATION ASSOCIATION

In the matter of the Arbitration of:

Claimant,

v.

**Jerome F. Rock
Arbitrator**

Respondent.

Introduction to Narrative Witness Statement Protocol

Presenting Direct Testimony of Fact Witnesses in Arbitration Hearings using Narrative Witness Statements provides benefit to all parties. This Protocol is intended to provide Counsel with the procedural ground rules that implement this practice.

From the Tribunal's Perspective: The Tribunal is not alone in its objective to make the Arbitration process more efficient, and less costly, without sacrificing the quality of justice. When prepared early, and exchanged early, Narrative or Written Witness Statements can lessen the need for depositions of all parties on a witness list, since the cross-examining party has detailed advanced notice of the each witness' direct testimony. The opposing party can prepare for effective cross examination without the need to avoid surprise testimony. Because the Tribunal has a better understanding of the dispute having the benefit of prospective witness testimony, the Tribunal's guidance on pre-hearing matters is improved, and we are prepared to focus on the major issues at the formal Hearing. The Narrative Witness Statements reduce the need for the Tribunal to take notes during the Hearing, thereby reducing the distraction associated with extensive note taking. Formal transcripts of the Hearing are often not necessary.

From the Claimant's Perspective: The Narrative Witness Statement is the work product of your pre-Hearing preparation of your Witness's testimony. Counsel can be confident all the material elements of the Witness's testimony will be presented accurately and completely, while reducing the stress on the witness during direct examination at the Hearing. If you consider it necessary, you will be permitted to present the Witness for Direct Examination at the Hearing following the sequential numbering of the Narrative Witness Statement.

Narrative Witness Statement Protocol

From the Respondent's Perspective: Since the Narrative Witness Statements are exchanged well in advance of the Hearing, the Respondent's cross-examination can be prepared without time pressure, saving time, and perhaps improving the quality of cross-examination. The Respondent is also better prepared to present rebuttal witness testimony, as necessary.

The Tribunal's expectation is that the early exchange of prospective direct testimony of witnesses will focus the claims and defenses of the parties and reduce the cost or duration of discovery by deposition. In the event discovery of new information requires that the Narrative Witness Statements be supplemented or amended after they have been exchanged, upon request by a party, the Panel will consider the request to restate portions of the narrative witness statements.

This suggested Protocol will be distributed to all parties in advance of the Preliminary Hearing. Counsel are encouraged to review this Protocol and express their opinions and suggestions to adopt or modify the Narrative Witness Protocol to adjust to the special needs of the case.

Narrative Witness Statement Protocol

The Tribunal requests that all Direct Witness Testimony under the control of a party be presented at the Arbitration Hearing with Narrative Witness Statements, prepared by the Witness with the permissible assistance of Counsel, submitted under Oath or affirmation, and exchanged in advance of the Hearing in accordance with the schedule set forth in the Tribunal's Preliminary Hearing Order. Direct witness testimony of non-parties are subject to the Narrative Witness Statement Protocol to the extent possible. Unless otherwise provided, all Witnesses must appear at the Hearing and available for cross examination.

The following outlines the Tribunal's Protocol for the Narrative Witness Statements:

- 1. The Narrative Witness Statement should be equivalent in content to Direct Examination of the Witness, using the conventional direct examination format; first question, then witness answer. Avoid privilege, establish the foundation, avoid speculation and hearsay, be cautious about straying into unsupported opinion and argument. In general, Counsel should prepare their direct examination as if they expect objections and rigorous cross examination from their adversary. The Attorney questions can be printed as Q: with the Witness response labeled A:*

By way of illustration, but not limitation, Counsel should consider the following topics as part of the Direct Examination by Narrative Witness Statement:

- a. The full name and address of the Witness;*
- b. Their present or past association with the parties;*
- c. A description of the Witness' background, qualifications, training and experience as relevant to the dispute, or to the content of the Witness' statement;*
- d. Full detailed description of the facts and the source of the Witness' information as to those facts, just as you would during the Direct Examination of your witness;*
- e. All documents on which the Witness relies upon should be provided and submitted with the Narrative Witness Statement, even if the documents are submitted as proposed exhibits to the Hearing;*
 - a. When first referencing an Exhibit, make sure the witness places a foundation for the authentication and introduction of the Exhibit sufficient to support a finding that the item is what the claims it to be.*
 - b. For example, an e-mail or text message could be authenticated by direct evidence alone if its author or proponent testifies to producing the contents of the email or text message. An e-mail or text message may also be **authenticated** by direct **evidence** when someone with personal knowledge who received the email or text message testifies that the printed email or text message was received by them. Emails that show the source of the email are usually sufficient to authenticate the document.*
 - c. In the interest of judicial economy, Counsel are encouraged to stipulate to the authentication of as many documents as possible to reduce the burden of authentication.*
 - d. The Witness should reference the specific portions or sections of the Exhibit that apply to their testimony. Make sure a reader of the Narrative Witness Statement can follow the testimony and match the testimony to the Exhibit. Citing pages and paragraphs to documents, or adding reference markers, such as letters, numbers or arrows will assist in avoiding ambiguity.*

- e. *When directing a witness to describe or discuss a document referenced in the Narrative Witness Statement, Counsel should follow the Exhibit Reference numbering system used for the Arbitration Hearing, as set in the Preliminary Hearing Orders.*
 - f. *Include an affirmation of the truth of the Narrative Witness Statement, signed by the Witness under Oath.*
- 2. *Narrative Witness Statements are not appropriate for the following Witnesses:*
 - a. *Any person not under the control of the party, or whose attendance is compelled by Subpoena. The party requesting the Subpoena shall provide a general summary or the expected testimony of the witness, and shall produce the summary no later than the schedule established for exchange of the Narrative Witness Statements.*
 - b. *Rebuttal Witnesses.*
- 3. *Number each Question and each Answer for the Narrative Witness Statement. The following Q/A format makes it convenient for future reference. Use Q 1, Q 2, Q 3, etc. for the Question from the attorney, and A 1, A 2, A 3, etc. for the Answers from the Witness.*
- 4. *Hearsay testimony is problematic in all Arbitration Hearings. Counsel should assist the Witness to avoid Hearsay testimony not supported by an exception. When exceptions to Hearsay exclusions apply, Counsel should footnote that part of the Narrative Witness Statement accordingly. During Cross examination, the Tribunal will consider objections to unsupported Hearsay statements contained in the Narrative Witness Statement. Admissibility, relevance, materiality, and weight of the evidence will be determined by the Tribunal.*

5. *The Narrative Witness Statements will be submitted to the Tribunal and Opposing Counsel in advance of the Hearing, the time schedule generally covered in Preliminary Hearing Scheduling Orders. The schedule for exchange of the Narrative Witness Statement of the adverse party will generally be set by the Tribunal after the exchange of the Narrative Witness Statements of those Witnesses under the direct control of the Claimant. When prepared early, and exchanged early, Narrative or Written Witness Statements should lessen the need for depositions since the cross-examining party has detailed advanced notice of the witness' direct testimony and can be prepare for effective cross examination.*

6. *At the Hearing, each Witness will be Sworn under Oath, and attest to the accuracy and completeness of the Narrative Witnesses Statement. Generally, the Narrative Witness Statement is presented as direct evidence, and immediately submit the Witness to cross examination. At Counsel's option, when they feel the Tribunal would benefit from observing the demeanor of the Witness, they may proceed with what would be considered a standard direct examination with questions from Counsel and answers from the Witness, following the general sequence of the submitted Narrative Witness Statement. Because one of the major advantages of Narrative Witness Statements derives from the efficiency of saving time at the formal Hearing, Counsel is encouraged to abbreviate the question and answer format once the Witness is comfortable testifying and you feel the Tribunal has the benefit of the Witness' demeanor. It is not necessary to complete the full scope of testimony contained in the Narrative Witness Statement.*

7. *Supplements to the Narrative Witness Statement. In the event discovery of new information presents the need to supplement or otherwise amend a Narrative Witness Statement after it has been exchanged with opposing Counsel, upon request by a party and with approval of the Tribunal, counsel may provide supplemental Questions (SQ) and Answers (SA) to the Narrative Witness statement consistent with the newly discovered information.*

8. *Format for Supplemental Information.* Supplemental SQ/SA will be inserted into the that sequence of the existing Narrative Witness Statement relating to the same topic as the supplemental information. For example, if the supplemental information relates to the topic in Question/Answer 45, use the format SQ 45.1, SQ 45.2, SQ 45.3, etc. and SA 45.1, SA 45.2 and SA45.3 etc. where the decimal is used to reference the necessary string of additional Supplemental Questions (SQ) and Supplemental Answers (SA) to be inserted in the Narrative Witness Statement.

9. *Opposing Counsel may cross exam the Witness at the Hearing. The Tribunal requests that to the extent practical all cross-examination directed to a witness refer to specific numbered Q/A statements of the Narrative Witness Statement.*

10. *Counsel may agree to waive cross examination of a Witness, in which case the Narrative Witness Statement will stand as direct evidence without the need for the Witness to be present at the Hearing. This might occur in the case of secondary Witnesses whose testimony is straight forward and non controversial. The Narrative Witness Statement can thus reduce the cost of pre-hearing discovery when used as a fact-finding tool.*

11. *Redirect examination of a Witness after Cross Examination is permitted but limited to new topics raised on cross examination.*

12. *If Counsel anticipates Rebuttal Witnesses, they are encouraged to make arrangements for presenting the Rebuttal Witness without unnecessary delay to the Hearing.*

13. *Expert testimony will follow the Narrative Witness Protocol, and the Tribunal may customize the Protocol to suit the needs of the case.*

14. *By stipulation of counsel, or as determined by the Tribunal, a Witness who has submitted and exchanged a Narrative Witness Statement need not be present at the Hearing if they*

are able to participate in the Hearing by video conference, subject to opportunity for cross examination.

Jerome F. Rock
Arbitrator