AMERICAN ARBITRATION ASSOCIATION®

Public Feedback on the Proposed Revisions to the Employment/Workplace Arbitration Rules

Attorney and Advocacy Group Feedback

Attorney Comment #1

Attorney: **Anonymous**
Date Received**: 2/6/25**

Proposed Rule 56, provides that remedies for non-payment may include orders limiting a non-paying party from filing motions or pursuing claims; "[h]owever, a party shall never be precluded from defending a claim or counterclaim." I'm not sure what this proviso is intended to mean, but it seemingly suggests default can never be entered against a non-paying party. What happens if the non-paying party is a respondent employer who drafted the arbitration agreement? Why, in such a case, shouldn't the non-breaching employee (who might have to pick up the fees to continue arbitration) have the ability to request and the arbitrator have the power to preclude the breaching employer from defending the claim? If not, employers might be incentivized to force arbitration then abandon payment if and when it seems things aren't going their way. I'd like to see this proposed rule clarified and/or the prohibition on precluding defense of claims eliminated in cases of non-paying employer respondents. Thanks for considering this comment.

Attorney Comment #2

Attorney: **Cliff Palefsky**
Law Firm: **McGuinn, Hillsman & Palefsky**
City: **San Francisco, CA**
Date Received: **2/6/25**

A few comments on the rules:

--The answer should contain the essential elements and affirmative defenses. With limited discovery, not having any sense as to the factual and legal defenses puts plaintiffs at an even worse disadvantage in getting information necessary to arbitrate case. No reason at all to make it voluntary. It has become a major defense 'tactic' to not file a meaningful answer.

--There has long been confusion over the meaning of your confidentiality rules. You have tried to clarify that the AAA and arbitrator has to preserve confidentiality and I know that you don't intend to gag the parties. But the rules have long been misinterpreted by arbitrators and defendants who believe it is an instruction to the arbitrator to order excessive confidentiality. As you know, confidentiality provisions are being struck down routinely as

unconscionable by courts because of the limits on obtaining evidence from 3rd parties and the inherent advantages it provides to the repeat user. It also may violate NLRB rulings. You really need to be clearer that you are referring to the hearing itself and who may attend and that the parties are and should be allowed to discuss the case itself with whoever they to in order to gather evidence and recognize the public policy involved in many cases.

--The elimination of an express reference to the possibility of depositions is a problem. It was one of the main features of the employment rules when they were drafting, recognizing the importance of some controlled depositions in many if not most cases. You also really need to clarify in the rules the authority of the arbitrator to order 3rd party subpoenas. Without that ability, the entire proceeding will be subject to challenge for not permitting adequate discovery and will only serve to prolong the hearings which will be used for discovery. It is a major step backwards. Not sure why you did that.

--Your prohibition on ex parte communications is of course appropriate but you must also place some limits on the ability of arbitrators to take on additional arbitrations and mediations with a party to a pending proceeding. That practice is completely inappropriate, flies in the face of the purpose and policy of the prohibition of ex parte communications and is certainly something that make the other party deeply concerned about neutrality.

Thanks for considering these points. Happy to discuss if you like.

Cliff Palefsky
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Attorney Comment #3

Attorney: **Alex Katzman**
Law Firm**: Katzman & Katzman, PLLC**
City: **San Antonio, TX**
Date Received**: 2/10/25**

Dear Sir or Madam,

Rule 56: There should be a mechanism to remand a case to court if the employer does not pay the arbitration cost as required. In the past AAA has told me that my client (the Claimant) is responsible top pay the arb fee for the Respondent if the Respondent fails to pay it. This actually incentivizes the Respondent to breach the agreement to pay the arb fees.

Rule 32: In addition to limiting summary judgment, the rules should also provide that post-hearing briefing should be limited solely to those issues that the arbitrator seeks clarification. Every employment arbitration I've had has had the Respondent's counsel seeking to fully brief after the hearing. The whole point of having an arbitrator as

the tribunal is to have an experienced lawyer or former judge make a decision based on that experience in an effort to make the arbitration faster, cheaper and less onerous for the parties.

Best regards,

Alex Katzman
Board Certified – Civil Trial Law* **
*Texas Board of Legal Specialization (TBLS)
**National Board of Trial Advocacy (NBTA)

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Attorney Comment #4

Attorney: **Anonymous**
Date Received**: 2/13/25**

To Whom It May Concern:

I am writing to provide comments to the American Arbitration Association's Draft Amendments to the Employment Arbitration Rules. I respectfully submit my comments below.

I. R-4 Filing Requirements and Procedures. Given that most employment arbitrations are initiated by the employee (not the employer), certain proposed revisions to the filing requirements benefit only the employer.

a. The revised rules contain stricter filing requirements which used to be a brief statement of the nature of the dispute and remedy sought. Now it is a statement of the nature of the claim and the amount involved, which detail may not be fully known to the employee. Moreover, cases that do not meet these filing requirements will not be considered filed with the AAA. This ability to reject a filing which might result in the employee missing the statute of limitations, only benefits the employer.

b. The requirement to provide copies to the parties that the case is filed against may be overly burdensome for individuals who do not have the time or resources to provide such copies. I recommend allowing for an option to have the AAA forward the arbitration demand via email to the other parties.

c. For counterclaims, the new filing requirements appear not to apply. For example, for counterclaims, a brief statement is sufficient. If there are going to be heightened filing requirements for the party initiating arbitration, the same requirements should apply to the party making counterclaims.

II. R-13 Number and Appointment of Neutral Arbitrators

a. Employment Law Experience. The revised rules remove the requirement that neutral arbitrators shall be experienced in the field of employment law. It is now only present in multi-arbitrator disputes. It is critical that arbitrators in single arbitrator actions be

experienced in the field of employment law. Arbitrators with no experience in the field of employment law tend to treat the parties in an employment action as equals when clearly the employee is not on equal footing as the employer. The requirement for employment law experience should be re-instated in the revised rules.

b. Diversity. The revised rules remove the requirement that the roster of available arbitrators be established on a nondiscriminatory basis and diverse by gender, ethnicity, background, and qualifications. Given that many employment actions are based on claims of discrimination and are brought by individuals of diverse background, it is appropriate that the roster be established in a nondiscriminatory manner and be diverse. It is also important that all arbitrators receive anti-bias and anti-discrimination training.

III. R-20 Preliminary Hearing – P-2 Checklist.

a. The checklist of items to be discussed in the revised rules includes "how costs of any searches for requested information or documents that would result in substantial costs should be borne." This only benefits the employer as the employer has resources to be able to pay for its discovery. This is grossly unfair to the employee. The employee should never be required to pay for the employer's costs of conducting searches of requested information or documents. This may also be considered unconscionable based on case law.

b. The checklist should also include a discussion of authentication of documents. Given that arbitration proceedings are meant to be expeditious, I would recommend including a requirement in the preliminary hearing that the parties agree on an efficient alternative to the authentication of documents. The defendant should not be permitted to require the plaintiff to authenticate all documents by taking multiple, expensive depositions.

IV. R-22. Enforcement Powers of Arbitrator.

a. Under the revised rules, the arbitrator has the power to allocate costs of document production, including ESI. As stated above, this only benefits the employer and is grossly unfair to an employee. The employee should never be required to pay for the employer's discovery costs. This may also be considered unconscionable based on case law.

b. The revised rules also give the arbitrator the power to draw adverse inferences, exclude evidence and other submissions, and make special allocations of costs or an interim award in the case of willful non-compliance. My concern here is the use of the word "willful" which is a higher standard to meet for non-compliance than plain non-compliance. I would recommend removing "willful" to allow the arbitrator to have more discretion.

V. R-31. Conduct of Proceedings.

a. The revised rules seem to have removed direct examination from the conduct of proceedings. The rules state that witnesses must submit to questions from the arbitrator and the adverse party but it appears that direct examination was omitted.

b. The revised rules and the current rules reference the arbitrator's power to direct the parties to focus their presentations on issues that could dispose of all or part of the case. However, this appears to be focused on the case being dismissed. The arbitrator should also have the power to direct parties to focus their presentations on issues that could dispose of affirmative defenses of the defendant.

VI. Additional Comments.

a. Depositions. Many companies are including in their form arbitration agreements limitations on the number of depositions permitted (e.g., depositions of two fact witnesses only). This kind of limitation only benefits the employer. The employer will likely only need to depose the employee and can conduct unlimited interviews of its other employees. The employee plaintiff does not have the same benefits. I recommend including a provision in the discovery section that the arbitrator may override any limitations on number of depositions.

b. Discovery Protocol Requests for Production of Documents. I recommend adding to the rules that a party cannot outright refuse to respond to any of the document production requests set forth in the AAA's discovery protocols.

Thank you in advance for your consideration. I would be happy to discuss any of these comments or provide more detail.

Attorney Comment #5

Attorney: **Anonymous**
Date Received**: 2/17/25**

I am curious as to the reasons for undertaking such major changes in what I have for substantial time period, i.e., throughout my several decades long employment arbitral experience, professionally deemed and referred to as "the gold standard," meaning by that, in large part, compliance with the California Supreme Court's seminal *Armendariz* decision. *Armendariz,* in part, stands for the proposition that employment arbitration is an alternative, but not inferior, tribunal for resolution of these critical claims. Notwithstanding our necessary pandemic remote hearings, *in-person confrontation of witnesses*, upon which the arbitrator makes critical credibility determinations, critically enables the arbitrator to best meet her or his responsibilities.

Regretfully, but inevitably, some arbitrators, with sole discretion as to whether or not in-person hearing is necessary for a fundamentally fair process, may decide, based in whole or in part, upon other factors; moreover, that Proposed Rule R-23 establishes such a "default" along with sole arbitrator selection, creates the appearance of "an inferior tribunal." In this arbitrator's considered opinion, therefore, in order to maintain itself as "the gold standard," the AAA should *seriously reconsider* this proposed rule.

I have not yet had opportunity to review the entirety of the proposed rules but this proposed deviation from "gold standard" simply leapt out at me as extremely ill-considered. Of course the parties may stipulate to remote hearing, in whole or in part; the existing rule/practice allows for that, but remote, over a party's opposition, is fundamentally unfair.

I would appreciate hearing response as to the foregoing concern, or being able to review AAA's decision making as to this point. Currently I arbitrate exclusively with AAA in accordance with the "gold standard."

Attorney Comment #6

Attorney: **Anonymous**
Date Received**: 2/28/25**

Dear AAA:

I respectfully submit the following comments in my personal capacity. I represent plaintiffs in employment law and have represented clients in at least two AAA-administered employment arbitrations. **[Redacted]**

I write separately in my personal capacity to raise three concerns.

First, consent and retroactivity. The sheer breadth and scope of the proposed changes raises fundamental questions regarding whether any party can be deemed to have "consented" to the amended rules if the arbitration agreement was formed before the amendments' effective date. In my view, the proposed changes are so sweeping as to fundamentally alter the nature of what it means to agree to arbitrate under AAA rules.

Among other things the reasons the changes are fundamental are:

- Significant alteration in the apparent scope of discovery that narrows what discovery claimants can seek by requiring them to prove in advance that discovery is likely to be, among other things, "material."
- Ambiguity as to the fee schedule that risks imposing significantly higher costs on employees.
- Giving arbitrators the power to order confidentiality measures never agreed to by the parties.
- and changing arbitrator selection to give parties less control & less opportunity to strike particular arbitrator candidates …. This in particular exacerbates the harm of the first three bullets, since counsel will be unable to strike arbitrators that have abused their powers in past cases.

The association should consider that its actions will likely result in significant, expensive litigation over the question of which version of the rules was "agreed" to. That is a question of contract formation and therefore is likely to be resolved by courts. To generate such a risk contravenes fundamental purposes of arbitration to provide a more efficient and less costly dispute resolution forum. Both employees and employers will be dragged into extensive, costly litigation over this threshold question.

➔ **A more prudent approach would be to specify that the changes apply only to contracts formed after the effective date of the amendments.**

Second, unconscionability. The proposed change to Rule R-1 [Redacted]) creates a risk that many employees will be forced to incur fees divergent from the AAA Employment/Workplace Fee Schedule. The arbitrator and AAA are both empowered to diverge from that standard, and it is not clear what fee schedule is set in cases involving employment claims as well as other claims.

This creates a risk that AAA arbitration clauses will be found unconscionable in many cases, or at least that parties opposing arbitration will have a colorable argument to this effect. *See generally* cases citing Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 90, 121 S. Ct. 513, 522, 148 L. Ed. 2d 373 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."); Parada v. Superior Ct., 176 Cal. App. 4th 1554, 1574, 98 Cal. Rptr. 3d 743, 760 (2009) (finding imposition of steep arbitration costs to be substantively unconscionable).

Again, the association should consider that the ambiguity created by its proposals would be likely to generate voluminous and expensive litigation over threshold questions.

➔ **The amendments should be revised to remove any ambiguity or discretion respecting the fee schedule to be applied, and state clearly that all disputes involving claims between employees/contractors and employers will be assigned the Employment/Workplace Fee Schedule.**

Third, timing. I learned of the AAA proposed amendments yesterday, just one day before the comment deadline. Apparently the changes were first announced by tweet on January 29th, but were not well publicized. I have had insufficient time to review the proposed changes. I am aware of very few published analyses of the changes by attorneys who have had time to review them carefully.

➔ **The association should delay the implementation of any amendments and should re-open the period for public comment to extend another 60 days for consideration, and should more broadly publicize the proposed amendments in advance of this second comment round.**

Advocacy Group Comment #7

Attorney(s): **Rachel Dempsey, David Seligman, Juno Turner**
Advocacy Group: **Towards Justice**
City: **Denver, CO**
Date Received**: 2/28/25**

February 28, 2025

Re: PUBLIC COMMENT ON THE AAA'S PROPOSED AMENDMENTS TO THE EMPLOYMENT ARBITRATION RULES

To the American Arbitration Association,

AAA has a forced labor problem, and the proposed rule changes will make it worse. Numerous parties have raised the alarm about this issue for years. Each time, AAA has responded that its due process protocols and strict fee-shifting requirements help mitigate these concerns, reiterated its responsibility to provide a fair forum, and committed to considering ways to improve. Not only has it not substantively addressed the forced labor problem, it now appears that AAA has been quietly preparing to gut even the insufficient safeguards that were previously in place. This troubling lack of transparency and disregard for abuses of the arbitral system seriously undermine the legitimacy and neutrality of AAA as an arbitral forum.

As AAA is well aware, employers have weaponized arbitration procedures in order to make AAA complicit in forced labor schemes. In January 2023, the New York Attorney General wrote AAA expressing concern that companies were using AAA "to attempt to enforce illegal liquidated damages provisions" and requesting that the company cease administering proceedings where employers sued their workers in arbitration to enforce debts intended to coerce workers into staying in abusive employment relationships. (Exhibit 1). The Southern District of New York and the Second Circuit Court of Appeals agreed that AAA had allowed itself to be converted into a coercive tool that employers could use to extract illegal forced labor, taking the extraordinary step of enjoining a AAA proceeding as a potential violation of the federal Trafficking Victims Protection Act ("TVPA"). *Vidal v. Advanced Care Staffing, LLC*, No. 1:22-cv-05535-NRM-MMH, 2023 WL 2783251 (E.D.N.Y. Apr. 4, 2023); Summary Order, No. 23-303-cv (2d Cir. Mar. 7, 2024), ECF No. 107.

AAA did not address the problem. Instead, in 2024, AAA arbitrators began to churn out default judgments for tens of thousands of dollars on behalf of nurse staffing company MedPro. In possible violation of, among other laws, the TVPA, these default judgments enforced demonstrably unlawful penalties against nurses who had quit jobs that placed them in untenable working conditions for low wages. In an August 13, 2024 letter to AAA, Towards Justice informed the company that these forced labor violations were taking place, bringing attention to several of the ways in which AAA's due process protections were falling short, including that cases were served via emails that were shunted to spam and that arbitrators

were allowing MedPro to seek recovery of its attorneys fees. Towards Justice requested, again, that AAA cease administering arbitrations in forced labor cases. (Exhibit 2). AAA responded dismissively, refusing to engage with the documented due process failures before it but stating that it took Towards Justice's comments seriously. (Exhibit 3).

The abusive arbitrations continued, and on January 13, 2025, the American Civil Liberties Union, alongside the Asian American Legal Defense and Education Fund, Equal Rights Advocates, Legal Aid at Work, Legal Voice, National Black Worker Center, National Center for Law and Economic Justice, National Domestic Workers Alliance, National Employment Law Project, National Institute for Workers' Rights, People's Parity Project, Public Justice, Public Justice Center, and Towards Justice, wrote a letter to AAA expressing concern that employers were using AAA to coerce forced labor from their employees and requesting that AAA cease administering arbitrations that are part of a forced labor scheme. (Exhibit 4). AAA responded on February 27, 2025 stating that Employment Arbitration Rules provided "several essential fairness requirements," while acknowledging that its rules were internally inconsistent as to the loser-pays provision and stating that employees could raise that issue in individual arbitrations. (Exhibit 5). Notably, that response was sent ***one day*** before the deadline for comments on proposed changes to the Employment Arbitration Rules—including, as set forth in other comments, several changes that would undermine many of the existing procedures in place that AAA itself cites as providing key protections to employees.

In other words, AAA has spent years emphasizing that its existing Employment Arbitration Rules can help protect employees against employer abuse of the arbitration process. The proposed changes to the rules would, among other concerns, make it easier for employers to require fee-splitting or loser-pays provisions and would undermine the due process protocol— things that AAA itself has repeatedly emphasized are a critical part of a fair system. This reflects a profound dereliction of AAA's duty to the law and brings into sharp relief longstanding concerns about arbitration's inherent partiality to the deep-pocketed employers that pay its fees. These changes to the rules will not stop employers from seeking out the most biased and procedurally unbalanced arbitral forums that will take their money, and they will not stop the race to the bottom as employers and their lawyers create their own arbitral forums with rules that favor them. But they will erode AAA's yearslong efforts to create a reputation as a fair and impartial adjudicator, and they will leave workers exposed to devastating employer exploitation and abuse.

Sincerely,

TOWARDS JUSTICE
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Advocacy Group Comment #8

Attorney(s): **Deborah White; Larissa Whittingham**
Advocacy Group: **Retail Litigation Center**
City: **Washington, DC**
Date Received**: 2/28/25**

via e-mail: employmentrules@adr.org

February 28, 2025

American Arbitration Association

120 Broadway, Floor 21
New York, NY 10271

Dear American Arbitration Association,

Thank you for the opportunity to submit public comments on the proposed amendments to the American Arbitration Association's (AAA's) Employment Arbitration Rules. The RLC appreciates the transparency from the AAA in posting proposed amendments to its rules and considering input from all stakeholders as it crafts these important Rules. The RLC's comments are accompanied by three addenda:

Addendum 1 – Comparison of RLC's revisions with select existing and proposed amended rules.

Addendum 2 – RLC's amicus brief in *Wallrich v. Samsung*, with exhibits.

Addendum 3 – Copies of select sources cited.

Contents

Introduction

The Retail Litigation Center, Inc. (the "RLC") is a 501(c)(6) nonprofit trade association that represents over 60 national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC's members employ millions of people throughout the U.S., provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC also counts more than 20 law firms as members of its association.

The RLC is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant evolutions in the legal landscape.

In addition to filing more than 250 amicus briefs in federal and state courts of all levels since its founding in 2010, the RLC also convenes retail and law firm members on issues of importance to the industry. It offers educational programming and collaborative opportunities to retail litigators on a wide variety of issues, including arbitration.

VII. The RLC, Arbitration, and Mass Arbitration

Many of the RLC's members enter into arbitration agreements with consumers and employees because arbitration allows all parties to resolve disputes "efficiently while avoiding the costs associated with traditional litigation." Retail Litigation Center Brief as *Amicus Curiae*, *Epic Systems Corp. v. Lewis*, at 1-2, Docket Nos. 16-285; 16-300; 16-307 (U.S. 2017). Members of the RLC partner with a variety of arbitration services, including but not limited to AAA.

For years, the RLC has helped educate courts on arbitration as a "fair, inexpensive, and less adversarial" alternative to litigation. Retail Litigation Center Brief as *Amicus Curiae*, *Uber & Lyft v. CA*, Docket Nos. 23-1130, 23-1132 (U.S. 2024) (urging the Supreme Court to check attempts to circumvent "the FAA's strong protection for individual arbitration"); *see also* Retail Litigation Center Brief as *Amicus Curiae*, *Coinbase v. Bielski*, Docket No. 22-105 (U.S. 2023); Retail Litigation Center Brief as *Amicus Curiae*, *Viking River v. Moriana*, Docket No. 20-1573 (U.S. 2022). The RLC continues to show up as a voice for the retail industry combatting hostility to arbitration. *See e.g.,* Retail Litigation Center Brief as *Amicus Curiae*, *Comcast v. Ramsey,* Docket No. 24-365 (U.S. 2024) (explaining how the "*McGill* rule robs parties of arbitration's benefits and directly conflicts with [the Supreme Court's] decision in *Concepcion*.").

Recently, the RLC has also educated courts on attempts to exploit the individualized nature of arbitration by using social media to manufacture thousands of identical, simultaneous

demands to leverage arbitration fees for the purpose of forcing early settlements primarily to benefit the attorneys bringing the claims. The RLC filed an amicus brief in *Wallrich v. Samsung*, drawing attention to the ethical concerns inherent in today's mass arbitration model. Retail Litigation Center as *Amicus Curiae*, *Wallrich v. Samsung*, Docket No. 23-2842 (7th Cir. 2023) (hereinafter, "RLC's *Samsung* Amicus Brief"). That brief and exhibits to it supporting the RLC's arguments accompanies these Comments as Addendum 2.

In bilateral arbitration, "[e]ach plaintiff's claim is distinct, and each plaintiff is individually represented, not 'merely' a class member." Decl. of Richard Zitrin ¶ 4, *Abernathy v. DoorDash, Inc.*, No. 19-7545 (N.D. Cal. Nov. 22, 2019), ECF No. 35-1; *see also* J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1350 (2022) ("The second distinctive feature of the mass-arbitration model is that its claims proceed individually rather than being merged into something like a single classaction or MDL consolidation."). Arbitration providers understand this fact keenly as they experience the challenge of administering thousands of unique claims. *See e.g., Sega v. JAMS*, Complaint, Case No. 258T CV 02240 (Sup. Ct., County of Los Angeles) (alleging a particular arbitration provider "does not have the capability to manage [each claim in a mass arbitration] like an individual arbitration.").

Because mass arbitrations are simply a large group of bilateral arbitrations, the AAA's Proposed Amendments to its Consumer and Employment Arbitration Rules will apply to mass arbitrations (in addition to the Mass Arbitration Supplemental Rules, which provide valuable additional processes in the mass arbitration context). As a result, it is essential to understand the underlying drivers of mass arbitration and incorporate unique considerations from that background into the proposed amendments.

A. Mass Arbitration Campaigns Are Profit-Driven, Not Dispute-Driven

Mass arbitrations are generated through solicitations by attorneys who will financially benefit from a settlement. Indeed, the purpose of mass arbitration is to leverage the dollar value of arbitration fees multiplied by a large number of claimants to force early settlement. Instead of consumers or employees who believe they have been wronged seeking counsel, attorneys with financial incentives spearhead the claims. A Ninth Circuit decision issued today noted the concerning motivations behind a mass arbitration that began with a group of "100,978 identical demands" (though somehow eventually trimmed back to 7,300 actually going forward in arbitration), saying that the "true motivation underlying the mass arbitration tactic deployed here, [] appears to be geared more toward racking up procedural costs to the point of forcing [the defendant] to capitulate to a settlement than proving the allegations of data breach to seek appropriate redress on the merits." *Jones v. Starz Entertainment, LLC*, No. 24-1645, Slip. Op., 5, 14 (9th Cir., Feb. 28, 2025).

A closer look at the drivers of mass arbitration is helpful before proceeding to specific recommendations for ensuring fair dispute resolution processes in that context. Maria Glover, an academic proponent of mass arbitrations, identified two preconditions for fueling mass arbitrations: (1) targeted use of developing technology to attract claimants; and (2) litigation funding. Both reveal the profit-motivation for mass arbitrations, divorced from valid consumer or employment disputes.

1. Targeted Use of Social Media & Technology to Attract Claimants

The first condition identified by Professor Glover is the growth of social media and increasingly sophisticated technology, which can be used to mass-solicit claimants and, in some cases, "help individuals initiate arbitration proceedings in exchange for a cut of any eventual payout." J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1338-39 (2022). Law firms are dependent on social media and sophisticated online marketing to generate a "mass" of claimants that then asserts hydraulic pressure against a target.[1] Mass arbitrations that have ended up in court (where filings are available to the public) include counsel allegedly representing 30,000 claimants (*Uber Techs, Inc. v. Am. Arb. Ass'n, Inc.*); 50,000 claimants (*Wallrich v. Samsung*); and over 100,000 claimants (*Starz v. Keller Postman*). In order to obtain this volume of claimants, "potentially misleading client solicitations are the first seeds of many mass arbitration harvests." Ann Marie Mortimer, *Emerging Mass Arbitrations May Be Ideal Proving Ground for AI*, Bloomberg (Nov. 9, 2023). The RLC's *Samsung* amicus brief included the below screenshot saying, "You May Be Entitled to Compensation up to $5,000" and listing a deadline a few months away.

Addendum 2, RLC's *Samsung* Amicus Brief, at 12. This and other examples of solicitations like "Sign Up in 2 Mins" (*id*, at 12) obfuscate the fact that respondents to the advertisement are retaining an attorney to represent them in an individual proceeding rather than merely seeking to recover in a class action (with a court approved settlement amount and deadline that would track the type of marketing seeking arbitration claimants). Even where firms purport to confirm representation, individuals have reported confusion (in multiple cases) over whether they are represented by counsel and, if so, for what legal claims. *See e.g.,* Addendum 3, Exhibit 2 (Declarations of ID, MS, SA, DE, DL, MD, *Tubi v. Keller Postman*, Exhibits 23-28 to First Amended Complaint, Case No. Case No. 1:24-cv-01616 (D.D.C. Nov. 25, 2024)); Addendum 2, Exhibit 5 (Lang Letter, *Kohl's, Inc. v. Lang*, No. 2023CV001652 (Wis. Cir. Ct., Waukesha County, Nov. 13, 2023), ECF No. 14) (initially stating that the counsel who had claimed to represent him and filed a claim initiating an arbitration on his behalf was "not my legal representative" and "falsely represented me in this class

action lawsuit" before filing a contradictory letter saying he was represented by four different law firms).

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[1] *While most solicitations for mass arbitrations take place online, multiple lawsuits have been filed against law firms spearheading mass arbitration solicitations for violating the Telephone Consumer Protection Act by repeatedly calling or texting potential claimants. See e.g., Cacho v. Keller Postman LLC, No, 3:23-cv-00185 (W.D. Tex. May 5, 2023); Gonzalez v. Keller Postman LLC, No. 3:23-cv-00145 (W.D. Tex. Apr. 10, 2023).*

2. Litigation Funding

The second underlying condition Professor Glover identified is the increase of litigation funding that "enables a party with no relationship to a lawsuit to pay some or all of the litigant's cost in exchange for a cut of any ultimate award." Glover, *Mass Arbitration*, at 1339. The purpose of litigation funding is to generate profits for large, sophisticated funders – it is a financial transaction based on an assessment of risk and return on investment. Litigation funding is not motivated by ensuring fair and efficient resolution of real disputes, as illustrated by a pitch for litigation funding for mass arbitration that was made publicly available on the docket of a case in 2023. The deck reveals the funder's strategy of "[i]dentifying 25-30 ripe targets," which it went on to define as those with an arbitration agreement with "favorable" terms and a valuation that is "high enough so they aren't judgment proof and can settle for hundreds of millions of dollars, but low enough that $200 million+ in arbitration fees creates an existential crisis[.]" RLC Addendum 3, Ex. 2 (Mass Arbitration Strategy and Investment Opportunity).

Betraying the idea that those bringing these claims are seeking to vindicate individual interests, the pitch expressly relied on the intent to avoid arbitration (in preference of forcing settlement) as it stressed that at the time the most "completed arbitrations seen to-date is 160" in order to give comfort to the proposed funder that the campaign can use a cudgel of fees for thousands of claimants without the risk of actually proceeding with the cost of arbitrating to achieve a result for those claimants. At no point did the pitch explain that – for counsel following the rules of professional responsibility – the decision of whether to resolve claims by settlement or go forward with arbitrations is actually in the hands of the clients and, thus, counsel cannot provide assurances that thousands of arbitrations may not proceed.

The strategy is further illustrated by an affirmation under penalty of perjury filed by the managing partner of a claimants' law firm, which illuminates both the tactics of mass arbitration prosecutors and the eagerness of multiple firms to profit from the same alleged claims against large target companies. Specifically, in this case, the law firm

managing partner represented a group of claimants in a mass arbitration based on Video Privacy Protection Act claims and that same attorney also signed up as a *claimant* in two different mass arbitrations (initiated by two competing law firms) under the same theory against the same company. Exhibit 4, RLC Addendum 3 0064(Affirmation in Opposition to Petition for an Order Pursuant to CPLR Section § 7502 Disqualifying Counsel and for Additional Relief, *WarnerMedia Direct, LLC v. Zimmerman Reed*, Index No. 652500/2024 (County of New York, June 28, 2024)) (hereinafter "Affirmation in Opposition to Petition"). The affirmation states that the partner terminated the services of the competing law firm representing him in the mass arbitration against the company but the other firm still filed a demand for arbitration in his name eight months later. *Id.* at ¶ 9 ("While I terminated Labaton on August 1, 2023, Labaton apparently filed a demand for arbitration with the American Arbitration Association ("AAA") on my behalf on April 12, 2024, **which I did not learn about until I read the Petition in this proceeding**.") (emphasis added). The suit alleged that the partner (and two other representatives from his firm, including an associate involved in mass arbitrations) signed up for the competing mass arbitrations in order to obtain confidential information – such as potential settlement numbers – in order to advance the mass arbitration in which he was representing his own group of claimants. Exhibit 3, RLC Addendum 3 0029 (Petition, *WarnerMedia Direct, LLC v. Zimmerman Reed*, Index No. 652500/2024 (County of New York, May 15, 2024)). While the partner denied the alleged motivations, he conceded the underlying concerning conduct and acknowledged the impropriety by immediately withdrawing as a claimant in the two competing arbitrations. Affirmation in Opposition to Petition. Regardless of the motivations, the undisputed factual background – including the filing of a demand for arbitration on behalf of an attorney without that attorney himself knowing – shines light on the concerning practices occurring in mass arbitrations.

B. Where AAA Comes In

Arbitration providers, such as AAA, can mitigate some of the ethical issues the RLC has identified by amending their rules and processes, as well as by enforcing standards already in place. The Mass Arbitration Supplementary Rules that AAA[2] issued in early 2024 lay important groundwork for ensuring that AAA can fairly administer real disputes. The RLC and its members appreciate the Supplementary Rules and encourage AAA to continue considering how the dynamics of today's mass arbitration model could preclude "fair, efficient, respectful, and collaborative conflict resolution[.]" AAA Vision.

As noted above, the AAA's Proposed Amendments to its Consumer and Employment Arbitration Rules will apply to bilateral arbitrations initiated in the context of a mass arbitration just like it does to bilateral arbitrations outside the context. Accordingly, the

RLC's perspective in commenting on the proposed amendments contemplates both scenarios and seeks to illuminate steps the AAA can take to continue to ensure that AAA is facilitating fair arbitrations for all parties.

III. Proposed Amendments – New Rules

New Employment Rule 11[3] – Mediation

Proposed New Rule 11, "Mediation," would allow the AAA to refer parties to mediation administered by AAA at any time after a demand for arbitration is filed. The RLC respectfully disagrees that such a rule is necessary and asks AAA to omit the proposed new rule.

Counter-parties to an arbitration frequently interact with each other in a variety of ways before filing a demand for arbitration. Indeed, some arbitration agreements contain express pre-arbitration dispute resolution procedures. Some claimants reach out to a business attempting to resolve a dispute prior to filing an arbitration. At any of those points, parties may – and often do – choose to mediate the dispute before taking the step of filing an arbitration. If mediation is unsuccessful, the parties may not want to spend the money and time on yet another mediation referred by the AAA, as anticipated in the proposed new Rule 11. And parties are always free to mediate if they choose, regardless of whether they are ordered to do so by an arbitrator.

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[2] *The RLC is dedicated to advancing the interests of its members among all arbitration providers. The RLC's Comments are limited to AAA's processes and actions to date because of the nature of this submission but the RLC is committed to engaging equally with other arbitration providers, should it have a similar opportunity.*

[3] *All rule numbers refer to the proposed amended rule number, where different from existing rules.*

In addition, proposed new Rule 11 would require the mediation to be administered by AAA. Parties who have mediated the same dispute before initiating arbitration may want to use the mediator they had previously used – outside of AAA's administration – if the parties do decide to mediate again. The desire to use a mediator with particular experience may be especially important in the mass arbitration context, where such a mediator might be familiar with the parties and dynamics of mass arbitration and could make a measurable difference in resolving the claims. While AAA's Mass Arbitration

Supplemental Rule 9 also anticipates mediation, it is not clear that it would preempt proposed new Rule 11 in the Employment Rules (particularly outside the 120 days following the Answer deadline that is expressly contemplated in MA-9).

Moreover, Mass Arbitration Rule 9 expressly allows any party to "unilaterally opt out of mediation." If the AAA moves forward with the currently proposed new rule 11 contemplating AAA referral to mediation, AAA should include a similar provision allowing a party to opt-out.

New Employment Rule 43 – Majority Decision

The proposed new Rule 43 (sub-part b) adds the ability for one member of an arbitral panel (the chairperson) to resolve disputes related to the exchange of information or procedural matters without consulting the full panel if the parties do not object to the practice. If AAA retains the ability of parties to object, the RLC supports the adoption of the rule.

New Employment Rule 57 – Sanctions

The RLC strongly supports the addition of the proposed new Rule 57 on Sanctions. While the RLC hopes a sanctions rule is rarely needed, it is a critical tool for arbitrators to have in place should circumstances necessitate its use.

Unfortunately, some of the problematic conduct in mass arbitrations includes attorney "representation" without an informed and knowing client – or more to the point: without the informed and knowing consent of tens of thousands of clients. *See e.g.,* Addendum 3, Exhibit 2 (Declarations of ID, MS, SA, DE, DL, MD, *Tubi v. Keller Postman*, Exhibits 23-28 to First Amended Complaint, Case No. Case No. 1:24-cv-01616 (D.D.C. Nov. 25, 2024)); Addendum 2, Exhibit 5 (Lang Letter, *Kohl's, Inc. v. Lang*, No. 2023CV001652 (Wis. Cir. Ct., Waukesha County, Nov. 13, 2023), ECF No. 14). Today's Ninth Circuit opinion noted that claimants' counsel sent "a single email . . . on behalf of 7,213" claimants purporting to disqualify an arbitrator on all their behalf within fifteen days of the naming of the arbitrator (which would equal 480 people per day if claimants' counsel were to have a discussion with each claimant about the question). *Jones v. Starz Entertainment, LLC*, No. 24-1645, Slip. Op., 7 (9th Cir., Feb. 28, 2025).

Recently, multiple individuals who were originally listed as claimants in a mass arbitration filed declarations about their understanding (or lack thereof) of claims that a law firm was attempting to advance purportedly on their behalf. *See e.g.,* Addendum 3, Exhibit 2 (Declarations of ID, MS, SA, DE, DL, MD, *Tubi v. Keller Postman*, Exhibits 23-28 to First Amended Complaint, Case No. Case No. 1:24-cv-01616 (D.D.C. Nov. 25, 2024)); Addendum 2, Exhibit 5 (Lang Letter, *Kohl's, Inc. v. Lang*, No. 2023CV001652 (Wis. Cir.

Ct., Waukesha County, Nov. 13, 2023), ECF No. 14). As one example, a purported former claimant in a mass arbitration against Tubi stated he was "not aware of [claimants' law firm] representing me in my claim against Tubi" and, though he acknowledged clicking on an ad about a possible claim, said that he did "not know what the claim was based on, but I feel like the ad was meant to trick people into thinking they had a valid claim and that the claim would not involve much participation." Exhibit 1, RLC Addendum 3 0008 (Declaration of DE).

Another declarant (a paralegal) said that the first time she learned that a demand for arbitration was filed in her name was after she decided not to pursue her claim and that the contents of the demand did not reflect her "statements, thoughts, or opinions." Exhibit 1, RLC Addendum 3 0002 (Declaration of LD). As noted above, this is not the first time a "claimant" has discovered his or her name was being used to prosecute an arbitration and then told a court that they did not knowingly agree to that proceeding. *See e.g.,* Lang Letter, *Kohl's, Inc. v. Lang*, No. 2023CV001652 (Wis. Cir. Ct., Waukesha County, Nov. 13, 2023), ECF No. 14; Exhibit 4, RLC Addendum 3 0064 (Affirmation in Opposition to Petition).

As a result, the sanctions rule should expressly authorize sanctions to be imposed against counsel violating ethical rules as opposed to sanctions being imposed against just the claimants themselves. Unknowing consumers or employees should not be penalized if and when those individuals do not even realize they are engaged in an adversarial process with a company – often because they are tricked or confused by a mass solicitation on social media. But arbitrators need tools to hold counsel accountable for abuse of the arbitral process.

Accordingly, the RLC recommends that the AAA amend the proposed new Rule 57 as follows[4]:

R-57. Sanctions

c. The arbitrator may, upon a party's request, order appropriate sanctions where a party, counsel to a party, or other party representative fails to comply with ~~its~~ their obligations under these Rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

d. The arbitrator may, upon a party's request, order appropriate sanctions against counsel appearing in an arbitration proceeding where the counsel fails to comply with their ethical obligations, the AAA Standards of Conduct for Parties

and Representatives, or the standards described in Rule 11 to the Federal Rules of Civil Procedure.

e. The arbitrator must provide a party, counsel to a party, or other party representative that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

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[4] *Throughout these Comments, proposed new wording is included in red and proposed omissions from the original proposed amendments are stricken.*

IV. Proposed Amendments – Existing Rules

Employment Rule 2 – Judicial Intervention

The proposed amendment to Rule 2 contemplates extending the arbitration suspension period from 30 days to 90 days when judicial intervention is sought. The RLC supports amending this section of Rule 2 and appreciates the AAA's acknowledgment that a judicial determination will rarely be made within 30 days. However, the proposed amendments are not sufficient. Instead, the RLC encourages the AAA : 1) to extend the time during which parties can evaluate whether to seek judicial review from 30 days to 90 days; and 2) to remove the timeline for suspending arbitration administration until a determination is reached in the judicial proceeding.

Realistically, parties may need more than 30 days to determine whether judicial intervention is necessary. This is especially the case in mass arbitrations, where claimants' counsel's strategy is often to surprise the company and the company may need to evaluate a variety of legal issues before it can determine whether judicial review is appropriate, such as whether the filed arbitration agreement even applies to all the claimants. Accordingly, the RLC respectfully urges AAA to extend the timeline in the first sentence of Rule 2 for deciding whether to seek judicial review from 30 days to 90 days.

Additionally, judicial proceedings take an unknown amount of time and their results may have a profound impact on the pending arbitration. Thus, the RLC recommends removing the timeline for suspending arbitration during judicial review so that the parties can obtain a determination from the court before arbitration commences.

If, within ~~30~~ 90 calendar days after the AAA's commencement of administration, a party seeks judicial intervention with respect to a pending arbitration and provides the AAA with documentation that judicial intervention has been sought, the AAA will suspend administration ~~for 90 calendar days~~ to permit the party to obtain an order regarding the arbitration from the court~~, with the authority to extend that time~~

~~period on its' own initiative or at the request of a party for good cause shown. Any request by a party to extend the time period must be made before the expiration of the initial suspension or any approved extension.~~

Employment Rule 4 – Content of the Demand

As discussed with respect to proposed new Rule 57 above, AAA should enhance protections guaranteeing that each purported claimant is a legitimate employee with a claim related to the demand for arbitration. Toward that end, the RLC proposes that AAA include an additional element in each arbitration demand to help ensure each claimant is actually an employee subject to the invoked arbitration agreement.

iv. The following information must be included ~~Information to be included~~ with any arbitration filing includes:

a. the name of each party;
b. the address of each party and, if known, the telephone number and email address;
c. if applicable the name, address, telephone number, and email address of any known representative for each party;
d. a particularized statement setting forth the nature of the claim including the relief sought and the amount involved;
e. identify the requested location of the hearing if an in-person hearing is requested;
f. a brief explanation of the dispute and specify the amount of money in dispute, if applicable; and
g. state the relief sought.

Employment Rule 5(d) – Controlling Arbitration Agreement

The proposed amendments include the following new subpart (d) to Rule 5(d):

(d) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.

The RLC strongly disagrees with the above sub-part. It is essential for fundamental fairness that the AAA administer the arbitration governed by the controlling arbitration agreement. Arbitration claimants may inadvertently submit an old or unrelated arbitration provision. Or, particularly in mass arbitration campaigns, an attorney may selectively choose an arbitration provision's terms most favorable to its position without conducting proper due diligence to

ensure that every respondent to a mass arbitration solicitation was actually subject to that provision. In either of those cases, the determination of which agreement is controlling is a necessary pre-condition to administering the arbitration – critically, failing to do so could impose arbitration on parties who actually were not even subject to an arbitration agreement. **Accordingly, the RLC recommends removing subpart d to Rule 5.**

Employment Rule 19 – Vacancies

The amendment to the rule on vacancies allows an arbitration to proceed when a panel member seat becomes vacant unless both parties agree otherwise. The RLC encourages the AAA to revise the amendment to allow either party to oppose proceeding with the arbitration in the event of a vacancy.

(a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may declare the office vacant. Vacancies shall be filled in accordance with applicable provisions of these Rules.

(b) In the event of a vacancy in a panel of neutral arbitrators, after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless ~~the parties agree otherwise~~ a party requests otherwise.

Employment Rule 23 – Date, Time, Place, and Method of Hearing

The proposed amendments to the rule on date, time, and place of hearing (former Employment.

Rule 11; proposed new Employment Rule 23) would require hearings to proceed virtually unless: 1) the parties both agree the hearing should be in-person; or 2) the arbitrator determines that an in- person hearing is necessary to ensure the fundamental fairness of the process.

The RLC disagrees with the proposal. Parties to arbitration should be able to proceed in person without requiring mutual consent. Testimonial evidence often requires credibility determinations that, in some cases, may be made more effectively in-person.

The proposed amendment would also allow the arbitrator to decide the location of the hearing, even though the existing Employment Rule 10 (proposed Rule 12 – "Fixing of Locale") governs location. The RLC recommends that AAA delete the determination of place and method from this rule.

The arbitrator shall set the date and time~~, place and method~~ for each hearing. ~~The hearing shall be held virtually or by other means as approved by the arbitrator unless the parties~~ agree ~~otherwise or the arbitrator determines that an in-person hearing is necessary for a fundamentally fair process.~~ The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

Employment Rule 32 – Motions

The proposed amended Rule 31 combines Consumer Rule 24 (Written Motions) and 33 (Dispositive Motion). The RLC urges AAA to clarify that parties can agree to different terms in their arbitration provisions and recommends removing the final sub-part of the proposed amended rule.

Specifically, new subpart (c] adds a new consideration requiring arbitrators to evaluate the time and cost associated with briefing as a determining factor. This requirement is particularly concerning in connection with sub-part b, which only allows arbitrators to allow the filing of a dispositive motion if that motion is likely to succeed and dispose of or narrow issues in the case. Thus, the final proposed sub-part envisions arbitrators denying leave to allow motions that are likely to successfully dispose of issues in a case. Adding an additional requirement would itself be inefficient.

Subject to differing terms in the parties' agreement:

(a) The arbitrator has the sole discretion to allow or deny the filing of a written motion and the arbitrator's decision is final.

(b) Where a party seeks to file a dispositive motion, the arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines the moving party has shown that the motion is likely to succeed and to dispose of or narrow the issues in the case.

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~~(c) Consistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion.~~

Employment Rule 34 – Written Statements and Post-Hearing Evidence

The proposed amendments to Rule 33's provision for witness testimony in writing (rather than in-person) changes the type of evidence from "declaration or affidavit" to "written statement." The RLC encourages the AAA to forego the amendment and maintain the "declaration or affidavit" requirement. If a witness is not appearing in person and wants their testimony to be considered as

evidence, that person should have to provide testimony under oath as is customary in an affidavit or declaration.

Employment Rule 42 – Confidentiality

The proposed new Rule 42 governing confidentiality includes the following subpart: "The AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published."

The RLC urges AAA to remove the above subpart. One of the many advantages of arbitration is the privacy it provides to both parties. The proposed new Rule 42 does not explain where AAA may "publish" awards, so more information is needed before the public could provide fully informed comments on publication. However, any form of publication that makes such awards available beyond the parties has the potential to threaten the privacy of the proceeding. This is particularly the case because AAA provides public information on parties that appear before it and which party prevails in cases that reach an arbitration award. Thus, it may be possible (and even easy in some contexts) to identify parties to an arbitration based on the content of the award even with the names of parties and witnesses redacted.

Accordingly, the RLC recommends removing sub-part (c) of proposed New Rule 42. If AAA retains the ability to publish awards, the rules should at a minimum require AAA to obtain the consent of both parties and to provide an opportunity for parties to offer redactions of any sensitive information in awards beyond merely parties and witnesses before publication.

V. Conclusion

The Retail Litigation Center commends AAA for soliciting and considering public comments on its proposed rule change and strongly recommends that all such comments be published on AAA's website. The AAA is a valued partner of businesses, consumers, and employees in dispute resolution and many of the proposed amendments will enhance the AAA's ability to help resolve disputes fairly and efficiently. As discussed above, some amendments could use further consideration to ensure all parties to an arbitration proceed fully informed, well-represented, and with all attendant rights necessary in effective dispute resolution.

Sincerely,

Deborah White, President
Larissa Whittingham, Litigation Counsel
Retail Litigation Center

Advocacy Group Comment #9

Attorney(s): **Debra S. Katz, Adam Herzog, Rachel E. Green, Rebecca Peterson-Fisher, Hugh Baran (Katz Banks Kumin). Plus 149 Employment Law Firms, Bar Associations, and Organizations – See signature below for all names and organizations.**
Law Firm: **Katz Banks Kumin**
City: **Washington, DC**
Date Received**: 2/28/25**

Cover Email:

Good evening,

Our firm Katz Banks Kumin LLP recently learned that the American Arbitration Association has proposed significant revisions to its Employment Arbitration Rules, and set an extremely brief public comment period for interested parties to weigh in. We provide the attached set of public comments on behalf of 150 employment law firms, bar associations, and organizations that represent workers in 32 states, the District of Columbia, and Puerto Rico.

As discussed in our letter, we urge the AAA to delay the adoption of the Proposed Revisions to the Employment Arbitration Rules and reconvene a fair-minded process—one in which a wide range of stakeholders including plaintiffs' side attorneys can participate. In addition, we provide substantive proposals in opposition to many of the AAA's proposed revisions.

Given the feedback we received from our plaintiffs' side colleagues in the rush to put together this submission, we are confident many others have additional views on the significant matters raised by the proposed rules.

Thank you,
Hugh Baran, Rachel Green, Rebecca Peterson-Fisher, Adam Herzog, and Debra Katz

PUBLIC COMMENT OF KATZ BANKS KUMIN LLP AND 149 OTHER EMPLOYMENT LAW FIRMS, BAR ASSOCIATIONS, AND ORGANIZATIONS ON THE AAA's PROPOSED AMENDMENTS TO THE EMPLOYMENT ARBITRATION RULES FEBRUARY 28, 2025

To the American Arbitration Association:

We are 150 law firms, bar associations, and organizations that represent workers— including in wage theft, whistleblower, and other employment matters—in 32 states, the District of Columbia, and Puerto Rico. We write this Public Comment with respect to the American Arbitration Association's proposed revisions to the Employment Arbitration Rules ("Proposed Revisions"). We represent employees in a wide range of industries and of varying income levels. We write because we are dismayed by many of the Proposed Revisions, which constitute a major change to the Employment

Arbitration Rules. We are deeply concerned that the adoption of these proposed revisions, without further consideration and changes, would make the AAA an unfair, biased forum that is structurally biased in favor of employers—and one that cuts against many of the very safeguards that the AAA has adopted in recent years, such as the Due Process Protocol.

As you are aware, most employees have no power to negotiate the use of the Employment Arbitration Rules, and they are frequently imposed as part of employer-mandated forced arbitration provisions. As of 2018, 56% of all private-sector non-union employees were subject to forced arbitration by their employers, including 64.5% of workers earning less than $13 per hour.[1] These numbers were projected to grow to more than 80% of private-sector nonunion workers by 2024.[2] And AAA is one of the most frequently used arbitration providers by employers imposing forced arbitration, designated as the arbitration provider in approximately half of all forced arbitration provisions.[3] The sheer breadth of workers who will be affected by any revisions to these rules underscores why the involvement of workers' advocates in any rule-redrafting is particularly important. But as far as we can tell, worker advocates were not given any meaningful opportunity to participate in the process that developed the Proposed Revisions.

Indeed, as of this writing, we lack any real information about the process by which AAA developed the Proposed Revisions. All that the AAA has said is that "In 2024, the AAA embarked on a project to revise our Employment Arbitration Rules, with an eye toward

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[1] *See Alexander J.S. Colvin, The growing use of mandatory arbitration, Economic Policy InsΘtute, at 9 (2018), .https://www.epi.org/files/pdf/144131.pdf.*

[2] *Kate Hamaji et al., Unchecked Corporate Power: Forced arbitration, the enforcement crisis, and how workers are fighting back, Center for Popular Democracy & Economic Policy Institute (2019), https://populardemocracy.org/unchecked-corporate-power.*

Litigation: Access, Process, and Outcomes, at 34–35 (2014), https://hdl.handle.net/1813/74294.

modernizing and clarifying these rules."[4] Nothing is stated about who was involved in this project. In addition, the public comment period has been extremely short, suggesting the AAA is not interested in meaningful scrutiny of the Proposed Revisions. Based on a search of the Internet Archive, the website announcing the Proposed Revisions and comment period was only posted on AAA's website on January 29, 2025, and commenters have only been given one month—till February 28, 2025—to respond.

Given all this, we urge the AAA to delay the adoption of the Proposed Revisions to the Employment Arbitration Rules and reconvene a fair-minded process—one in which a wide range of stakeholders including plaintiffs' side attorneys can participate.

In light of the AAA's stated commitment to being a fair and neutral forum for employees, we very much hope you will suspend the redrafting process and invite worker advocates to meaningfully join these conversations to develop Employment Arbitration Rules that ensure AAA arbitration lives up to the promise of the Due Process Protocol. To the extent that the AAA refuses to adjust the timeline for the adoption of these Proposed Revisions and invite worker advocates to the conversation, however, we urge you to reconsider and reject many of the Proposed Revisions. Below, we outline our specific concerns with the Proposed Revisions—and make a number of specific recommendations for further changes.

III. *AAA Rules are a Floor, not a Ceiling*

As a general matter, the AAA rules establish a floor, but not a ceiling, for procedural rights and protections. The AAA should commit to honor the terms of arbitration provisions which provide greater procedural rights and protections to the parties.

IV. *Discovery*

The Proposed R-21, governing "Exchange of Information," creates a much narrower discovery standard than that used in federal courts. Specifically, Proposed R-21 (b)(iii) provides that the arbitrator may require the parties, in response to reasonable document requests, to make available to the other party documents in the responding party's possession or custody that are not otherwise readily available to the party seeking the documents, and that are reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues. Documents must only be provided to the other party if those conditions are met. This Proposed rule thus requires the requesting party to have a reasonable belief that the documents they seek are: (1) relevant, (2) not readily available, (3) reasonably believed to exist, and (4) material to the outcome of disputed issues.

Should the AAA adopt this rule, the AAA rules would be significantly more onerous to all parties seeking discovery than the Federal Rules of Civil Procedure, which define the scope of discovery as follows:

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[4] *American Arbitration Association, Summary of Proposed Revisions to Employment Arbitration Rules,* https://go.adr.org/rs/294-SFS-516/images/AAA_Summary%20of%20Proposed%20Revisions_Employment%20_2025%20Update.pdf?version=0.

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the

discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

F.R.C.P. Rule 34(b)(1). The Federal Rules of Civil Procedure permit parties to seek discovery that is "relevant to any party's claim or defense," and provide no requirement that any party demonstrate that the sought-for discovery is "material" to the outcome of disputed issues. The counterbalancing force to the Federal Rules' permissive approach to broad discovery is that discovery must be "proportional to the needs of the case." F.R.C.P. Rule 34(b)(1). Illustrating the need for broad discovery of documents, most parties do not have the ability to define or estimate what documents will be "material" to the outcome of disputed issues before seeking and reviewing those documents during discovery. The narrow Proposed R-21 is likely to disproportionately harm employees' ability to seek and obtain discovery from their employers in AAA arbitration, because employees are unlikely to have insight into, and therefore are unlikely to be able to define with particularity, the small universe of employer documents that meet requirements (1) through (4). It is therefore likely to further hinder employee efforts to pursue claims against their employers through arbitration.

Moreover, the proposed new standard is likely to lead to objections and litigation over whether a party's belief that a document even exists is "reasonable" or "material" before the responding party is even obligated to determine whether responsive documents exist. Much ink may be needlessly spilled over threshold disputes that slow down the progress of litigation when the parties' time would be better spent exchanging information.

Finally, by limiting discoverability to issues which are material and disputed without requiring the parties to stipulate to issues not in dispute risks hamstringing a claimant's ability to prove basics facts necessary to their case, such as dates of employment, reporting structure, and compensation.

Proposed R-21 part (b)(iv) provides that the arbitrator may require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. This vague standard, "the form most convenient and economical for the party in possession of such documents," has a significant risk of misuse, with likely disproportionate disadvantages for employees in arbitration. It is not difficult to imagine an employer located in a remote location to determine that it is "most convenient and economical" for the employer to produce the documents in a physical, non-electronic form, for example several dozen boxes, either shipped to the employee or available on-site for the employee's in-person review. While these options may be more "convenient and economical" for the employer, they would pose an enormous burden for an individual plaintiff who is unlikely to have the resources available to scan and process such an enormous quantity of physical documents. Or, an employer may find it more "convenient and economical" to produce electronic data

in a format used in its business that is not a common file type and requires specialized software to interpret. In virtually all cases, the employee will have fewer resources than the employer. Furthermore, as you know, the employee is more likely to be self- represented. This Proposed R-21(b)(iv) would allow well-resourced employers to impose unfair burdens on self-represented employees and low-paid workers.

Finally, Proposed R-21 has removed language in the existing rules providing that the arbitrator has the authority to order "discovery, by way of deposition, interrogatory, document production, or otherwise." Removal of this clear delegation of authority to the arbitrator creates ambiguity around whether the arbitrator can order the parties to take a deposition, or to respond to interrogatories and risks setting expectations for parties and arbitrators that these basic discovery tools are available only upon the showing of extraordinary need.

PROPOSALS:

VIII. Proposed R-21(b)(iii) be amended to mirror the factors delineating the scope of discovery as provided in F.R.C.P. 34(b)(1), to strike a better balance between a permissive, broad scope of discovery, tempered by proportionality to the needs of the case.

IX. Proposed R-21(b)(iv) be amended to require the parties to exchange documents in common file formats, transmitted electronically, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form.

X. Proposed R-21 be amended to add part (b)(v), providing that the arbitrator may "require the parties to comply with deposition subpoenas, interrogatories, or document requests."

III. Jurisdiction

The Proposed R-7, governing "Jurisdiction," considerably expands the power that an arbitrator has over the arbitrability of the claims brought before them—upending the presumption that questions of arbitrability are generally for courts to decide absent clear and unmistakable agreement of the parties. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."). Normally, when parties raise the question of "who should decide arbitrability, there is a presumption that the question should be resolved by the court." *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, 6 F.4th 308, 317 (2d Cir. 2021); *see First Options of Chi.*, 514 U.S. at 944–45.

But under Proposed R-7, the arbitrators can as a default matter rule on their own jurisdiction as to the arbitrability of claims or counterclaims asserted before them, without waiting for a court to decide whether they have in fact been delegated that authority. This is a significant deviation from the current rules that essentially adds a delegation clause in the AAA Employment Rules.

This new rule is comparable to R-7 of the AAA Commercial Arbitration Rules and Mediation Procedures. But the bargaining power in commercial disputes, governed by AAA's Commercial Arbitration Rules, is different from that in employer-employee disputes, which would be governed by these new AAA Employment Arbitration Rules. When commercial parties select the Commercial Arbitration Rules in their arbitration provisions, they can be presumed to understand the import of delegating power to the arbitrator to rule on the arbitrability of all claims and counterclaims before them. But employees and workers are not comparably situated to their employers and should not be subject to a similar degree of auto- delegation through this proposed rule. *See Vidal v. Advanced Care Staffing, LLC*, No. 22-CV- 5535 (NRM)(MMH), 2023 WL 2783251, at *10 (E.D.N.Y. Apr. 4, 2023) ("Sophisticated commercial actors may be aware . . . that the incorporation of the AAA Commercial Rules signals the existence of a delegation clause. But it is highly unlikely that a foreign nurse unfamiliar with United States law, let alone caselaw surrounding the interpretation of arbitration agreements, would see a reference to the AAA Commercial Rules in the contract and reach that same conclusion, i.e., understand that such incorporation would in any way reflect an actual intent to delegate the question of arbitrability to the arbitrator.") (citations omitted).

If this change in Proposed R-7 is adopted, every employer could argue that they have an imputed delegation clause about enforceability of their arbitration clauses, as long as the arbitration provision with their employees mentions these AAA Employment Rules. This is inherently unfair to employees who, unlike litigants in commercial disputes, are unlikely to be repeat users of arbitration or have the resources and legal counsel to advise them on the impact of this type of delegation clause.

Employees will be faced with arbitration provisions in their employment offers with little to no information explaining the implications of agreeing to the use of AAA rules for all arbitrations, let alone an explanation of the implications of agreeing to delegate the arbitrability of all claims or counterclaims to the arbitrator. Employees thereby are unlikely to be able to comprehend the potential implications of signing an arbitration clause that references rules that delegate the decision about arbitrability of claims and counterclaims to the arbitrator. Moreover, AAA's rules should recognize that some questions may not be legally delegated to arbitrators**.**
See, e.g., *New Prime Inc. v. Oliveira*, 586 U.S. 105, 112 (2019) (court must decide whether FAA exemption applies regardless of delegation clause).

PROPOSALS:

f. At a minimum, Proposed R-7 should be rejected and the current R-7 should remain unchanged.

g. Proposed R-7 should be amended to make clear that if employers and employees want to contract into delegation to the arbitrator of the decision of whether claims are arbitrable, merely incorporating that delegation in via the AAA rules is insufficient. That delegation

must be explicitly spelled out in the arbitration agreement, not simply in AAA rules or incorporated by reference.

h. Proposed R-7 should be amended to reflect that arbitrability issues that cannot be delegated to arbitrators—including threshold questions of formation and the Section 1 transportation workers exemption—cannot be decided by the arbitrator if either party wants a court to decide that question.

v. *Injunctive Relief*

The Proposed R-35, governing "Interim Measures," addresses the circumstances under which the arbitrator may grant injunctions. This Rule marks a considerable expansion of arbitrator authority to order injunctive relief: usually, parties must go to Court for injunctive relief unless their arbitration agreement specifically provides for the arbitrator's ability to order injunctive relief. R-35, therefore, essentially provides arbitrators with the power of the Courts to order injunctions if the arbitration agreement incorporates the AAA Employment Arbitration Rules. This is especially concerning in the context of confidentiality, non-disclosure provisions, and non-compete agreements, which often include a carveout providing the non-breaching party with the right to seek injunctive relief in Court. Concerningly, R-35 includes no guideposts regarding what standards an arbitrator must follow when issuing an injunction, no limitations on whether an arbitrator may enjoin third parties, and no acknowledgement that each state has its own arbitration act governing what powers the arbitrator has and under what circumstances the arbitrator may grant injunctive relief. By granting this power to arbitrators broadly via R-35, the AAA Employment Arbitration Rules may violate state laws.

PROPOSALS:

a. Proposed R-35 should include language clarifying that arbitrators may only grant injunctive relief if doing so does not conflict state laws, and is material to the case at hand.

b. Proposed R-35 should be amended to clarify that arbitrators may not enter injunctions restraining someone in their liberty to get another job.

c. Proposed R-35 should be amended to include a kickout provision to permit *de novo* review by a court of a liberty-restraining injunction.

d. Proposed R-35 should be amended to provide that injunctions entered by an arbitrator cannot apply to third parties not before the arbitrator.

vi. *Fee Schedule*

The Proposed R-1, governing "Applicable Rules of Arbitration," permits the AAA to make the initial decision whether or not to apply the Employment Rules and the Employment/Workplace Fee

Schedule to a dispute, *and* allows arbitrators to reject that determination. Specifically, Proposed R-1 states: "The AAA has the initial authority to apply or not to apply the Employment/Workplace Arbitration Rules and/or the Employment/Workplace Fee Schedule. If either party disagrees with the AAA's decision, the objecting party must submit the objection by the due date for filing an answer to the demand for arbitration. If an objection is filed, the arbitrator shall have the authority to make the final decision on which AAA rules and fee schedule will apply."

This Proposed R-1 provides the AAA and the arbitrator with authority to apply or not apply the Employment/Workplace Fee Schedule. This marks a change from the current standard, which provides that the AAA *will* apply the Employment/Workplace Fee Schedule. This change could provide the AAA and the arbitrator with the power to ignore, or otherwise disregard, the presumption that the Employment/Workplace Fee Schedule and Rules should apply to employment disputes arbitrated by the AAA. It could also create a chilling effect on employees' pursuit of their rights if they think the Commercial Fee Schedule may apply if the AAA or the arbitrator so chooses, or that the arbitrator may enforce "loser pays" or fee-splitting provisions that displace the Employment/Workplace Fee Schedule—under which arbitrator compensation is by default paid by the employer. As twelve States Attorneys General wrote to the AAA in 2019, such practices "may discourage workers . . . from proceeding through the arbitration process by imposing significant costs that conflict with the provisions of the Employment/Workplace Fee Schedule."[5]

Furthermore, R-1 states that the parties "shall be deemed to have made these rules a part of their arbitration agreement" whenever they have provided for arbitration by the AAA or under the AAA Employment/Workplace Arbitration Rules. It is conceivable that someone has provided for arbitration by the AAA but has not specified which set of AAA Rules applies. For example, this issue may arise in a case involving multiple claims, where some claims may fall under different sets of AAA Rules than others. This could result in a party being required to use the Employment/Workplace Rules for the employment/workplace claims, but another set of AAA Rules for other claims. The ambiguity caused by R-1 could cause avoidable inefficiencies and time-consuming delays; whereas a default rule applying the use of the Employment/Workplace Arbitration Rules for all claims in these situations would avoid such disputes.

PROPOSALS:

h. Proposed R-1 be amended to reflect the status quo, *i.e.*, that the AAA Employment/Workplace Fee Schedule must apply to any workplace claim filed by an employee.

i. Proposed R-1 be amended to clarify that if any one claim brought before the arbitrator is an employment or workplace claim subject to the AAA Employment/Workplace Arbitration Rules, these Rules should apply, even if the remainder of the claims would not otherwise

fall under the Rules, and even if the remainder of the claims are against non-employer parties.

VI. Appointment of Arbitrators

The Proposed R-13, governing "Number and Appointment of Neutral Arbitrators," removes language providing that the roster of available arbitrators "will be established on a non- discriminatory basis, diverse by gender, ethnicity, background, and qualifications," previously in

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[5] Letter from Twelve States Attorneys General to Ann Lesser, *Request for Information Regarding Arbitration of Employment-Related Claims* (Nov.12, 2019), https://oag.dc.gov/sites/default/files/2019-11/AAA-Arbitration-Data-Letter.pdf.

Rule 12(b)(iii). The removal of this language appears to be a recognition that the AAA has, to date, failed to recruit a diverse roster of arbitrators from a range of professional, racial, ethnic, and other backgrounds. Beyond that, the removal of this language will meaningfully impair parties on both sides of arbitrations before the AAA because it will result in less diverse arbitrators arbitrating important matters, and research shows that diversity improves strategic thinking, innovation, and problem-solving. The employees and employers coming before AAA arbitrators will be diverse in gender, ethnicity, background, and qualifications, and they deserve to face an arbitrator who has been pulled from a similarly diverse roster.

In addition, R-13(b)(v) added language providing that, unless the parties agree otherwise, "where there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators." This change removed the right of either party to strike, as previously provided under Rule 12(c)(ii), where there are two or more claimants or two or more respondents. It is not unusual for an employment arbitration to involve two or more claimants or two or more respondents, particularly for wage theft cases involving more than one worker not getting paid properly and naming as defendants both the employer entity and individual supervisors. Removing either party's right to strike, especially paired with the AAA's removal of the aforementioned language asserting its dedication to ensuring its arbitrators are diverse by gender, ethnicity, background, and qualifications, removes considerable power from all parties in arbitration disputes before the AAA.

PROPOSALS:

(c) Proposed R-13 be amended to re-insert the language from current Rule 12(b)(iii), providing that the roster of available arbitrators "will be established on a non-discriminatory basis, diverse by gender, ethnicity, background, and qualifications."

(d) If AAA is unwilling to re-insert the same language from the current rule, at the very least the roster of available arbitrators should be diverse by background (in terms of defense-side, plaintiff-side, bench).

(e) Proposed R-13 be amended to remove part (b)(v), which revokes the current right to strike if there are two or more claimants or two or more respondents.

(f) Proposed R-13 be amended to provide that the roster of available arbitrators used in a given dispute be drawn from a cross-section of the community where the arbitration will be held.

VII. Confidentiality

The Proposed R-42, governing "Confidentiality," expands the power of the arbitrator with respect to issuing orders concerning confidentiality. The current Rule 23 merely provides that the arbitrator shall maintain the confidentiality of the arbitration and "shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary." R-42 provides that the arbitrator "may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information."

The new rule thereby appears to authorize the arbitrator to issue protective orders that cover a potentially broad range of topics, including "any other matters in connection with the arbitration." In doing so, the new rule essentially delegates to the arbitrator the ability to import a nondisclosure agreement into the arbitration that could go far and beyond protecting the confidentiality of typical information such as medical records, financial records, and trade secrets. This could result in wide-ranging confidentiality orders restraining employees from being able to discuss what happened during their employment and terminations. This could also result in arbitrators attempting to issue gag orders applying to third parties who are not parties to the arbitration.

PROPOSALS:

1. R-42 be amended to provide only that the arbitrator "may make orders concerning the confidentiality of the arbitration proceedings and may take measures for protecting trade secrets and confidential information."

2. R-42 be amended to clarify that matters that arose before or outside of the arbitration proceeding or the award are not subject to a confidentiality order, absent other independent confidentiality restrictions or the parties' agreement, entered *after* the arbitration has been filed, to keep those matters confidential.

VIII. *Interpreters*

The Proposed R-20, governing "Interpreters," requires the party who "wants" the interpreter to make the arrangements and pay for the costs. But this appears to represent a departure from the default rule that a party who is calling a deposition must pay associated costs of transcription and interpretation.

However, for circumstances where parties both rely on the interpreter (such as at the actual arbitration), the parties should share the costs.

PROPOSALS:

1. Proposed R-20 be amended to clarify that a party calling a deposition is required to pay the costs of interpretation.

2. Proposed R-20 be amended to provide that for situations where both parties rely on the interpreter, the parties should share the cost.

IX. *Extensions of Time and Postponements*

The Proposed R-29, governing "Extensions of Time and Postponements," provides that extensions of time established by the Rules or the parties' arbitration agreement may only be provided "for good cause." "Good cause," however, is not defined. Given that many arbitrations result in the parties agreeing to mediate, and that the parties may by mutual agreement seek to extend arbitration deadlines during the period of mediation, R-29 should include clear language stating that mutual agreement to mediate constitutes "good cause" to extend time. Further, R-29's changes could be read to provide the arbitrator with veto power over the parties' mutual agreement to extend time. Given that an overarching purpose of arbitration is to effectuate the agreement of the parties, R-29 should provide that the parties can extend time by mutual agreement, whether or not an arbitrator finds "good cause."

PROPOSALS:

1. R-29 be amended to state that "good cause" includes the parties' mutual agreement to participate in mediation, whether or not the mediation is with AAA.

2. R-29 be amended to clarify that the arbitrator does not have veto power over the parties' mutual agreement to modify any period of time established by the Rules or the parties' arbitration agreement. See Part I.

X. *Declining to Administer Arbitration*

The Proposed R-10, governing "Declining or Ceasing Administration," provides that the AAA "in its sole discretion may make the administrative determination to decline or accept a Demand for Arbitration, stop the administration of an ongoing arbitration and/or decline to administer future cases

from a party" under certain circumstances, (a) where a party or the party's representative fails to abide by the AAA Standards of Conduct, or (b) where a party "fails to submit payment of fees requested in accordance with the Rules or Employment/Workplace Fee Schedule."

This appears to depart from the AAA's current policy, which states that "if the Association determines that a dispute resolution program on its face substantially and materially deviates from the minimum due process standards of the Employment Arbitration Rules and Mediation Procedures and the Due Process Protocol, the Association may decline to administer cases under that program."[6] Such a safeguard is important to deter employer overreaching in the drafting of arbitration provisions that violate the AAA's due process standards and/or federal and state law. Moreover, the proposed rule appears to grant arbitrators discretion to effectively impose terminating sanctions on a party if the arbitrator finds an attorney or party has violated AAA's Standards of Conduct, an extraordinary remedy very rarely granted in court.

PROPOSALS:

1. Proposed R-10 should be amended to provide that the reasons stated in the current policy for declining to administer arbitration – deviation from the minimum due process standards of the Employment Arbitration Rules and the Due Process Protocol – are also a valid reason for the AAA to decline to accept a Demand for Arbitration, stop the administration of an ongoing arbitration, and/or decline to administer future cases from a party and allow the worker to return to court.

2.

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[6] *See Employment Rules at 7-8, "AAA's Policy on Employment ADR,"* https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf.

2. Proposed R-10 should further be amended to ensure that the arbitrator in a given matter cannot effectively impose terminating sanctions for an alleged violation of AAA's Standards of Conduct without recourse for a party to appeal that decision to AAA.

Sincerely,

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THE UNDERSIGNED 149 EMPLOYMENT LAW FIRMS, ASSOCIATIONS, AND ORGANIZATIONS

cc: **State Attorneys General** from the District of Columbia, California, Colorado, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Vermont, and Washington

ADDITIONAL EMPLOYMENT LAW FIRMS, BAR ASSOCIATIONS, AND ORGANIZATIONAL SIGNATORIES

California Employment Lawyers Association Colorado Plaintiff Employment Lawyers Association
Metropolitan Washington Employment Law Association
Minnesota Chapter of the National Employment Lawyers Association National Employment Lawyers Association - New Jersey
National Employment Lawyers Association-Alabama Affiliate (NELA-AL) National Employment Lawyers Association/New York
National Lawyers Guild Labor and Employment Committee NC-NELA
Washington Employment Lawyers Association
Columbia Legal Services Equal Rights Advocates Make the Road New York
National Employment Law Project PowerSwitch Action
Sugar Law Center for Economic & Social Justice Towards Justice
Workplace Fairness Aaron Halegua, PLLC
Alan Lescht and Associates PC Alderman, Devorsetz & Hora PLLC Avloni Law a Professional Corporation Bain Mazza & Debski LLP
Bantle & Levy LLP Benham-Baker Legal, PC Burrell Kagin Law LLP Butler Curwood, PLC
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Higgins Benjamin, PLLC
HKM Employment Attorneys LLP Hunter Pyle Law PC
Joseph, Greenwald & Laake, PA Justice at Work PA
Justice Law Corporation Kakalec Law PLLC Katz Melinger PLLC Kaupp & Feinberg, LLP King Employment Law
Kitzer Rochel, PLLP
Kornbluth Ginsberg Law Group, P.A. Kosinski and Thiagaraj, LLP
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Reisch Law
Ritz Clark & Ben-Asher LLP Robert B. Landry III PLC Roumel Law
Salahi PC
Sanford Heisler Sharp McKnight Solidarity Law
Stember Cohn & Davidson-Welling, LLC Terp Law
Teukolsky Law, APC The Bowman Law Office The Canon Law Firm
The Consumer & Employee Rights Law Firm PC The Jhaveri-Weeks Firm, P.C.
The Lacy Employment Law Firm
The Law Offices of Magen E. Kellam, P.A. The Law Offices of Traci M. Hinden
The Marek Law Firm

Tin Fulton Walker & Owen, PLLC Tommaney Law PLLC
Turchik Law Firm PC Tycko & Zavareei LLP Urba Law PLLC Valerian Law, P.C. Van Kampen Law
Vladeck, Raskin & Clark, P.C. Watkins Law
Wienand & Bagin William T. Wilson, Esq.
Wind of the Spirit, Immigrant Resource Center Woolf Law
Zeff Law Firm, LLC
Zipin, Amster, & Greenberg LLC

Advocacy Group Comment #10

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Advocacy Groups: **American Financial Services Association; US Chamber Litigation Center; US Chamber Institute for Legal Reform; Alliance for Automotive Innovation; Mayer Brown**
City: **Washington, DC**
Date Received**: 2/28/25**

February 28, 2025

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce ("the Chamber"), the American Financial Services Association ("AFSA"), and the Alliance for Automotive Innovation ("AAI"), we write in response to the AAA's invitation for public comment on the proposed amendments to the AAA Consumer Arbitration Rules and the AAA Employment Rules and Mediation Procedures.

As we discuss below, while some of these proposed changes are beneficial, others raise significant concerns for our respective members.

Contents

Introduction

The Chamber, AFSA, and AAI thank the AAA for providing this opportunity to comment on the proposed new Consumer and Employment Arbitration Rules.

The U.S. Chamber of Commerce is the world's largest business association, with hundreds of thousands of direct members nationwide, and indirectly representing the interests of millions of businesses of every size, in every industry sector, and from every region of the country. The U.S. Chamber of Commerce Institute for Legal Reform ("ILR") is a program of the U.S. Chamber of Commerce dedicated to championing a fair legal system that promotes economic growth and opportunity. The U.S. Chamber of Commerce Litigation Center is the litigation arm of the U.S. Chamber of Commerce and fights for business at every level of the U.S. judicial system, on virtually every issue affecting business. The Chamber and its ILR and Litigation Center have written extensively and care deeply about arbitration issues.

The AFSA is the national trade association for the consumer credit industry, with members ranging in size from large international financial services firms to single-office, independently owned consumer finance companies. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The AAI is an automotive industry trade association whose members collectively manufacture more than 95% of all new cars and light trucks sold in the U.S. AAI's members include Ford Motor Company, General Motors, Stellantis/FCA, BMW, Ferrari, Honda, Hyundai, Isuzi, Jaguar, Kia, Mazda, Mercedes-Benz, Mitsubishi, Nissan, Porsche, Subaru, Toyota, Volkswagen, and Volvo, as well as numerous global Tier I and

Tier II automotive component suppliers, battery producers, and semiconductor makers.

Many Chamber, AFSA, and AAI members and affiliates depend on arbitration as a low- cost and efficient mechanism to resolve disputes of all types—including consumer and workplace disputes—in a fair and swift manner. The Chamber, AFSA, and AAI have long supported arbitration as a beneficial dispute resolution mechanism for all parties, including consumers and workers. Indeed, based on our experience and those of our respective members, arbitration allows businesses to reach fair resolutions of disputes with customers, clients, users, workers, and independent contractors, while avoiding the high cost of litigation in court. This in turn allows businesses to keep prices affordable and sustain economic growth.

We therefore appreciate the AAA's invitation for comments from stakeholders on the proposed rule changes. The guiding principles behind our comments are straightforward: Arbitration should be fair to all parties; it should allow for the resolution of disputes in a practical and cost-effective way that is at least as efficient as the resolution of individual claims in court; and it should honor party choice and procedural flexibility—characteristics that are the hallmarks of arbitration.

In Part I of these Comments, we address specific proposed changes to the Consumer and Employment Rules. As noted above, many of the proposed amendments are positive developments. But additional changes or clarifications are warranted to protect the efficiency and fairness of arbitration for all parties; we suggest revisions to the proposed rules based on the real-world experience of Chamber, AFSA, and AAI members and feedback we have received from them. Among other things:

j. The standards governing when the Consumer and Employment Rules apply should be simpler and more predictable than set forth in the proposed rules. The proposed rules lack clarity about when the Consumer or Employment Rules apply to standalone arbitration agreements, submission agreements, and arbitration clauses in certain types of consumer-like and independent-contractor contracts.

k. Filing requirements should include additional identifying information from claimants and signed certifications from claimants and their counsel. These requirements will help deter filings in the names of claimants who are unaware of the proceedings, do not have arbitration agreements with the business (because they actually are not its customers or workers), or simply do not exist (or are deceased). These problems have become pervasive.

l. The proposed changes improperly curtail parties' ability to file dispositive motions. That impediment would make arbitrations more expensive and inefficient. Under the AAA's proposed changes, the parties will still have to argue those threshold legal issues to the

arbitrator. But the change would make them to wait until the hearing to do so forcing the parties, the arbitrator, and witnesses to waste resources preparing for and participating in a hearing that will (in many instances unnecessarily) cover all other legal and factual issues.

m. The proposed Consumer Rules should not mandate documents-only desk arbitrations over a party's objection. To be sure, purely legal issues often can be resolved on the papers. But when a case turns on disputed factual issues, parties should be entitled to a hearing at which they can cross-examine the witnesses so the arbitrator can assess credibility. And in many mass arbitrations, claimants' counsel have sought desk arbitrations in an apparent effort to conceal the claimant's lack of involvement—or even that the claimant is fictitious or has no idea that an arbitration has been filed in his or her name. Accordingly, any party should have the right to request at least a telephonic or virtual hearing.

n. The proposed new procedures for exchange of information will needlessly make arbitration more expensive and less fair. The rules instead should specify what must be exchanged in every case (witness lists and the documents on which the parties intend to rely), then authorize additional targeted discovery if approved by the arbitrator as necessary for a fair process. By contrast, the proposed rules appear to allow parties to conceal documents on which they intend to rely or to allow for the same unrestricted document discovery that makes court proceedings so burdensome and expensive for consumers, workers, and businesses alike. And troublingly, the proposed rules also authorize arbitrators to propound their own discovery requests to the parties, which contravenes norms of party-led discovery and frustrates party efforts to agree to limit discovery to reduce the cost of dispute resolution.

In Part II, we address the important subject of mass arbitrations—an issue that the proposed amendments do not address directly and that cries out for further changes to AAA rules and fee schedules. In adopting the Mass Arbitration Supplementary Rules and new fee schedules for mass arbitrations in January 2024, the AAA took a constructive first step towards addressing the worst abuses in mass arbitration filings. But abusive mass arbitrations continue unabated. These campaigns seek to weaponize those AAA mass arbitration fee schedules and loopholes in the existing Mass Arbitration Supplementary Rules to extract settlements from businesses based almost entirely on the threat of aggregated AAA fees rather than the underlying merits of the claims. Many Chamber, AFSA, and AAI members have experienced these abuses firsthand. We strongly urge AAA to make additional changes to guard against to abusive mass arbitrations and to ensure that AAA arbitration remains a viable forum for consumer and workplace disputes.

We again appreciate the opportunity to submit these comments and thank AAA for its willingness to solicit feedback. Thank you for considering these comments.

(g) **Comments on Particular Proposed Changes to the Consumer and Employment Arbitration Rules.**

- ***Applicability of the rules***

The proposed Consumer and Employment Rules each include a rewritten Rule R-1 intended to clarify when the AAA will apply those rules to a dispute. The desire to provide greater clarity is commendable, as is the effort to harmonize the wording and structure of the corresponding Consumer and Employment Rules. But the AAA should make further changes to clarify the applicability of these rules in certain frequently recurring situations.

***Consumer Rules*:** The current Consumer Rule R-1(a) states that the Consumer Rules will apply in four situations: (1) when the arbitration agreement selects the Consumer Rules; (2) when the agreement selects the superseded Supplementary Procedures for Consumer-Related Disputes; (3) when the agreement is in a consumer contract but does not select specific AAA rules; and (4) when the agreement is in a consumer contract but selects different rules. The new proposed Rule R-1(a) streamlines this list, but in an unclear way, as it indicates that the Consumer Rules apply whenever parties "have provided for arbitration by the American Arbitration Association ('AAA') or have an arbitration agreement within a consumer agreement." The intent may be to select the Consumer Rules for any arbitration initiated under an arbitration clause in a consumer agreement (as defined by the new Rule R-1(b)), but the placement of the modifier "in a consumer agreement"—as well as the use of the conjunction "or"—in the proposed Rule R-1(a) makes the sentence ambiguous. In addition, the proposed language is ambiguous with respect to: (1) freestanding arbitration agreements that were executed in conjunction with a consumer agreement and (2) when parties wish to arbitrate a dispute arising out of a consumer transaction but have not entered into a pre-dispute arbitration agreement.

To avoid this confusion, **the AAA should revise the first sentence of Rule R-1(a) to read:**

The parties shall be deemed to have made the Consumer Arbitration Rules ('Rules') a part of their arbitration agreement or submission agreement when they have provided for arbitration by the American Arbitration Association ('AAA') and either: (1) the arbitration agreement is in or was entered into in connection with a consumer agreement (as defined below); (2) the arbitration or submission agreement states that the Consumer Arbitration Rules (or the superseded Supplementary Procedures for Consumer-Related Disputes) shall apply; or (3) the submission agreement is for a dispute arising out of or relating to a consumer agreement.

This revision will allow parties to be certain that the Consumer Rules will apply when they

name those rules in their arbitration or submission agreement. And this revision confirms that consumer disputes, whether arising out of an arbitration clause in a consumer contract or a freestanding arbitration or submission agreement, will be administered under the Consumer Rules and fee schedule.

Our proposed revision also remedies another defect with the proposed Rule R-1(a), which (in an apparent attempt at simplification) deleted the current language authorizing parties to select application of the Consumer Rules in their arbitration agreement. The proposed Employment Rules, however, retained the language allowing parties to select application of those Rules in their arbitration agreement, and the same should be true of the Consumer Rules. Otherwise, the deletion of the language allowing parties to select the Consumer Rules would cast into doubt which rules and fee schedule will apply to those agreements—of which there are hundreds of millions. It instead opens the door to a dispute in every case over whether the underlying contract qualifies as a "consumer agreement" under Rule R-1(b). And those disputes will be particularly difficult to resolve under the language of proposed Rule R-1(b), which drops the examples of contracts that do and do not qualify as "consumer agreements" from the current Rule R-1(a). **Those examples from current Rule R-1(b)** provided useful guidance to parties, and **they should be retained in the new Rule R-1(b)**.[1]

In addition, by clarifying that parties may contract for the Consumer Rules, the AAA will ensure that disputes involving products or services that might not always be strictly "for personal or household use" are certain to be administered under the Consumer Rules and fee schedule by agreement of the parties. Consider, for example, an individual's cell phone contract, credit card agreement, or subscription to productivity software. Individuals frequently use these products or services for both personal and business purposes, yet under the proposed Rule-1(a) and R-1(b), those individuals arguably would not be able to invoke the Consumer Rules and fee schedule even if the parties agree to those rules and fee schedule. It would be difficult, if not impossible, to apply the Consumer Rules to aspects of the dispute involving consumer purchases or uses while applying the Commercial Rules to aspects pertaining to business purchases or uses.

Moreover, sometimes small businesses—typically sole proprietorships—will purchase these products and services, and it may be appropriate to treat them as consumers when a dispute arises. Indeed, the law in some states analogizes small businesses to consumers, concluding that they have resources and sophistication similar to those of consumer litigants.[2] Yet small businesses are arguably precluded from availing themselves of the Consumer Rules and fee schedule under the proposed Rules R-1(a) and (b) even when the parties agree and have contracted for that result. In fact, contracts with small-business customers—or form contracts that are used interchangeably with both consumers and small-business customers—often call for arbitration under the Consumer Rules to treat those customers the same as other customers who would be qualify as consumers subject to the Consumer Rules.

Nor is there any reason not to allow parties to contract for the Consumer Rules. We are not aware of any instances in which large business-to-business contracts have inappropriately selected the Consumer Rules rather than the Commercial Rules. But even if that were to happen, proposed Rule R-1(d) gives the AAA or the arbitrator the authority to decide that the Consumer Rules should not apply to the arbitration.

***Employment Rules*:** The first sentence of proposed Employment Rule R-1(a) contains an ambiguity. It provides: "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter 'AAA') *or* under its *Employment/Workplace Arbitration Rules and Mediation Procedures* or for arbitration by the AAA of an employment dispute without specifying

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[1] *The proposed Rule R-1(b) also includes a typographical error. It ends with an asterisk footnote, but there are two asterisk footnotes, which should be combined.*

[2] *See, e.g., Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Super. Ct., 34 Cal. Rptr. 3d 659, 675 (Ct. App. 2005) ("We believe that the franchise factual context is sufficiently similar to mandatory employee/employer arbitration, or consumer arbitration, to allow" the unconscionability and public policy "principles" for employment and consumer cases "to be applied to this case.").*

particular rules" (first italics added). **The first "or" in the sentence should be deleted** to avoid confusion about whether the Employment Rules apply to disputes unrelated to employment or workplace issues. In addition, **the last two sentences of proposed Rule R-1(a) should be deleted as duplicative of proposed Rule R-1(d)**, which contains the same verbiage.[3]

Proposed Rule R-1(b) goes on to explain that the Employment Rules and associated fee schedule will be applied to disputes "between an independent contractor (working or performing as an individual and not incorporated) and a business or organization when the dispute involves work or work-related claims under independent contractor agreements, including any statutory claims." One of the asterisk footnotes to proposed Consumer Rule R-1(b) includes the same statement that the Employment Rules apply to these disputes.

In both places, the rule should be revised to specify that the Employment Rules apply to "disputes between an independent contractor (working or performing as an individual *and not as a separate business)* and a business or organization when the

dispute involves work or work-related claims under independent contractor agreements, including any statutory claims. An independent contractor is working as a separate business when the contractor is incorporated, is an unincorporated entity, or provides services under a d/b/a or business name distinct from the individual's name."

Without this change, the proposed Rule R-1(b) would unsettle the many contracts selecting arbitration under the Commercial Rules for service contracts with unincorporated businesses—as many contractors are organized as limited liability companies, general or limited partnerships, or other unincorporated structures. These disputes are often best resolved under the Commercial Rules and fee schedule, and parties should be free to contract for that result.

Moreover, **Employment Rule R-1(b) should add that "[a]ny decision by the AAA or an arbitrator to apply these Employment/Workplace Rules and fee schedule to a dispute involving an independent contractor shall not be relevant to any determination whether the independent contractor is an employee for purposes of any law."** Without this clarification, parties may become embroiled in unnecessary (and inappropriate) disputes regarding the non-existent legal implications of application of the Employment Rules to certain independent contractors.

Finally, we note that the proposed Employment Rule R-1(d) regarding how to resolve conflicts between arbitration agreements and the AAA rules—specifying that the agreement generally governs over the rules—is a positive, much needed change. The current Rule R-1 provides that if there is "an adverse material inconsistency" between the rules and the

[3] Specifically, Rule R-1(a) states: "The parties, by written agreement, may vary the procedures set forth in these Rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator." Rule R-1(d) similarly states: "The parties may agree to modify these Rules, but they must agree in writing. If they want to make changes after the arbitrator is appointed, any changes may be made only with the approval of the arbitrator."

arbitration agreement, "the arbitrator shall apply these rules" rather than the agreement. The current approach has led to considerable uncertainty, as parties frequently debated (and arbitrators reached contrary views concerning) whether particular inconsistencies are "adverse" and "material." The current approach also deviates from the principles under the Federal Arbitration Act that "arbitrators wield only the authority they are given" by the "'parties' agreement,'" and that parties "may generally shape such agreements to their liking[.]"[4] The proposed Rule R-1(d) restores the primacy of the parties' arbitration agreement (to the extent that the agreement is not unconscionable or otherwise

unenforceable). And the proposed language also harmonizes Employment Rule R-1(d) with the similar provision in the Consumer Rules, which have long taken this approach to inconsistencies between arbitration agreements and the AAA rules.[5]

3. *Case-initiation procedures*

- ***Additional filing requirements are needed to prevent fraudulent claims.***

The reorganization and clarification of the rules governing how to commence cases and what must be submitted with the demand for arbitration are extremely important and beneficial. They make the process easier to understand and more predictable to navigate. But we recommend further changes to address commonly recurring issues and prevent unfairness to the parties.

***Claimant's identifying information*:** In addition to the information required to be included with any arbitration filing under both proposed Consumer and Employment Rule R- 4(a)(iv), **claimants also should be required to provide their customer or account numbers or employee/contractor identification numbers, if any.** This information is often needed by the business to identify the claimant in its records and confirm the existence of an arbitration agreement; the claimant's contact information alone often is not sufficient (although the new requirement that claimants provide their email addresses with their demands for arbitration is helpful). And claimants initiating arbitrations often will attach arbitration clauses printed from a company's publicly available website, which do not show that the claimant is actually a party to an arbitration agreement with the business. Indeed, as the AAA is well aware, there are often discrepancies between the claimant's contact information provided with the demand and the information for that individual in the business's records. Those discrepancies—especially in the context of a mass arbitration—raise significant concerns that the claims have not truly been

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[4] *Lamps Plus, Inc. v. Varela, 587 U.S. 176, 184 (2019) (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010)).*

[5] *Specifically, current Consumer Rule R-1(c) contains materially identical language to the language in proposed Employment Rule R-1(d). That language is also continued in proposed Consumer Rule R-1(d).*

authorized by the claimants (or even that the claimants are not really customers of or workers associated with the business).

***Claimant's signature and certification*:** The filing process should also **require the claimant to sign the demand for arbitration personally, either by hand or electronically, making the following certifications:**

X. The claimant has entered into the arbitration agreement that he or she has invoked with the respondent; and

XI. if the claimant is represented by counsel, that he or she has authorized counsel to file the arbitration and consents to respondent's disclosure to the AAA, the arbitrator, and claimant's counsel of information about the claimant, the dispute, and the claimant's confidential customer or employment records, as needed to adjudicate the arbitration.

These signed certifications by claimants (who currently are not required to sign demands for arbitration at all) will help avoid improper filings in the names of individuals who have not (or do not understand that they have) authorized a lawyer to commence a legal proceeding before the AAA. This confusion is widespread in the mass arbitration context. Many mass arbitration claimants are recruited online by lawyers or other lead generators using online or social-media ads that focus on the potential payments that might be available to individuals who click to sign up rather than the reality that the individual would be signing up to be a party to an individual arbitration proceeding.[6] An average reader of these solicitations might consider them to be invitations to participate in mere investigations of a business practice or for the submission of a claim as an absent class member in a class action.

Moreover, requiring confirmation that claimants consent to the disclosure of their account or employment records when necessary will help greatly reduce the incidence of disputes over access to claimant information. Especially in the mass arbitration context, businesses and claimants' counsel frequently clash over the counsel's demand for private information—a serious concern because businesses are often obligated to keep most personal information confidential from third parties unless the claimant has consented to the disclosure.[7]

***Signed certification by claimant's counsel*:** As part of the filing process, **claimant's counsel also should be required to sign a certification that, to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the**

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[6] *See, e.g., U.S. Chamber of Commerce ILR, Mass Arbitration Shakedown: Coercing Unjustified Settlements 21 (Feb. 2023), at https://instituteforlegalreform.com/wp-content/uploads/2023/ 02/Mass-Arbitration-Shakedown-digital.pdf (displaying sample social-media solicitations for mass arbitration filings) ("Mass Arbitration Shakedown").*

[7] *See, e.g., 15 U.S.C. §§ 6801-09 (barring financial institutions from disclosing customer information to third parties without the customer's consent).*

claims are not being presented for an improper purpose (such as to harass or needlessly impose costs of arbitration), their claims are not legally frivolous, and their factual contentions have evidentiary support or, if so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery. A parallel signature requirement also should be added to counsel filing an answer or asserting a counterclaim.

This certification is modeled after Federal Rule of Civil Procedure 11(b), which (like its state-court equivalents) is intended to prohibit lawyers from filing frivolous claims. It is therefore familiar to all lawyers who might assert claims or counterclaims in AAA arbitrations. Counsel also should be required to certify that the arbitrator may impose sanctions against them if those standards are violated.[8] The proposed certification by counsel is similar to the existing requirement under Mass Arbitration Supplementary Rule MA-2 that "filings [to initiate a mass arbitration] must include an affirmation that the information provided for each individual case is true and correct to the best of the representative's knowledge."

This change (along with a companion change to Consumer and Employment Rule R-57 proposed below) will reduce confusion about arbitrators' authority to sanction counsel when appropriate. The ability to impose such sanctions is needed to deter lawyers from filing demands on behalf of non-existent claimants or on behalf of claimants who have not authorized an arbitration to be filed on their behalf. For example, the Chamber's ILR has identified numerous reports of demands for arbitration being filed by counsel in the names of individuals who, according to the respondent, are fictitious, deceased, not customers who purchased the product or service at issue, or who were unaware that arbitrations had been filed in their names.[9] Lawyers trying to use a mass arbitration to extract a settlement from the targeted business sometimes resort to the filing of ever-larger numbers of unvetted demands for arbitrations simply to drive up AAA fees that the business must pay. In these situations, it may be inappropriate to sanction the claimant for the frivolous filing. Yet under the proposed rules, the lawyers who engage in these tactics will seek to circumvent sanctions by arguing that they are not parties to the arbitration agreement and neither the agreement nor the AAA rules authorize

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[8] *Indeed, these steps are mandated by the rules of professional conduct and should also apply in the arbitration context. Model R. of Prof. Conduct 3.1 cmt. 2 ("The filing of an action . . . or similar action taken for a client" requires lawyers to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions.").*

[9] *Mass Arbitration Shakedown, supra n.6, at 37 (noting reports from defense counsel that "the number of obviously groundless claims in mass arbitrations often exceeds 30 percent of claims—and on a number of occasions has exceeded 90 percent"); see also Diana Pogosyan, Note, Issues Arising Out of Mass Arbitrations & Solutions to Combat Them, 2024 UTAH L. REV. 1173, 1186 (2024) (detailing rising abuse of mass arbitration filings).*

sanctions on counsel.[10] In court, there is no question that these lawyers could—and almost certainly would—be sanctioned.[11] AAA arbitrators should have the same authority.

Requiring additional identifying information and signed certifications at the demand-for- arbitration stage should not present a problem for real claimants and their counsel. But in the mass arbitration context, filers of abusive mass arbitrations often cannot provide this basic information because they are not vetting their clients (some of whom are not even real). And filers strive to avoid providing any certification at all as to the legitimacy of filings because they are often parroting (without investigation) information typed by unknown strangers into online claimant-recruitment forms. As a result, process arbitrators have had to order claimants' counsel to submit amended demands that include this information and require claimants' counsel to sign under a similar certification to address the problem of unverified claimants.[12] The rules should simply require this information and certifications upfront to avoid disputes and reduce the level of fraud that has long been documented.

3. ***Service requirements should conform to parties' agreements and not permit service through methods of questionable effectiveness.***

The proposed Consumer and Employment Rules both include additional clarification about how demands for arbitrations are to be served. Two aspects of the proposed revision, however, should be amended to ensure that the proper parties are notified about a new claim.

The first change relates to the fact that, in many consumer and employment or independent-contractor agreements, the parties agree on a specific method for notice of claims. Those contractual agreements regarding notice should be honored. Accordingly, rather than authorizing service of the demand for arbitration "at the last-known address" of the "party or its authorized representative," **Rule R-4(b)(iii) and Rule R-40 of both the proposed Consumer and Employment Rules should state that service should be directed to the address provided in the parties' agreement. Only if the agreement does not so provide (or cannot be done) should case-initiating documents be served in the other ways specified in the proposed rules.**

[10] *See, e.g., Herrera v. Santangelo Law Offs., P.C., 520 P.3d 698, 705-707 (Colo. Ct. App. 2022) (concluding that arbitrators lack inherent authority to impose sanctions on counsel under Colorado law).*

[11] *See, e.g., Fed. R. Civ. P. 11(c)(1) (authorizing "an appropriate sanction on any attorney, law firm, or party").*

[12] *See, e.g., Mosley v. Wells Fargo & Co., 2023 WL 3185790, at *1 (S.D. Cal. May 1, 2023) (refusing to vacate process arbitrator award requiring mass arbitration demands to be amended to include claimant's bank account number), aff'd, 2024 WL 977674 (9th Cir. Mar. 7, 2024).*

Second, **Consumer and Employment Rule R-4(b)(iii)(a) should be amended to allow service of case-initiating documents at the last-known address for *individuals*, but for *entities*, service instead should be made this way only if there is no agent for service of process in the state where the entity is registered, incorporated, or doing business.** Service at any "last known address" for a business may lead to service by mail to ancillary business locations (such as mall kiosks or other retail locations) in an effort to conceal the filings from the business's legal department. Moreover, service of case-initiating documents by mail to the last known address of the business's "authorized representative" may lead to inappropriate attempts to serve businesses by mailing documents to attorneys who may no longer represent the business. Service of case-initiating documents upon counsel should be allowed only with the prior agreement of the party being served.

Accordingly, **Consumer and Employment Rule R-4(b)(iii) should be amended to state as follows:**

Any papers, notices, or process necessary for the filing of an arbitration under this Rule may be served on a party in the manner provided for in the parties' agreement. If the agreement does not so provide, a party may be served:

XI. for an entity, by mail addressed to its registered agent of process in the state where the entity is registered, incorporated, or doing business; or if the entity does not have a registered agent, by mail addressed to the party at its last known address;

XII. for an individual, by mail addressed to the party at his or her last known address;

XIII. by electronic service/email to the party, or by mail or electronic service/email to the party's authorized

representative, with the prior agreement of the party being served;

XIV. by personal service; or

XV. by any other service methods provided for under the applicable procedures of the courts of the state where the party to be served is located.

3. The AAA should adopt a fair method to determine which arbitration provision controls when there is a dispute.

It is not uncommon for consumers or workers to file a demand for arbitration based on a superseded or otherwise incorrect version of an arbitration agreement. We therefore recommend revising proposed Consumer and Employment Rule R-5(d), which indicates that in the event of a dispute over which arbitration agreement governs a dispute, the *claimant's* choice of arbitration agreement will control, subject to final decision by the arbitrator.

As written, the proposed rule will predictably cause unnecessary problems if claimants attach the wrong or superseded version of an arbitration provision. This is increasingly prevalent in the mass arbitration context. In recent years, many businesses have revised their arbitration agreements to address the rise of abusive mass arbitrations, such as by adding pre-arbitration notice-of-dispute requirements or adopting other procedures to facilitate the orderly and fair resolution of mass claims. If the *claimant's* choice of arbitration agreement always is controlling as an initial matter—even if incorrect—claimants may be able to impose improper costs and burdens on businesses that seek to enforce the correct versions of their agreements. And that is especially true in the context of a mass arbitration if the process arbitrator decides (incorrectly) that the question of which agreement governs is a merits question that must be decided by merits arbitrators.

Instead, as the default position, Rule R-5(d) should be revised to state that in the event of a dispute over which arbitration agreement governs, the *later-in-time* arbitration agreement is controlling as an initial matter. This choice of default is more logical because the most recent version of the arbitration agreement invoked by a party is more likely to be the governing one.

In addition, Rule R-5(d) should be modified to reflect that, in many instances, a AAA arbitrator cannot decide the issue. To be sure, the AAA rules generally authorize arbitrators to decide their own jurisdiction. But in many arbitration agreements, the parties choose not to delegate these questions of arbitrability to arbitrators, but instead reserve them for courts. And even if the different iterations of the arbitration agreement

both delegate questions of arbitrability to the arbitrator, if one of the agreements selects a different arbitration administrator (say, JAMS instead of the AAA), the proponents of each agreement would seek to present the arbitrability question to differently empaneled arbitrators. Under the FAA, however, only a court may decide a dispute over who decides arbitrability.[13]

Accordingly, **Rule R-5(d) should specify that "if the respondent alleges that a different arbitration agreement is controlling, the matter will be administered in accordance with the later-in-time agreement, subject to a final determination by a process**

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[13] *See Coinbase, Inc. v. Suski, 602 U.S. 143, 149, 152 (2024) (holding that "if parties have multiple agreements that conflict as to the third-order question of who decides arbitrability," then "a court must decide which contract governs" that issue).*

arbitrator or, if there is no process arbitrator, by the merits arbitrator. If the parties have not agreed to delegate questions of arbitrability to the arbitrator (or if the proffered agreements select different administrators), the stay provisions of Rule R-2 shall apply to permit the parties to obtain an order regarding the arbitration from the court."

4. The automatic stay of arbitrations when judicial intervention is sought should be available for 90 days and last until the court rules.

We welcome the proposed change in new Consumer Rule and Employment Rule R-2 to lengthen the automatic stay to 90 days when any party seeks judicial intervention regarding the commencement of an arbitration, with extensions of the stay permitted sua sponte or upon a showing of good cause. This change is an excellent step toward reducing the burden on parties; under the current approach, parties often must litigate both the court challenge and the arbitrations once the 30-day stay expired. And the change also reduces the burden on courts, which were required to decide emergency motions for temporary restraining orders or preliminary injunctions staying the arbitrations while the issue of arbitrability is litigated because of the short duration of the automatic stay under current rules.

The justification for the change is obvious: court actions take much longer than 30 days. And there is no reason for emergency motion practice in court in every case in which the parties dispute arbitrability.

That said, the proposed change is insufficient to address the problem for two reasons.

First, although the rule conditions the stay on a party seeking judicial intervention within 30 days of commencement of administration, the respondent may not be in a position at that

point to know whether to seek judicial intervention. Especially in a mass arbitration involving many thousands of claimants, the respondent may need more than 30 days to determine, among other things, whether it has arbitration agreements with all claimants and thus whether judicial intervention is needed. **The proposed Rule R-2 therefore be amended to grant the automatic stay if the parties seek judicial intervention within 90 days of commencement of administration.**

Second, the reality of litigation in state and federal courts is that questions of arbitrability almost always take longer than 90 days to be resolved. Yet these disputes rarely entail such exigent circumstances as to—in effect—insist that courts rule in expedited fashion. **We therefore recommend that the AAA amend Rule R-2 to specify that the automatic stay should continue as long as proceedings regarding arbitrability remain pending before the court, unless the court orders otherwise.** That way, in the rare case in which there truly is an emergency that justifies proceeding with the arbitrations faster, the parties can ask the court for an order directing the parties to take steps needed to commence arbitration proceedings— greatly reducing the need for emergency motions (and thus the burdens on parties and courts).

Accordingly, **Consumer Rule and Employment Rule R-2 should be revised to state:**

If within 90 calendar days after the AAA's commencement of administration, a party seeks judicial intervention with respect to a pending arbitration and provides the AAA with documentation that judicial intervention has been sought, the AAA will suspend administration during that court proceeding, unless the court orders otherwise.

5. The proposal to add authority to consolidate multiple arbitrations filed by the same claimant is a valuable tool to address mis-filed or abusive duplicate arbitrations.

Proposed Consumer Rule and Employment Rule R-4(e) authorize the AAA to consolidate multiple arbitrations filed by the *same party* arising out of the same contract, subject to final determination by the arbitrator. This change will promote the efficiency of arbitration proceedings. With the switch to online case initiation, technical issues may lead some claimants inadvertently to file their case multiple times. Or some claimants may deliberately engage in claim splitting or duplicative filings to inflict needless arbitration costs on the respondent business. In either scenario, the proposed rule makes sense, confirming that the AAA has the discretion to consolidate multiple arbitrations filed by the same claimant into a single proceeding.

6. The proposed changes to Consumer Rule R-14 and Employment Rule R-12 could be misinterpreted to impose an inappropriately short deadline to raise objections to the locale of the arbitration or arbitration hearings.

Proposed Consumer Rule R-14 and Employment Rule R-12 have rewritten the current rules regarding the fixing of the locale of the arbitration to be more uniform. This harmonization and better explanation of determining the locale is greatly appreciated.

There appears to be a typographical error, however, in Consumer Rule R-14. It is missing the language in Employment Rule R-12(b) regarding how to determine the locale when one is specified in the arbitration agreement—namely, that the parties' agreement will govern, unless the parties agree otherwise or the arbitrator decides that a different locale is required. There is no reason to omit that language from Consumer Rule R-14, because that procedure has historically been applied in consumer arbitrations without difficulty. **Consumer Rule R-14 therefore should be amended to add a provision mirroring Employment Rule R-12(b).**

In addition, one substantive change should be made to these proposed rules. Specifically, Consumer Rule 14(c) and Employment Rule R-12(d) each state that "[a]ny disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days after the AAA sends notice of the filing of the Demand or by the date established by the AAA." The introduction of a 14-day deadline to raise objections regarding the locale is new, and could threaten to upend the orderly administration of arbitrations.

The inclusion of a presumptive deadline for locale challenges creates a risk that arbitrators might find that a party has waived an objection to the locale by not raising it during the 14-day period. It is likely that no such hard-and-fast deadline for raising issues regarding the locale of an arbitration or any hearings was intended. But the proposed rule may be read that way. And a 14-day deadline is too short for issues regarding locale to be raised, especially in the context of a mass arbitration. Parties may have initial threshold disputes that make it impractical to figure out what the locale should be before the answer is filed—including, for example, disputes over where a claimant lives (an issue that occurs with some frequency in mass arbitrations). Moreover, at this early stage, parties may be in the process of engaging counsel and may be unaware of the short time in which to object to the locale. And in the mass arbitration context, the initial answers to the demands for arbitration are not even due until 45 days after the filing requirements for each demand have been met (Rule MA-4(a))—yet under the proposed rule, any objections to locale must be raised far earlier.

To be sure, we appreciate that the AAA must be able to choose an initial locale as an administrative matter to appoint an appropriate arbitrator. Requiring that objections to locale be included in the answer or by some other deadline the AAA may set is

appropriate. But the rule should be revised to clarify that subsequent objections to the locale may be raised but will be decided by the arbitrator. Thus, **Consumer Rule R-14 and Employment Rule R-12 should state that "[a]ny disputes regarding the locale that are to be decided by the AAA should be included in the answer or submitted to the AAA and all other parties before the AAA begins arbitrator selection or by the date established by the AAA. Any later objections to locale must be presented to the process or merits arbitrator."**

C. *The Consumer Clause Registry*

1. *Determining whether an arbitration clause may be included on the Consumer Clause Registry should be a one-time determination of compliance with the Consumer Due Process Protocol.*

Proposed Consumer Rule R-12 reorganizes and revises the current rule requiring arbitration clauses in consumer agreements to be submitted for review for compliance with the AAA's Consumer Due Process Protocol and published on the AAA's Consumer Clause Registry before the AAA will administer any arbitrations under the clause. The AAA should make two changes to the proposed rule to promote fairness to the parties and predictability of outcomes.

***Compliance with unwritten "due process standards" in Consumer Rules*:** Proposed Rule R-12(b) specifies that the required review will encompass not only "material compliance with due process standards" in the Protocol, but also with those in "the *Consumer Arbitration Rules*[.]" The implication is that some aspects of the Consumer Rules contain unenumerated due process standards—separate and apart from the comprehensive due process standards articulated in the Consumer Due Process Protocol—that arbitration clauses cannot vary. This nebulous standard provides no guidance to parties drafting arbitration agreements, who might wish to depart from the default Consumer Rules in certain respects. This approach also conflicts with proposed Rule R-1(e), which confirms that parties can tailor arbitration procedures and rules in their arbitration agreements for the types of disputes that can arise or for the needs of particular cases, subject to the limits of the Consumer Due Process Protocol.

This approach also is entirely unnecessary. Arbitration clauses already must comply with the Consumer Due Process Protocol, which protects fairness to consumers. And parties already have the power to challenge the enforceability of an unfair arbitration clause under state unconscionability law, either by raising the challenge to the arbitrator under Rule R-7 or, if the clause does not delegate questions of arbitrability to the arbitrator, raising that challenge in court.[14] Those arbitrability challenges are resolved in a predictable fashion, as a large body of precedent determines or at least guides the outcome. There is no need to inject additional uncertainty by suggesting that a new extra-

legal source of challenges to arbitration clauses must be considered—namely, compliance with unwritten "due process standards contained in . . . the *Consumer Arbitration Rules*," as proposed Rule R-12(b) would require. Indeed, it would be unfair to the parties to arbitration agreements if, after a dispute has arisen, a party could evade arbitration by arguing that the arbitration agreement impermissibly departs from some unidentified inalterable requirement of the Consumer Rules, even though the agreement otherwise is fully enforceable under applicable law. **Accordingly, references to "due process standards of these Rules" in Consumer Rule R-12(b) should be deleted.**

***Collateral attacks on Consumer Due Process Protocol compliance*:** Proposed Rule R-12(b) also refers to proposed Rule R-1(c), which states that even if the AAA accepts a case for administration, any party who "disagrees" about "whether the agreement meets these Rules and the *Consumer Due Process Protocol* . . . can bring the issue to an arbitrator for a final decision." In other words, issues regarding compliance with the Consumer Due Process Protocol and unwritten due process principles asserted to be implicit in the Consumer Rules now may be litigated in every case.

This potential for collateral challenges to the AAA's decision to approve an arbitration clause and include it on the Consumer Clause Registry will greatly unsettle the enforceability of

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[14] *See, e.g., Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 65 (2019) ("The [FAA] allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions[.]"); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question[.]").*

arbitration agreements. The AAA has many arbitrators on its roster that it appoints to consumer arbitrations, and those arbitrators may have differing views about the fairness of consumer arbitration agreements. Thus, parties will lack the needed confidence that a AAA-approved arbitration agreement will actually be enforced by AAA arbitrators.

In fact, claimants already have begun to mount these types of collateral attacks under current Consumer Rule R-1(d), which does not expressly authorize collateral challenges to the AAA's determination that an arbitration clause complies with the Consumer Due Process Protocol. The experience of Chamber, AFSA, and AAI members with these challenges makes clear that the rules should prevent those attacks—not allow such challenges in every case.

To begin with, these challenges are being raised today even if judicial decisions confirm that the arbitration agreement is enforceable as a matter of law. Nonetheless,

claimants' counsel often urge arbitrators to depart from legal precedents and instead to indulge extra-legal arguments about perceived "fairness." But that mode of analysis is effectively rudderless—and its outcome is entirely unpredictable. The inevitable result is that almost any arbitration clause, no matter how pro-consumer, may eventually be deemed out of compliance with the Protocol or unwritten fairness principles argued to be implicit in the rules by fiat of some future arbitrator applying his or her own brand of justice, regardless of the governing law.

This result would be palpably unfair to contracting parties, who count on the enforceability of arbitration agreements. The AAA should not codify a procedure that creates an enormous—and unpredictable—risk that arbitration agreements that are enforceable under applicable law will be invalidated. Indeed, many companies that use form contracts incur enormous expenses to print and distribute millions of consumer contracts containing arbitration clauses. These companies must be able to rely on the AAA's upfront determination that it will administer disputes brought under a particular arbitration clause. If the AAA decides in that initial review that the arbitration clause does not comply with the Consumer Due Process Protocol, the company has advance notice, and so can change its clause before including it in contracts with customers either to comply with the Protocol or to pick another administrator.

But if the AAA's initial approval of the arbitration clause can be overturned in any future case, it is too late for the company to rewrite the clause to make it enforceable, and the predictability and other benefits of arbitration will be lost.

Nor are these collateral challenges to initial AAA approval of arbitration clauses necessary. As noted above, in any future case, consumers are free to argue that the arbitration clause is unconscionable or otherwise unenforceable under applicable law. Because those arbitrability challenges can be made in any case, there is no need for an additional collateral challenge to the AAA's determination that an arbitration clause complies with the Consumer Due Process Protocol.

Accordingly, the AAA **should revise proposed Consumer Rules R-1(c) and R-12** to avoid these issues:

- First, **the provisions authorizing the AAA to refuse to administer arbitrations under arbitration clauses that do not comport with the Consumer Rules or satisfy "due process standards" implicit in those rules should be deleted**, as all that should be required is compliance with the Consumer Due Process Protocol.

- Second, **the final two sentences of proposed Rule R-1(c), which authorize collateral challenges to the AAA's administrative determinations in every case, should be deleted**.

- Third, **the following sentence should be added to the end of proposed Rule R-12(d): "Once the AAA has accepted a case for administration and approved an arbitration agreement for inclusion on the Consumer Clause Registry, those determinations may not be reversed by an arbitrator. But if a party believes that an arbitration agreement is unenforceable under applicable law, they may raise that issue with the arbitrator under Rule R-7 or (if the parties have not agreed to arbitrate such issues) with a court."**

2. The changes to the annual registry fee create an unjustifiable trap for the unwary.

Proposed Consumer Rule R-12(e) states that if a party does not pay the annual Registry fee, "the AAA will decline to administer consumer arbitrations arising from that arbitration agreement," and that "[c]harging an expedited review fee as an alternative is not permissible." **This language should be revised to permit administration upon payment of the annual Registry fees that were not previously paid, plus a reasonable penalty (such as an additional year's Registry fee). Alternatively, the AAA could eliminate the annual Registry fee and simply increase the initial fee when a business's arbitration agreement is first submitted for review**.

Refusal to administer arbitrations under a previously approved arbitration agreement merely because the business fell behind on the annual Registry fee creates a trap for the unwary. Administrative errors such as this are inevitable, especially because turnover in personnel in legal departments may mean that the invoice for the annual Registry fee is sent to an unmonitored email inbox. In addition, the consequences for nonpayment under the proposed rule—the end of a company's consumer arbitration program—are unduly harsh. Indeed, that penalty is far out of proportion to the failure to pay the annual fee, because that fee is not for any particular case and thus nonpayment would not disrupt any consumer arbitration. And consumers, in particular, suffer from this approach; a consumer rebuffed from trying to initiate arbitration that the AAA refuses to administer for this reason would have little recourse but to submit their claim to the overburdened, expensive, and harder to navigate court system. Many consumer claims that would be feasible to arbitrate would be priced out of court entirely, leaving these consumers with no redress.

Likely for this and similar reasons, other arbitration providers, such as JAMS and NAM, do not impose such a harsh penalty.

D. The pre-administration notice and review requirement for employment arbitrations.

Unlike the proposed Consumer Rules, which expand the pre-arbitration registration requirement and allow it to be revisited in every case, the proposed

Employment Rules eliminate current Rule R-2, which mandated that employers intending to use AAA to administer disputes under an "employment ADR plan" "notify" AAA at least "30 days prior to the planned effective date of the program" and "provide the [AAA] with a copy of the employment dispute resolution plan."

This is a good change that should be retained. Few employers understood whether their employment or independent-contractor arbitration agreements were subject to the requirements in current Rule R-2. The rule did not explain what the AAA would do once notified, leaving the standard for whether and why the AAA would accept or reject particular arbitration agreements unclear. And existing law already affords parties with the ability to challenge the enforceability of unconscionable arbitration agreements. Because the pre-administration notice and review process was superfluous and unsettled the enforceability of arbitration agreements, it is appropriate to eliminate it.

E. Mediation

Proposed Consumer Rule and Employment Rule R-11 provides that in every arbitration, and at any stage in the case, "the AAA may refer the parties to mediation," separate and apart from any "request" by the "parties" for "mediation." But the AAA should not empower itself to force the parties to participate in mediation. Given the relatively modest stakes of most one-off consumer or workplace arbitrations, the cost of formal mediation simply is not justified. And many agreements already include pre-arbitration dispute-resolution procedures designed to facilitate the voluntary settlement of cases. If parties have agreed to and participated in these contractual dispute-resolution processes, a requirement by the AAA that they engage in mediation—perhaps for a second time—would be wasteful.

Even worse, the potential for AAA-required mediation allows claimants to extract unfair settlement leverage over businesses. The AAA's proposed Rule R-11 calls for any such compelled mediation to be administered by AAA under the AAA Consumer (or Employment) Mediation Procedures—and under those procedures, the company generally must pay the cost of mediation. That means that claimants can request mediation in every case, which can be ordered over the business's objection, simply to force the business to pay the additional expense. This potential for abuse would be even greater in mass arbitrations if mass arbitration filers could request individual mediations in every case.

For these reasons, **this aspect of proposed Consumer and Employment Rule R-11 authorizing the AAA to refer the parties to mediation even if they do not all agree should be abandoned entirely**. But if the AAA insists on including such a rule, the rule should be limited to global mediations in the context of mass arbitrations.

That is because, in mass arbitrations—as in mass torts cases administered by courts under multi-district litigation procedures—the ability to require global mediations

regardless of a party's wishes makes more sense. These types of disputes are almost always resolved through settlements achieved pursuant to one or more global mediations. Nonetheless, lawyers who file mass arbitrations sometimes refuse to mediate in an effort to accelerate the targeted business's obligation to pay arbitration fees—and thereby to impose additional unfair settlement leverage on the business. Accordingly, **proposed Rule R-11 should be revised to specify that global mediation may be ordered over a party's objections by either the AAA or an arbitrator only if (1) the proceeding is governed by the Mass Arbitration Supplementary Rules and (2) any party paying in whole or in part for the mediation agrees.**

The proposed Rule R-11 also should be revised in two other respects. First, **the rule should clarify that the parties may agree to mediation that is not administered by the AAA**. Parties may prefer to use a different mediator who is affiliated with another administrator or an unaffiliated mediator expert in resolving the particular type of claim. The AAA should not prohibit parties from using non-AAA mediators; it is inappropriate to tie the AAA's arbitration services to its mediation services in this manner, and arguably gives improper incentives to the AAA to order AAA mediation over a party's objections.

Second, **proposed Rule R-11 should specify that unless the parties agree otherwise, arbitration proceedings must be stayed during the mediation.** The proposed rule adopts the opposite presumption. But requiring concurrent mediation and arbitration produces unnecessary expense, by both the parties and the arbitrator. And this waste is especially pronounced in mass arbitrations, where claimants may seek to expedite the arbitration proceedings solely to increase the business's AAA fees as a tactic to extract a blackmail settlement during the mediation.

F. Dispositive motions

The treatment of dispositive motions is a critical one for Chamber, AFSA, and AAI members given that many issues can be bifurcated and decided on an expedited basis—often as a matter of law—before the parties engage in costly discovery or prepare for and participate in a hearing. The current Consumer Rule R-33 and Employment Rule R-27 address this issue appropriately by giving the arbitrator the *discretion* to allow dispositive motions if there is "substantial cause" for believing that the motion is likely to succeed and dispose of or narrow the issues in the case. Indeed, in the experience of Chamber, AFSA, and AAI members, a significant percentage of consumer arbitrations in particular are swiftly resolved as a matter of law on the basis of a dispositive motion.

Although proposed Consumer Rule R-31 and Employment Rule R-32 keep the current language in subpart (b), both add two provisions that each place a heavy thumb on the scale against allowing a party to file a dispositive motion. First, subpart (a) states that the arbitrator "has the sole discretion to allow or deny the filing of a written motion and the arbitrator's decision is final." That statement is hard to square with the possibility of

arbitral appeals under proposed Consumer Rule R-58. It also is a barely disguised admonition to arbitrators that they are free to dispense with the "substantial cause" standard of subpart (b) and refuse to allow the filing of a dispositive motion. And that is especially true when subpart (a) is taken in combination with subpart (c), which states that "[c]onsistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion." That statement effectively discourages arbitrators from allowing dispositive motions in consumer and workplace arbitrations.

In fact, by directing arbitrators to consider the expense of briefing dispositive motions, proposed subpart (c) requires them to look into the wrong end of the telescope. When there is substantial cause to believe the dispositive motion is likely to succeed and dispose of or narrow the issues, the motion will, by definition, *reduce* the time and cost of an arbitration. By contrast, disallowing such a dispositive motion would never reduce the parties' costs, because the parties will in every case be required to include in their pre-hearing briefs the arguments that would have been contained in the dispositive motion and then argue those issues at the hearing.

Eliminating dispositive motions does not save any expense. Instead, it makes the dispute more costly to resolve because the parties must develop facts and prepare for and participate in a hearing on all issues, even those that would have been rendered irrelevant by an early ruling on a dispositive motion. Yet the proposed subpart (c) encourages arbitrators to ignore this reality and view the costs of briefing a proposed dispositive motion in isolation.

Indeed, the proposed change to discourage dispositive motions is internally inconsistent with the proposed change to expand the use of desk arbitrations in consumer cases under proposed Consumer Rule R-36.[15] Dispositive motions allow cases to be resolved efficiently on the papers—but without depriving any party of the ability to show that factual disputes warrant a hearing. As the AAA well knows, and as the experience of Chamber, AFSA, and AAI members confirms, a substantial portion of both consumer and employment arbitrations are resolved outright, or at least greatly streamlined, by orders granting dispositive motions. The proposed changes, however, would needlessly increase the time and cost of arbitrations.

Accordingly, both subparts (a) and (c) should be deleted. There is no reason to depart from the current rules governing the availability of dispositive motions.

At a minimum, however, **if subpart (c) is retained, it should be revised to direct the arbitrator also to consider the "time and cost for the parties, witnesses, and the arbitrator associated with proceeding with information exchange, hearing preparation, and**

[15] *As discussed below, we recommend against the expanded use of desk arbitrations.*

conducting the hearing that encompasses the issues that otherwise would have been potentially resolved, or rendered irrelevant, by the dispositive motion."

In addition, to promote the goal of achieving an efficient and economical resolution of the dispute, **the proposed rule also should clarify that information exchange should be stayed during the pendency of a dispositive motion, unless the parties agree otherwise or good cause is shown for denying a stay.**

G. Offers of entry of an award on specified terms

In amending the Consumer and Employment rules, the AAA should adopt a procedure commonly used in court litigation to facilitate early settlement of disputes—the offer of judgment procedure available in federal and many state courts.[16] **A new rule should be added to permit any party to serve an offer of judgment, similar to Federal Rule of Civil Procedure 68.**

Under this approach, no later than two weeks before the hearing, either party may serve the other with an offer of entry of an award on specified terms. If an offer is accepted, the arbitrator shall enter a consent award in accordance with those terms pursuant to proposed Rule R-47. If an offer is not accepted within 14 days, it is considered withdrawn, and evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. If the award that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made, including any AAA or arbitrator fees paid after the date of the offer. This change would greatly promote settlement of consumer and workplace cases.

H. Exchange of information

The proposed changes to the rules governing information exchange in consumer and workplace arbitrations create confusion about what information must be exchanged and the extent to which additional discovery may be required without arbitrator approval.

***Anticipated exhibits and witness lists*:** We advise clarifying that in every case, the arbitrators shall direct the parties to exchange documents in their possession or custody on which they intend to rely at the hearing. That is the approach taken in current Consumer Rule R-
22(b). In addition, we also recommend requiring parties in every case to disclose in advance the witnesses, if any, they plan to have testify and the topics of their anticipated

testimony. Consumers and employees should not be left guessing what documents or witnesses a company may use to make out its claims and defenses, and vice versa. Thus, **proposed Consumer Rule R-20(b) and Employment Rule R-21(b) should be revised to state that "[u]nless the parties agree otherwise or for good cause shown, by such date that the arbitrator sets that is sufficiently in advance of the hearing to permit a fundamentally fair**

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[16] *See, e.g., Fed. R. Civ. P. 68.*

process, the arbitrator shall require the parties to do the following: (i) exchange documents in their possession or custody on which they intend to rely at the hearing; (ii) exchange lists of witnesses, if any, they intend to have testify at the hearing, along with each witness's contact information and the proposed topics of his or her testimony; and

(iii) update their exchanges of documents on which they intend to rely and list of witnesses they intend to have testify, as those documents or witnesses become known to them."

***Requests for production of documents*:** The proposed subparts (b)(iii)-(iv) appear to contemplate in every case that requests for production of documents—including the requests for electronically stored information that make litigation in court so expensive—may routinely be granted in every arbitration. That creates the misimpression that such wide-ranging discovery tools are appropriate in every consumer and employment case. Yet as the Supreme Court has observed, "discovery allowed in arbitration . . . might not be as extensive as in the federal courts, [because] by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[17] Indeed, "[p]arties generally favor arbitration precisely because of the" lower cost of resolving a dispute without court rules and full-blown judicially supervised discovery, which "may be of particular importance in employment litigation, which often involves smaller sums of money[.]"[18] The Court also has stated that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation" in court.[19]

For these reasons, **subpart (b)(iii) should be revised to clarify that "the arbitrator may, on application of a party and if needed to ensure a fundamentally fair process while ensuring that the arbitration process remains fast and economical, require another party, in response to a reasonable and narrowly tailored document request, to make available documents in the responding party's possession or custody, not otherwise available to the party seeking the documents, that are relevant and material to the outcome of disputed issues."**

***Interrogatories and depositions*:** Proposed Consumer Rule R-20 and Employment Rule R-21 do not address the availability of interrogatories or depositions. By contrast, current Employment Rule R-9 gives the arbitrator the authority to order those forms of discovery when truly necessary. Because targeted depositions and interrogatories may sometimes be appropriate in workplace arbitrations, **proposed Employment Rule R-21(b) should be revised to add a new subpart that authorizes the arbitrator to permit, "upon application of a party and if needed to ensure a fundamentally fair process while ensuring that the arbitration**

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[17] *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (internal quotation marks omitted).*

[18] *14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009).*

[19] *Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995).*

process remains fast and economical, other forms of discovery, including narrowly targeted depositions or interrogatories."

***Sua sponte discovery*:** Proposed Consumer Rule R-20 and Employment Rule R-21 indicate that the arbitrator may order discovery "on the arbitrator's own initiative." Similarly, proposed Consumer Rule R-32(d) and proposed Employment Rule R-33(d) would authorize the arbitrator to "subpoena witnesses or documents . . . on the arbitrator's own initiative." **The adoption of arbitrator-led, sua sponte discovery should be reconsidered.**

The norm for American arbitrations, particularly for consumer and workplace disputes, is for party-led discovery—with limits to avoid the type of full-blown discovery that takes place in courts. This approach ensures that the parties enjoy the flexibility to keep the cost of dispute resolution lower by choosing to forgo additional discovery. This flexibility should be preserved. There is no reason to shift to a more European inquisitorial system, under which the arbitrator independently conducts discovery by propounding his or her own discovery requests and subpoenaing witnesses the parties otherwise would not have called.

I. *Procedure for hearings*

Four aspects of the proposed changes to procedures for hearings warrant reconsideration. First, non-parties should not be permitted to attend arbitration hearings, and certainly not without advance notice and a showing of a right to attend. Second, documents- only desk arbitrations over a party's objections should not be required. Third, unsworn written testimony should not be allowed to be submitted as evidence. Fourth,

the AAA should restore deleted language confirming that arbitrators should apply in employment arbitrations the same burdens of proof and production that would apply in court.

1. *Arbitrators should not be permitted to allow third parties to attend arbitration hearings without advance notice.*

The confidential nature of arbitration has a long history.[20] Confidentiality is particularly beneficial in workplace arbitrations, which can involve sensitive issues, such as allegations of

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[20] *See, e.g., Del. Coalition for Open Gov't, Inc. v. Strine, 733 F.3d 510, 518 (3d Cir. 2013) ("Confidentiality is a natural outgrowth of the status of arbitrations as private alternatives to government-sponsored proceedings."); Hoteles Condado Beach v. Union De Tronquistas Local 901, 763 F.2d 34, 39 (1st Cir. 1985) (arbitration is "a private proceeding which is generally closed to the public"); Hutchings v. U.S. Indus., Inc., 428 F.2d 303, 312 (5th Cir. 1970) ("T]he arbitration process is a private one[.]"); Michael Collins, Privacy and Confidentiality in Arbitration Proceedings, 30 Tex. Int'l L.J. 121, 122 (1995) (describing "institutional arbitration rules" requiring that arbitrations "shall be held in private" and "centuries" of legal recognition in the laws of common law jurisdictions that "arbitrations take place in private").*

misconduct that the parties generally would prefer to keep private. Parties to consumer arbitrations also benefit from confidentiality, as the privacy of the proceedings frees the parties in consumer cases as well as in workplace cases to take a less hostile, more conciliatory approach toward one another than parties might otherwise feel constrained to take in public view. Worker and consumer claimants might feel pressure to take a more adversarial approach; and businesses would be concerned that any attempt at conciliation or decision not to raise legal or factual defenses would be invoked against the business in future proceedings in arbitration or in court.

Nonetheless, proposed Consumer Rule R-23 and Employment Rule R-24 both state that "[a]ny person having a direct interest in the arbitration is entitled to attend hearings." What might constitute a "direct interest" entitling a third party to attend a hearing is left undefined and unexplained. Under this vague standard, members of the press, bloggers and other curious individuals—including an entire constellation of individuals claiming some connection to the parties or the subject matter—might insist upon a right to attend hearings. And the parties would be powerless to prevent these interlopers from attending. That would undermine the parties' expectation of privacy in arbitration.

Even worse, under these proposed rules, the parties are not even guaranteed advance notice and an opportunity to object if a third party seeks to attend a hearing. This approach to arbitration hearings risks very substantial unfairness to the parties.

The provision in these proposed rules allowing anyone with a "direct interest" to attend hearings should be deleted.

Alternatively, if the proposed language is kept, it should be revised to require third parties seeking to attend the hearing either to obtain consent from all parties or demonstrate a "substantial direct financial interest in the arbitration and a sufficient need to attend that overcomes the presumption of privacy of arbitration proceedings." In addition, third parties seeking to attend hearings without consent from all parties should be required to request leave in writing in advance, and all parties should be given an opportunity to object.

2. Telephonic or virtual hearings promote due process and help to curb widespread abuse in mass arbitrations.

Under the current Consumer Rules, cases involving claims for $25,000 or less default to a document-only desk arbitration, but a hearing of some sort is granted if "a party asks for a hearing or the arbitrator decides that a hearing is necessary." Rule D-1(b). By contrast, under proposed Consumer Rule R-1(f), "[w]here no disclosed claims or counterclaims exceed $50,000, the dispute shall be resolved by the submission of documents only/desk arbitration as provided in Rule D-1(b) of the Procedures for the Resolution of Disputes through Document Submission." That referenced Rule D-1(b), as well as proposed Rule R-36, clarify that the arbitrator may order a "virtual or telephonic hearing" if one is "necessary," or an "in-person hearing" is needed "for a fundamentally fair process."

We agree with increasing the amount-in-controversy threshold below which cases default to desk arbitrations from $25,000 to $50,000. Desk arbitrations often can efficiently resolve these types of disputes. But parties should remain entitled to at least a telephonic or virtual hearing, without the risk that arbitrators will decide that the party has not sufficiently proven that a hearing is "necessary."

Indeed, the AAA Consumer Due Process Protocol Principle 12(1) explains that as part of the right to "a fundamentally-fair arbitration hearing," parties must be afforded "an opportunity to be heard[.]" To be sure, the Protocol goes on to explain that this right "may be met by hearings conducted by electronic or telephonic means or by a submission of documents." But in this age of pervasively available telephonic or virtual hearing options, cases should be resolved without a hearing over a party's objection only if a dispositive motion can resolve the case.

Otherwise, where factual disputes must be resolved, any party who requests a hearing should be granted at least a telephonic or virtual hearing so that the party can ask questions of witnesses and to allow the arbitrator to assess credibility.

Making telephonic or virtual hearings available when requested by a party also ensures that all parties will have an opportunity to speak with and have their arguments acknowledged by the arbitrator. Because arbitrators do not speak with the parties in a desk arbitration, arbitrators have no opportunity to demonstrate their attentiveness and careful consideration of each party's positions.

Finally, allowing parties to request telephonic or virtual hearings will also deter abusive mass arbitrations in which the lawyer filing the arbitrations has no real relationship with the purported claimants—who may not even exist or have any idea that arbitrations have been filed in their names. These lawyers typically request desk arbitrations, which allows them to obscure the claimants' fictitiousness or lack of awareness of the proceedings. Accordingly, **Rules R-1(f), R-36, and D-1(b) should all be revised to clarify that a desk arbitration will be converted to a telephonic or virtual hearing upon the request of any party.**

3. Unsworn written testimony should not be permitted.

Proposed Consumer Rule R-33(a) and Employment Rule R-34(a) authorize the arbitrator to "receive and consider the evidence of witnesses by written statements rather than in-person testimony." That is a change from current Consumer Rule R-35(a), which permits written testimony only "by declaration or affidavit." (The current Employment Rules do not have a counterpart to current Consumer Rule R-35(a), but current Employment Rule R-8(xv) provides that during the initial arbitration management conference, the arbitrator shall consider "the extent to which testimony may be admitted at the hearing . . . by affidavit[.]").

The AAA should not allow unsworn written testimony to be presented as evidence. This change would invite fraud, as a lying witness could later avoid punishment by pointing out that he or she was not under oath. And the change is unnecessary, as it is easy for parties to provide sworn affidavits or declarations signed under penalty of perjury.

4. Arbitrators should apply the same burdens of proof and production as courts in employment cases.

In the current Employment Rules, the third sentence of Rule R-28 provides that "[t]he parties shall bear the same burdens of proof and burdens of producing evidence as would apply if their claims and counterclaims had been brought in court." The counterpart to that rule in the proposed Employment Rules, Rule R-31, deletes that sentence. This omission may lead to confusion about whether the discretion conferred on arbitrators to

"vary" hearing procedure includes the power to reallocate the burdens of proof and production imposed by substantive law. That outcome could unfairly bias the proceedings against either the claimant or the respondent and systematically distort the results in employment arbitrations. This change should be reconsidered, and **the third sentence of Rule R-28 should be restored**.

J. *Sanctions*

As discussed above, **the proposed rule regarding sanctions (Rule R-57 in both the Consumer and Employment rules) should be revised to authorize arbitrators to impose sanctions on counsel who fail to comply with the required certifications**. Particularly in mass arbitrations, where claimants may be fictitious or unaware of the frivolous claims filed in their names, both merits and process arbitrators should be empowered to impose sanctions on counsel, because counsel (rather than the claimants) are the ones responsible for the breach of ethical obligations.

K. *Publication of arbitration awards*

Proposed Consumer Rule and Employment Rule R-42(c) provides that "[t]he AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published." The potential that the AAA may indiscriminately publish awards is inconsistent with the confidential nature of arbitration. And even if an applicable law required the disclosure of the *result* of an arbitration, publication of the full award—including the arbitrator's detailed discussion of the allegations, evidence, and findings—would be unnecessary. But if the proposed rule were to be kept, three aspects should be changed.

First, the proposed rule improperly permits the AAA to publish an award even if the parties have agreed to keep the arbitration proceedings and the arbitrator's award confidential. Parties sometimes choose to agree to arbitration because arbitration proceedings are private. The proposed rule would frustrate those parties' intentions.

Second, even if the parties have not expressly agreed to keep the award confidential, the proposed rule fails to provide the parties with advance notice and the ability to object to publication of the award. Because of the expectation of privacy in arbitration, and the potential that particular arbitrations may involve sensitive subjects or materials, all parties should have the right to show that there is good cause not to publish an award, either in whole or in part.

Third, even if an award were to be published, the proposed rule improperly assumes that the only redactions from the published version should be the names of the parties and witnesses. Arbitration awards may discuss trade secrets or other confidential matters, or information that a party finds embarrassing.

Accordingly, **if kept, Consumer Rule and Employment Rule R-42(c) should be revised to provide:**

> **The AAA may choose to publish an award rendered under these Rules if the parties have not agreed to keep the arbitration proceedings confidential. If the AAA intends to publish an award, the parties will be given 30 days advance notice and an opportunity to object. An award will not be published if any party shows good cause. If an award is published, the names of the parties and witnesses and any sensitive information identified by the parties will be redacted.**

L. Arbitral appeals

Proposed Consumer Rule R-58 expressly authorizes an optional appellate arbitration process, so long as the appeal complies with the Consumer Due Process Protocol and the associated AAA and arbitrator fees are allocated in the same manner as regular arbitrations under the Consumer fee schedule.

The adoption of an express rule governing optional appeals in consumer arbitrations is helpful. But the AAA should make three changes to this proposed rule.

***Appeal of non-final awards*:** First, **the rule should specify that only final arbitration awards, not interim awards or process arbitrator orders, are subject to appeal**. Otherwise, claimants seeking settlement leverage might appeal every conceivable interlocutory ruling to delay the proceedings and inflict costs on the respondent.

***Consumer fee schedule*:** Second, **the Consumer fee schedule should not apply to arbitral appeals**. That fee schedule would require the business to subsidize the lion's share of the costs of arbitral appeals, which are far more expensive than the typical consumer arbitration because they often involve a panel of three arbitrators rather than one. **Instead, the cost allocation of Rule A-12 of the AAA's Optional Appellate Rules should apply, unless a different allocation is required by applicable law.** Under Rule A-12, the appellant generally advances the fees, subject to reallocation by the arbitral panel in the final award. This allocation ensures fairness to both parties because, by requiring appellants to pay the costs unless they prevail (or justice otherwise requires), it discourages the pursuit of groundless appeals.

If the Consumer fee schedule instead were applied to arbitral appeals, claimants will have an incentive to threaten to appeal in every case, no matter how baseless, simply to drive up a business's costs and enable the claimant to extract a higher cost-of-defense settlements for claims that the arbitrator already has determined to be valueless. This risk

is particularly acute in the mass arbitration context, where filers already take every opportunity to maximize the threatened AAA fees on a business.

Moreover, many existing agreements with appellate options were written in reliance upon the Optional Appellate Rules and their approach to fee allocation, which does not assume that the business pays the vast majority of expenses for appeals, regardless of who wins. By switching to a much more one-sided allocation, the AAA would frustrate the parties' intentions in drafting those agreements.

Alternatively, **even if the AAA were to require the Consumer fee schedule apply to arbitral appeals, that fee schedule should apply only if the value of the relief sought (whether monetary or non-monetary) is $75,000 or less**. In other cases, the amount at stake is sufficient to justify application of the fee allocation of Rule A-12 of the Optional Appellate Rules.

***Safe harbor for appellate procedures*:** Third, **the rule should add a safe harbor clarifying that an agreement authorizing an appeal under the AAA's Optional Appellate Arbitration Rules does not also have to comply with the AAA's Consumer Due Process Protocol.** Otherwise, because the Protocol was not written with appeals in mind, application of the Protocol to appellate procedures will lead to considerable uncertainty. For example, does the Protocol's right to bring claims in small claims court mean that appeals must also be removable to small claims court? At what point does the schedule for briefing, argument, and decision—or even the availability of an appeal—cause "undue delay" within the meaning of the Protocol? To avoid these issues, the AAA should prescribe a safe harbor and identify its appellate arbitration rules as acceptable.

II. Additional Reforms Are Urgently Needed to Curb the Rapidly Growing Number of Abusive Mass Arbitrations.

Although amendments to the Consumer and Employment Rules can improve the efficacy and fairness of arbitration proceedings, these changes at the margins fail to confront the elephant in the room—abusive mass arbitrations. These campaigns are being pursued at an accelerating rate. Law firms filing these mass arbitrations do not seek to obtain merits rulings on the asserted claims, but instead exploit loopholes in the AAA's rules and fee schedules to inflict enormous upfront arbitration fees on companies. These fees leave companies no choice but to pay excessive settlements, regardless of the merits (or lack of merits) of the underlying claims. The AAA should make immediate changes to the Mass Arbitration Supplementary Rules and fee schedules to halt this subversion of AAA proceedings.

A. Abusive mass arbitrations are proliferating, and threaten to undermine continued viability of consumer and employee/worker arbitration.

There is nothing inherently wrong with consumers or workers taking advantage of economies of scale by using shared counsel to pursue individual arbitrations of similar claims. Many such claims are individualized and could never have been certified as class actions in court. Without arbitration, these claims would have been priced out of the justice system. And even if a class action could have been possible, individual arbitrations are often superior; they can be resolved in a fraction of the time and for a fraction of the cost, and the outcomes are generally fairer to the parties. Indeed, studies show that consumers and workers who bring claims in arbitration prevail more often and recover as much or more than consumers or workers who litigate in court.[21] By contrast, class members rarely benefit from class actions.[22]

But the mass arbitration device, in its current form, is susceptible to abuse because of vulnerabilities in the AAA's rules and fee schedules. Lawyers pursuing this strategy recruit as many claimants as possible—regularly tens of thousands or even over a hundred thousand. The recruited pool contains many more claimants than the lawyers could possibly vet, much less for whom the lawyers could actually arbitrate claims. But the point is not to arbitrate the claims.

Instead, the point is to threaten to file arbitrations because it would inflict massive AAA fees on the target. The aggregated fees leave the business little choice but to yield to a settlement, because it is simply impossible under the AAA's current approach to mass arbitrations for businesses to mount a defense. Indeed, in a decision issued earlier today, the Ninth Circuit criticized a law firm that frequently pursues mass arbitrations before the AAA for trying to inflate a business's arbitration fees in a JAMS mass arbitration from $1,750 to $12,775,000.[23] The Ninth Circuit stated that the law firm had used a "mass-arbitration tactic" that "appear[ed] to be geared more toward racking up procedural costs to the point of forcing [the business] to capitulate to a settlement than proving the allegations [underlying the claims] to seek appropriate redress on the merits."[24]

In 2023, the Chamber's ILR published a report documenting the sharp rise in the filing of abusive mass arbitrations, noting (for example) that public reporting showed that, during a short

[21] *See Mass Arbitration Shakedown*, *supra*, n.6, at 10-11 (identifying and discussing studies comparing consumer and employment litigation and arbitration outcomes).

[22] *See id.* at 12-14 (discussing studies of the limited benefits of class actions to class members).

[23] *Jones v. Starz Entmt., LLC*, No. 24-1645, slip op. at 6 (9th Cir. Feb. 28, 2025).

[24] *Id.* at 14.

time period, a single law firm had filed enormous mass arbitrations against Doordash, Postmates, CenturyLink, FanDuel, Draftkings, Intuit, Amazon, Chegg, Samsung, Buffalo Wild Wings, Chipotle, Dollar Tree, and Peloton.[25] Those publicly reported mass arbitrations were, of course, merely the tip of the iceberg. Most mass arbitration filings go unreported. And far more mass arbitrations are threatened and produce settlements before arbitrations are filed.

The AAA's January 2024 introduction of the Mass Arbitration Supplementary Rules and new consumer and employment mass arbitration fee schedules reflected a welcome recognition of the need to address this new dangerous abuse of the arbitration system.[26] The reforms adopted in those rules and fee schedules were much needed. But they are not enough.

Since those January 2024 changes went into effect, the pace of threatened and actual filings of abusive mass arbitrations has dramatically quickened. Many more Chamber, AFSA, and AAI members have been targeted by improper mass arbitration campaigns. And the velocity of new threats and size of law firms' claimant portfolios continue to increase. The end result is that mass arbitrations are evolving into a heavy tax on companies that continue to select the AAA in arbitration agreements with customers and workers.

The AAA should take action now to stop abusive mass arbitrations and to ensure that its forum remains a fair and cost-effective way to resolve all types of consumer and workplace disputes—including mass disputes.

B. Additional case-initiation requirements are needed to address ongoing mass arbitration abuses.

The first area in which reform of mass arbitration procedures is sorely needed is at the filing stage.

***Need for claimant identifying information and signed certifications by claimants and their counsel*:** In the experience of Chamber, AFSA, and AAI members, the number of mass arbitration claims filed in the names of individuals who turn out not to be purchasers of the disputed product or service (or workers subject to the challenged employment practice) is often shockingly high—typically 30 percent of filings, and sometimes exceeding 90 percent.[27] Frequently, mass arbitration claimants are fictious or have no arbitration agreement at all with the respondent. Yet without adequate identifying information, determining which claimants do not exist, or are asserting non-arbitrable or frivolous claims (because they are not the customers or workers at issue) is often a laborious manual process. And it is a task that—

[25] *See id.* at 19-21.

[26] *See* Adam Shoneck, *Mass Arbitration—How Did We Get Here & Where Are We Now?* (June 6, 2024), at https://www.adr.org/blog/mass-arbitration-how-did-we-get-here-and-where-are-we- now (describing 2024 changes to rules and fee schedules for mass arbitrations).

[27] *See*, *e.g.*, *Mass Arbitration Shakedown*, *supra* n.6, at 37.

unless an enormous amount of manpower is expended—would take the business longer than the 30 days a respondent has under the Mass Arbitration Supplementary Rules to file a court action to halt non-arbitrable arbitrations or the 45 days a respondent has to file an answer.[28]

This problem is getting worse, not better. Claimants' counsel often recruit claimants online by posting websites or social-media ads using webforms for prospective claimants to complete.[29] These forms have always attracted fraudsters who fill out fake information in the hope that that the claim would avoid scrutiny but pay out in the almost inevitable settlement. But the rise of generative AI and related technologies is making it possible to submit ever-larger numbers of fake claims and to customize the information to make the fraud harder to spot.

The recent spike in fraudulent claims submitted in class settlements via online web portals—which operate similarly to the forms used to recruit mass arbitration claimants— illustrates the problem. Experience shows that even small class settlements often receive hundreds of thousands or millions of increasingly clever fake claims, such as ones with individualized claimant identifying and contact information or even computer-generated proofs of purchase.[30] In class settlements, neutral claims administrators scrutinize the filings to weed out improper claims. But in mass arbitrations, business respondents often report that claimants' counsel are doing little or nothing to investigate their recruited "claimants" before filing arbitrations.[31]

Claimants' counsel have an ethical duty to vet their mass arbitration claimants *before* filing demands for arbitrations in the claimants' names.[32] Claimants' counsel should not be permitted to outsource that duty to business respondents as a tactic for imposing substantial investigation costs and AAA fees on the business. But the current rules allow that result because insufficient identifying information is required at the case-initiation stage, and neither claimants

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[28] *See MA Rules R-1(e) & R-4(a).*

[29] *See Mass Arbitration Shakedown, supra n.6, at 34.*

[30] *See, e.g., Dkt. 54 ¶¶ 20-23, Hezi v. Celsius Holdings, Inc., No. 1:21-cv-9892 (S.D.N.Y. Nov. 22, 2022) (declaration of claims administrator describing 658,719 fake claims submitted via class settlement website); Dkt. 155 at 1-2, Hesse v. Godiva Chocolatier, Inc., No. 1:19-cv-972 (S.D.N.Y. Dec. 16, 2022) (noting determination by claims administrator that claims had been faked by a "bot" hosted in a "foreign country").*

[31] *See, e.g., Mass Arbitration Shakedown, supra n.6 at 37.*

[32] *See, e.g., Model R. of Prof. Conduct 3.1, cmt. 2 (stating that before "[t]he filing of an action . . . or similar action taken for a client," the lawyer must "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions"); Steven C. Bennett, Who Is Responsible for Ethical Behavior by Counsel in Arbitration, 63 Disp. Resol. J. 38, 40 (2008) ("The prevailing view" is that "state codes of lawyer conduct, generally modeled on the American Bar Association's Model Code of Professional Conduct, . . . apply to lawyers who serve as advocates in arbitration.").*

nor claimants' counsel are required to sign certifications that subject them to the same standards barring the filing of frivolous claims that would apply in court. **As discussed above, we urge the AAA to adopt stricter filing requirements above for all consumer and workplace arbitrations. Those requirements are especially needed to curb abusive mass arbitrations.**

***Process arbitrator authority to impose sanctions on counsel*:** Relatedly, **Mass Arbitration Supplementary Rule MA-6 should be amended to clarify that when process arbitrators decide disputes over compliance with AAA or contractual filing requirements or related issues regarding proper case initiation, if the arbitrator finds that claimants' counsel has filed patently improper claims, the arbitrator has authority to require claimants' counsel to show cause why they should not be sanctioned**. The process arbitrator also **should have the authority to impose sanctions if appropriate:** these improper cases will never reach a merits arbitrator, and this abusive conduct will escape sanctions entirely unless the process arbitrator is authorized to take action.

***Satisfaction of pre-arbitration dispute-resolution processes*:** Another commonly disputed issue before process arbitrators is the failure of claimants to comply with contractual obligations to engage in informal dispute resolution before commencing arbitration.[33] For example, arbitration agreements often require the parties to provide written notice 30 days or more before filing arbitration so that the parties have a meaningful opportunity to discuss settlement before AAA fees are incurred. The AAA therefore should **require mass arbitration claimants to attach either their pre-arbitration notices to their demands for arbitration if compliance with such a procedure is required by the arbitration agreement or an explanation why they believe that no such requirement applies (or is legally enforceable)**. In many cases, that attachment would prove whether a claimant has complied with the contractual precondition to arbitration,

streamlining the issues for process arbitrators or courts that are later asked to enforce the pre-arbitration requirement—or perhaps avoiding the dispute entirely.

***Disclosure of third-party litigation funding agreements*:** Many larger mass arbitration campaigns are now financed by third-party litigation funders, which loan money to claimants' counsel to pay the expenses incurred to recruit as many claimants as possible in exchange for a share of the proceeds. The presence of these third-party funders, however, may distort both litigation and settlement behavior by claimants' counsel. Counsel may feel beholden to the funder to take ethically dubious steps to maximize the funders' payout, such as advancing non-meritorious or even frivolous claims to extract a settlement based on the business's AAA

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[33] *See Mass Arbitration Supplementary Rule MA-6(c)(ii) (authorizing process arbitrators to hear "[d]isputes over any applicable conditions precedent" to arbitration).*

fees and cost of defense.[34] For this reason, some courts (either by operation of statute, court rule, or standing order) require disclosure of such arrangements.[35] The AAA should do likewise and **require mass arbitration filers to disclose, when the arbitration is initiated, copies of any contractual agreements giving anyone other than the claimant or claimants' counsel the right to receive compensation that is contingent on the proceeds of the arbitration.**

C. AAA and arbitrator fees should not be assessed on a per-case basis in mass arbitrations.

The fee schedule for mass arbitrations should be also be reexamined and revised. The January 2024 switch from per-case filing fees to a single initiation fee, no matter how many cases are filed, was a salutary change. But this realignment should extend to the rest of the fee schedule. **All per-case fees and deposits should be eliminated and replaced with fees that fairly compensate the AAA and arbitrators for the cost of services provided without giving claimants' counsel the ability to weaponize the AAA's fee schedule to extract blackmail settlements from respondents.**

For example, consider a mass arbitration that continues past the process-arbitrator stage in which claimants insist on proceeding with all cases at once. At that point, under the fee schedules for both consumer and employment mass arbitrations, the AAA would charge the business nonrefundable Per Case Fees and Arbitrator Appointment Fees for every case—even if only a small fraction of those cases would ever be arbitrated.[36] Similarly, separate initial

[34] *See, e.g., U.S. Chamber of Commerce ILR, What You Need to Know About Third Party Litigation Funding (June 7, 2024), at https://instituteforlegalreform.com/what-you-need-to-know-about- third-party-litigation-funding/.*

[35] *See, e.g., Ind. Code § 24-12-11-5; La. Rev. Stat. § 9:3580.13(B); Mont. Code § 31-4-108; W.V. Code § 46A-6N-6; Wis. Code § 804.01(2)(bg); see also D. Ariz. L.R. 7.1.1; C.D. Cal. L.R. 7.1-1; Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement ¶ 17 (N.D. Cal. Nov. 30, 2023); Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022); M.D. Fla. L.R. 3.03(a); N.D. Ga. L.R. 3.3(A)(2); S.D. Ga. L.R. 7.1.1; N.D. Iowa L.R. 7.1; S.D. Iowa L. R. 7.1; D. Md. L.R. 103.3(b); E.D. Mich. L.R. 83.4(b)(2); Nev. L. R. 7.1-1(a); D.N.J. Civ. L.R. 7.1.1; E.D.N.C. L. Civ. R. 7.3(b)(2); M.D. Tenn. L.R. 7.02; N.D. Tex. L.R. 3.1(c); W.D. Tex. L.R. CV-33(b)(3).*

[36] *See AAA, Consumer Mass Arbitration and Mediation Fee Schedule (2024), https://www.adr.org/sites/default/files/document_repository/Consumer_Mass_Arbitration_and_Mediation_Fee_ Schedule.pdf; AAA, Employment/Workplace Mass Arbitration and Mediation Fee Schedule (2024), https://adr.org/sites/default/files/Employment-Workplace_Mass_Arbitration_and_Mediation_ Fee_Schedule.pdf.*

arbitrator deposits can be charged for every case, even if all of the cases are assigned to a small roster of arbitrators who each will decide numerous cases individually.[37]

These charges, which must be paid upfront and in full before the company can defend itself on the merits in any case, can reach staggering amounts. As the number of claimants increase, the amount can be so high that the company cannot reasonably afford to mount a defense. To illustrate these concerns, consider the amount of Per Case Fees, Arbitrator Appointment Fees, and initial arbitrator compensation deposits a business must pay for a mass arbitration of 10,000 claimants, 50,000 claimants, or 100,000 claimants—representing commonly compiled numbers of individual arbitrations that lawyers frequently threaten to file:

Number of Claimants	**Per Case Fees**	**Arbitrator Appointment Fees[38]**	**Initial Arbitrator Deposits[39]**	**Total**
10,000 consumers	$1,375,000	$4,500,000	$30,000,000	$35,875,000
10,000 workers	$1,375,000	$11,000,000	$30,000,000	$42,375,000

50,000 consumers	$5,375,000	$22,500,000	$150,000,000	$177,875,000
50,000 workers	$5,375,000	$55,000,000	$150,000,000	$210,375,000
100,000 consumers	$10,375,000	$45,000,000	$300,000,000	$355,375,000
1000,000 workers	$10,375,000	$110,000,000	$300,000,00	$420,375,000

These amounts—tens or hundreds of millions of dollars—cannot feasibly be paid upfront. And they are not the only fees that must be paid: businesses also must pay Final Fees on a per-case basis as hearings are scheduled, and arbitrators may request additional deposits for each case to which they are assigned as they do work.[40] But it is the potential of being charged the Per Case Fees, the Arbitrator Appointment Fees, and initial deposits for the arbitrator's compensation on a per-case basis, before merits arbitrators can hear defenses in any case, that gives mass arbitration filers tremendous leverage to extract a settlement.

The AAA therefore should revise its fee schedules to eliminate per-case fees and deposits in mass arbitrations. Those per-case amounts are the driver of abusive mass

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[37] *See supra n.36.*

[38] *For consumer cases, this calculation assumes the AAA will directly appoint arbitrators. If the agreement calls for rank-and-strike appointments, the fees would be even higher.*

[39] *This calculation assumes an initial arbitrator deposit of $3,000 per case.*

[40] *See supra n.36.*

arbitrations. And per-case fees quickly reach astronomical sums that bear no relation to the amount of fair compensation for the work the AAA does in administering the cases, almost none of which will actually be arbitrated. Instead, **in mass arbitrations, the AAA should charge for administrative services on an hourly basis and collect deposits on a per-arbitrator basis, no matter how many cases are assigned to an arbitrator, rather than on a per-case basis.**

D. Process arbitrators should enforce agreements to stage or batch cases to facilitate the efficient resolution of mass arbitrations.

Many companies have tailored their arbitration agreements to the needs of mass arbitration by preserving the right to individual arbitration but ensuring that those individual arbitrations proceed in an orderly fashion. Typically, these agreements require the parties to select bellwether or test cases to be arbitrated first, so that the outcome can inform a global mediation. Although the results on the bellwether cases would not be binding on any of the claimants in the other cases, the outcomes of those cases would provide useful information for all parties regarding the relative strength of the parties' claims and defenses. If any cases remain after the mediation, these agreements often specify that the individual arbitrations will proceed in an orderly staged fashion.

This is the process that courts use to handle mass numbers of individual cases, such as mass torts, whether in the multidistrict litigation process in federal court or similar procedures at the state level.[41] Courts do not simply proceed to simultaneous individual trials in each and every case. There is no reason for the AAA to lack the ability to impose coordination on mass individual proceedings by requiring orderly staging of cases when courts do exactly that in virtually identical circumstances.

With these tools, the AAA is well situated to administer mass arbitrations, even if all claimants want individual hearings. The AAA has a deep roster of neutrals who can preside over individual hearings. But those cases will necessarily need to be sequenced, and an intelligent staging process can facilitate the voluntary settlement of the vast majority of other cases. Mass arbitrations of claims in this way can be resolved fairly and efficiently.

Many claimants' counsel agree and cooperate with using these approaches to resolve mass arbitrations. But some claimants' counsel refuse to participate in the selection of bellwether cases or the orderly staging of arbitrations. Instead, they insist that every case must be individually tried *at the same time*. In practice, arbitrating every case in a significant mass arbitration simultaneously is never done. There simply are not enough arbitrators to try thousands or tens of thousands of cases at the same

time. And it is an unfair abuse of AAA, arbitrator, and party resources to allow unscrupulous claimants' counsel to insist on this approach in an attempt to inflict additional AAA fees on companies in order to extract blackmail

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[41] *Mass Arbitration Shakedown, supra n.6, at 48-50.*

settlements. Indeed, this practice harms the parties in other unrelated disputes by improperly diverting AAA resources.

Accordingly, the Mass Arbitration Supplementary Rules should be amended to provide that arbitrators will enforce bellwether or batching clauses in arbitration clauses unless invalidated by a court order or, if there is a delegation clause, the arbitrator has ruled that the clause is unlawful under the law of a particular state (in which case the bellwether or batching shall be applied to claimants from other states).

E. The Mass Arbitration Supplementary Rules should also apply when mass arbitrations are threatened.

As currently written, Rule MA-1(b), the Mass Arbitration Supplementary Rules apply when 25 or more similar demands for arbitration are *filed* by the same or coordinated counsel. This requirement should be revised so that the rules also apply when 25 or more such demands are *threatened in writing* to be filed.

Under some arbitration agreements, if numerous claimants represented by the same or coordinated counsel notify the business of an intent to arbitrate similar claims, all of the claims must be either batched together in a single or a small number of arbitrations or only a small number of individual test cases may be filed in arbitration at a time. When parties follow these procedures and fewer than 25 cases are filed at once, the AAA is currently declining to apply the Mass Arbitration Supplementary Rules. But that outcome prevents the parties from taking advantage of the process-arbitrator procedure available under those rules—a role that can help facilitate the efficient resolution of disputes over threshold administrative issues.

The AAA therefore should amend Rule MA-1(b)(i) to provide that Mass Arbitrations are defined as "twenty-five or more similar Demands for Arbitration (Demand(s)) filed or threatened in writing to be filed against or on behalf of the same party or related parties."

* * *

We again thank the AAA for the opportunity to submit public comment on behalf of our members regarding the proposed rule changes.

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Advocacy Group Comment #11

Attorney(s): **Umair Javed; Avonne Bell**
Law Firm: **Cellular Telecommunications Industry Association (CTIA)**
City: **Washington, DC**
Date Received**: 2/28/25**

February 28, 2025

BY EMAIL

American Arbitration Association ConsumerRules@adr.org
EmploymentRules@adr.org

Re: Comments on Draft Amendments to Consumer and Employment Arbitration Rules

To Whom It May Concern:

On behalf of CTIA—the Wireless Association® ("CTIA"), we write in response to the AAA's invitation for public comment on the proposed amendments to the AAA Consumer Arbitration Rules and the AAA Employment Rules and Mediation Procedures. We thank AAA for the opportunity to provide these comments.

CTIA represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. Our members include wireless carriers, device manufacturers, and suppliers, as well as apps and content companies.

Many CTIA members have long entered into arbitration agreements with their customers and workers, selecting the AAA as the administrator. Our members who are wireless carriers in particular have entered into hundreds of millions of consumer arbitration agreements. Both CTIA members and their customers and workers benefit from AAA arbitration because it allows the parties to resolve disputes fairly, and quicker, faster, and more economically than they could in court.

We write today to emphasize the urgent need for reform of AAA rules and procedures in connection with mass arbitrations—an issue of great importance to CTIA members.

We welcomed the AAA's introduction of the Mass Arbitration Supplementary Rules in January 2024 as a means to curb some of the worst abuses of mass arbitration. These changes were an important first step, but after hearing from our members, we stress that more far-reaching reform to address these abuses is imperative. Unfortunately, due to widespread abuses, mass arbitration has all too often become a weapon to force businesses to pay enormous settlements without regard to the merits of the underlying claims.

The counsel who engage in this practice typically have no interest in arbitrating the claims. Indeed, they make no secret of that fact when threatening to file mass arbitrations against CTIA members and other businesses. Instead, they are capitalizing on loopholes in AAA's existing rules and fee schedules that let them threaten companies with inflict massive AAA fees that must be paid upfront before the business can defend any claim on the merits.

When faced with the prospect of having to pay many millions of dollars of AAA fees, companies must confront a painful decision. They either must settle the dispute immediately, even when they have not engaged in any wrongdoing, or spend enormous sums to have even a chance to raise their defenses on the merits. Adding insult to injury, lawyers threatening these mass arbitrations

routinely inflate their claimant pool—and thus the threatened AAA fees—by recruiting claimants online, without adequately vetting them to weed out purported claimants who are fictitious, not customers of the business, or never purchased the disputed product or service. The AAA should take immediate action to stop these abuses, which are being facilitated by the AAA's current mass arbitration rules and fee schedules. Indeed, the number of threatened mass-arbitration campaigns has continued to grow—in large measure because the AAA's process is so easy for plaintiffs' lawyers to weaponize.

Arbitration should be fair, efficient, and equitable for both sides of any dispute. But abusive mass arbitrations now threaten to undermine the legitimacy of the AAA's arbitration process. CTIA therefore respectfully urges the AAA to make additional reforms to curb abusive practices and ensure the long-term viability of arbitration, including the changes recommended in the comments submitted by the U.S. Chamber of Commerce, the American Financial Services Association, and the Automotive Alliance for Innovation.

* * *

We again thank AAA for the opportunity to submit this public comment on behalf of our members regarding the proposed rule changes.

Sincerely,

Umair Javed
SVP & General Counsel
Avonne Bell, Director, Connected Life

Feedback From AAA Panelists

AAA Panelist Comment #1

Panelist: **Anonymous**
Date Received: **2/6/25**

As an arbitrator for 20 years with experience in virtual hearings, I find they are inferior and impose a huge tech burden on claimants and make presentation of documents difficult.

If AAA adopts a rule favoring virtual hearings, it should require the employer to fund the tech needed. I think witnesses take a different view of the need for truthfulness when hearings are virtual.

The other proposed amendments are fine.

AAA Panelist Comment #2

Panelist: **Anonymous**

Date Received: **2/7/25**

Attached are my notes containing feedback on the proposed revisions to the employment arbitration and mediation rules.

I think this process of soliciting public comment was a wise idea, both as a transparency measure, but also to ensure that problems or concerns are found and dealt with prior to adoption of the new rule set.

I am happy to visit if that will be useful.

Comments on proposed revisions to Employment Arbitration Rules

Date: February 7, 2025

Proposed Rule 1(a)
I continue to see arbitration agreements that name the rule set as the "National Rules for the Resolution of Employment Disputes." Rule 1(a) should expressly say that these rules replace the National Rules for the Resolution of Employment Disputes.

Proposed Rule 1(b), 1(c)
The proposed Rule 1(b) is a significant improvement, by making very clear – in the rules – how decisions are made about whether the employment rules will apply in independent contractor situations. This is much needed clarity.

Prosed rule 1(c) is also a significant improvement, in that it makes clear that AAA has authority to make the initial determination of whether the employment rules will apply, and provides a clear mechanism for the arbitrator to rule on any disputes over choice of rules.

Proposed Rule 1(d)
Not clear from the proposed rule, whether the intention is that a business may compel an employee to agree in a form contract to changes to the rules. OR, does the first sentence of 1(d) cover the situation whether the parties submit some contemporaneous stipulation or agreement at the time the case is initiated.

Proposed Rule 4(a)(ii)
The proposed rule should ALWAYS require the parties to file with AAA a copy of any court order compelling arbitration.
The proposed rule currently requires either the court order, or the arbitration agreement. If there is a court order, that MUST be filed with the case.

Proposed Rule 4(e)
The revised rule provides AAA discretion to treat multiple cases filed individually as a single case. Similarly, the revised rule provides AAA with discretion to treat a multi-claimant as a separate individual case.

This is likely to be problematic, given that a very large percentage of workplace arbitration agreements require all claims to be brought on an individual basis, and forbid any class, group or collective treatment of cases

Q: Is Rule 4(e) intended to over-ride arbitration agreements requiring all claims to be decided solely on an individual basis? Clarity here would be beneficial.

Q: How is this supposed to inter-relate to the Mass Claims Protocol?

Proposed Rule 5(f)
This rule encourages the parties to submit enough information in their pleadings to make the case clear to the arbitrator. Rule 5 is specific to answers and counterclaims. This is a general rule that applies to statements of claim, as well as answers and counterclaims.

Move Proposed Rule 5(f) to Rule 4 since it is a general rule related to filing requirements.

Proposed Rule 13(b)(iv)
This rule appears to authorize AAA to administratively appoint the arbitrator(s) in every multi-party case with either multiple claimants or multiple respondents.

I strongly oppose this change. Confidence in arbitration **absolutely** requires party involvement in arbitrator selection. I can think of no compelling reason for administrative appointment of arbitrators simply because the case has either multiple claimants or multiple respondents.

Proposed Rule 16
The proposed revisions fail to address a long-standing structural problem with the rules. The burden of conflict investigation is assumed to lie solely on the arbitrator. While the duty to investigate and disclose obviously must be met by the arbitrator, the missing element is that **the rules fail to require parties to make the disclosures necessary so that an arbitrator may then investigate and disclose.**

New Rule 16 does not address the AAA procedure for the parties to complete and submit a confidential checklist for conflicts. Nothing in the existing rules or the proposed new rules mentions or addresses

such a conflicts checklist, nor obligates parties to provide such a checklist. The failure of parties to submit meaningful checklists makes it impossible for arbitrators to do a thorough job of investigating and disclosing contacts or connections.

The rules need to expressly require parties to do their part, and submit a conflicts checklists.

Suggestion: Add a new Rule 16(d)

> Parties shall complete and submit to the Association a Confidential Checklist for Conflicts identifying all parties, party representatives, counsel, and likely witnesses. Corporate parties shall disclose parent companies and shall disclose if the party or any parent or related company is publicly traded. The checklists filed by the parties will be provided by the Association only to the arbitrator for the purpose of evaluating and making disclosures.

Proposed Rule 20
Consider changing the name of this to something like "Initial Case Management Conference." That is more descriptive of the limited nature.

Preliminary Hearing sounds like a substantive hearing.

Proposed R-21(a) Exchange of Information
The change here is a solid one, and suggests that some discovery will occur, and that such discovery will be managed by the arbitrator.

I believe this is an improvement over existing Rule 9 "the arbitrator may order…."

Proposed Rule 21(d)
The proposed rule provides that the parties may elect to utilize the applicable discovery protocols.

I believe this is a reference to the Association's Initial Discovery Protocols for FLSA cases or the Initial Discovery Protocols for employment cases.

Consider revising this rule to clearly match the actual name of the protocols.

Consider revising this rule to provide that the parties may agree, or the Arbitrator may direct, the use of the Initial Discovery Protocols or other early exchange of documents and information.

Proposed Rule 22 – Enforcement Powers
Proposed Rule 22 and Proposed Rule 57 cover similar ground, care is needed to ensure that the two rules remain consistent.

I support this change, as a necessary clarification of the authority of the arbitrator to take appropriate steps in the unusual case of a party abusing the information exchange/ discovery process.

In particular, Rule 22(d) is a welcome clarification of the authority of the arbitrator to take suitable action in the face of significant misconduct by a party. These situations are extremely rate, but a clear basis for arbitrator action is a needed clarification.

Proposed Rule 23
This proposed rule sets the starting point that final hearings will be conducted remotely, unless the parties agree otherwise or the arbitrator determines an in person hearing is necessary for a fundamentally fair process.

This may be a step too far.

The better choice would be a more neutral position – making clear that virtual hearings are an option, and that the arbitrator has discretion to order an in person hearing or virtual hearing after taking into account the location of parties, counsel and witnesses, and the travel costs.

Proposed Rule 27 Official Record
This rule is probably intended to broaden the methods of making an "official record" of a hearing. If the intent is for transcribers other than court reporters, then it should clearly say so.

I am not opposed to the idea. However, I think if that is the intent, it should be explicitly stated in the rule.

If the intent is to permit <u>wholly automated transcription services</u>, I would be opposed.

For example, modify the first sentence of 27(a) to read something like:

> Any party desiring a transcribed record of a hearing shall make arrangements directly with a court reporter, other transcriber or a transcription service and shall notify the arbitrator and the other parties of these arrangements at least 7 calendar days in advance of the hearing. The use of a court reporter is not required, unless so ordered by the Arbitrator.

Proposed Rule 31(c)

This rule needs to be carefully coordinated with Proposed Rule 23. 23 presumes that the hearing will be virtual or remote.

Should Rule 31(c) and Rule 23 be consolidated into a single rule?

Proposed Rule 31(d)
The proposed rule authorizes the parties to waive an oral hearing.

Waiving an oral hearing after the case has been filed is a very different thing, that the employer requiring waiver of an oral hearing the ADR plan or arbitration agreement.

Revise Rule 31(d) to read:
"The parties may agree to waive oral hearings in any case by a joint stipulation executed by all parties after the initiation of the arbitration.

Proposed Rule 32 – Motions
I think the proposed rule is an improvement over the existing rule.

"the arbitrator has sole discretion to allow or deny…" is absolutely crystal clear, and leaves no wiggle room. The existing rule is not bad, I just think this emphatic wording is an improvement.

Proposed Rule 33(e) – subpoenas
This new rule on subpoenas is a welcome addition. The process indicated is sensible, and I think solidly supported by the case law.

Proposed Rule 36 – Emergency Measures of Protection
I support this change. Including these rules within the Employment/Workplace Rules makes this a more complete rule set, covering likely possibilities.

Proposed Rule 46(b), 46(c) – Interim Awards
This is an improvement, in that the rules now explicitly address interim or partial awards.

Proposed Rule 53(c)
53(c) now correctly identifies the fee schedule. This is a needed change.

Proposed Rule 57 – Sanctions
Proposed Rule 22 and Proposed Rule 57 cover similar ground, care is needed to ensure that the two rules remain consistent.

This rule does not quite clearly say that the arbitrator's sanctions power extends only to the PARTY as opposed to counsel. I am no confident that the case law solidly supports arbitrator sanctions against counsel. Nor is there any obvious way for an arbitrator to enforce sanctions against counsel.

I suspect that this rule is intended to apply solely to sanctions against a party. I think that ought to be explicit in the rule.

Suggested change:

> (a) The arbitrator may, upon a party's request, order appropriate sanctions against a party that has failed to comply with its obligations under these Rules or with an order of the arbitrator

Proposed Mediation Rule M-6 - Mediator's Impartiality and Duty to Disclose

As with the arbitration rules, the mediation rules wholly ignore the critical importance of parties making disclosures to enable the mediator to investigate and disclose potential conflicts.

M-6 should include a new paragraph:

> In order to enable the mediator to investigate and report potential conflicts, each party is required to submit to the Association a confidential checklist for conflicts, which shall identify all parties, parent companies, key participants in the underlying dispute, and all counsel. If any company involved in the matter is publicly traded, such fact must be disclosed on the checklist for conflicts.

Proposed Mediation Rule M-12 – Stenographic Record

This proposed rule is too narrow. "Stenographic" is not the only kind of record which ought to be prohibited in mediation – what about audio or video recordings? The similar rule in the Arbitration rules does not use the term "stenographic" rather talks about a transcribed record.

This is especially important, since the proposed rules presume that all mediations will take place remotely.

It is extremely unlikely anyone is going to hire a court reporter to sit beside them out of sight, during a Zoom mediation. BUT – they could easily set up audio recording.

The language of the rule needs to be broader.

> There shall be no audio, video, transcribed or stenographic record of the mediation process.

Proposed Mediation Rule M-16 – Deposits
The mediation rules fail to address the possibility that a party may fail to make the required deposits for the AAA fees or mediator fees.

Add a new sentence along these lines:

> If a party fails to make required deposits for AAA fees or mediator compensation, the Association may suspend the mediation and notify the parties. If the required deposits are not made after notice, the Association may terminate the mediation.

AAA Panelist Comment #3

Panelist: **Anonymous**
Date Received: **2/9/25**

Hi,

Based on my review of the comparison document and the summary of proposed revisions, here are my comments and feedback (from an arbitrator's perspective):

Increased Stay Period for Judicial Intervention (Rule 2)
Feedback: Extending the automatic stay from 30 to 90 days for judicial intervention is a great improvement -- thanks. It provides parties with ample time to seek court relief, reducing rushed filings. This enhances fairness and procedural integrity, especially in complex cases.

Preliminary Hearing and Procedures (Rule 20, P-1, P-2)
Feedback: Renaming the "Arbitration Management Conference" to "Preliminary Hearing" is a great idea. I always called it "Preliminary Hearing" anyway. Adding a checklist for preliminary hearings would help arbitrators (especially new ones) organize cases better and streamline proceedings.

Virtual Hearings as Default (Rule 23)
Feedback: Defaulting to virtual hearings improves is a great idea! In most cases, it increases accessibility and reduces costs.

Expanded Arbitrator Enforcement Powers (Rule 22)
Feedback: This is a welcome addition. Allowing arbitrators to impose reasonable search parameters and issue sanctions ensures compliance and promotes efficient case management.

Revised Motion Procedures (Rule 32)
Feedback: The clarification that dispositive motions will only be allowed if they are likely to succeed and narrow issues is practical. It prevents unnecessary delays and promotes efficiency without undermining

due process.

Chair Arbitrator Authority (Rule 43)
Feedback: Allowing the chair to resolve procedural disputes without consulting the full panel expedites decision-making. This is especially useful for straightforward issues.

Sanctions Rule (Rule 57)
Feedback: Introducing the authority to grant sanctions reinforces the arbitrator's ability to maintain order and deter bad-faith conduct, improving procedural fairness and compliance.

Overall, great revisions!

Thanks.

AAA Panelist Comment #4

Panelist: **Anonymous**
Date Received: **2/10/25**

While most of the proposed changes are good, after my review, I suggest that the following be reconsidered:

R-1 regarding application of the Rules would be changed to delete the clause that if an "adverse material inconsistency" between the Rules and the arbitration agreement exists then the arbitrator "shall" apply the Rules. In that situation the arbitrator needs direction, and the parties should know in advance of initiating AAA arbitration how such a conflict with an agreed provision (e.g, on cost splitting, motions, hearing locale, etc.) would be resolved. Thus the existing clause should be retained.

R-24 regarding attendance at hearing would be revised to provide that any person with a "direct interest" or any "essential person" is entitled to attend the hearing. Those terms are undefined, subjective and could lead to numerous attendees at hearing (e.g., all shareholders of corporate parties have an interest). I would keep the old language that only parties or the corporate representative are allowed to attend, unless the arbitrator decides otherwise. Multiple nonparties attending a hearing undermines the strict confidentiality of a hearing, the rule of sequestration of witnesses, and presents other potential problems in controlling the proceedings.

R-56(b) regarding remedies for nonpayment would add a new provision to allow a party to request an order, a response, and an order. This would likely lead to essentially motion practice on the issue at a time when there is insufficient deposits, and lead to increased overall costs of arbitration. The arbitrator already has the authority to seek input from the parties and enter an order, including a suspension order,

without the parties briefing the issue. The AAA should also consider holding an award until all payments are made.

AAA Panelist Comment #5

Panelist: **Anonymous**
Date Received: **2/10/25**

Dear Sir or Madame,

As an arbitrator with the AAA, I think many of the proposed new rules are excellent. However, I do have the following comments and suggestions:

1. Rule 22 - I would specifically include "monetary sanctions, as one of the options, so there is no question that the arbitrator can impose monetary sanctions.

2. Rule 23 - If the hearing is going to be virtual, the rule should specify who is responsible for any of the costs associated with the virtual hearing; e.g., the cost of the "host" or the cost of setting up any necessary technology. Also, I think the default should be an in person hearing and a virtual hearing should only occur if agreed to by all parties or ordered by the arbitrator.

3. Rule 27 - It specifies that the party requesting the transcript pays for it. That is fine. But then it says that the transcript must be provided to the arbitrator and the opposing party. I don't think that is fair. This rule would enable a party to simply sit back, not pay for the transcript or spilt the cost, then get a free ride and obtain a copy. I think if a party does not want to split the cost or pay for a transcript, then they don't get one. That would be the result in court.

4. Rule 37 - This provides that the hearing is deemed closed 7 days after receipt of the final brief. However, sometimes, after all the briefing is completed, the arbitrator may have questions or want oral argument. I think the rule should provide that the hearing is deemed closed either 7 days after receipt of the final brief, or 7 days after closing oral argument, whichever id later.

5. Rule 47 - Consent Award - Sometimes the parties reach a settlement which requires a dismissal of the action but the parties want the arbitrator to retain jurisdiction in order to enforce the terms of the settlement. Under CCP, 664.6, a court can dismiss the case but reserve jurisdiction to enforce the terms of the settlement. However, Rule 47 does not provide for this. I suggest that Rule 47 provide that the arbitrator may reserve jurisdiction to enforce the terms of the settlement by issuing an award if there's a breach.

6. Rule 57 - As with Rule 22, I suggest that the rule specifically state that the arbitrator can impose monetary sanctions. More importantly, the Rule should provide that the arbitrator can also impose sanctions against the

party's attorney of record, because often times it is the attorney's conduct that justifies the imposition of sanctions. Without such a provision, it is unclear if the arbitrator has jurisdiction to sanction the attorney.

Although the checklist for the preliminary hearing includes considering "consolidation' of claims or counterclaims with another arbitration, there is no rule permitting the arbitrator to consolidate claims. The lack of any rule permitting consolidation should be corrected. It makes no sense to have potentially dozens of arbitrators deciding the same issue with the likelihood of different results. This stands on its head American jurisprudence of *stare decisis* and uniformity so that people can have a reasonable expectation of what the law requires and the consequences for a violation. After the common issue is decided, there can be evidence presented on individual damages. The Rules should have a procedure which sets forth a process by which cases with common issues can be consolidated, provided that the parties' arbitration agreement does not prohibit consolidation. It should be noted that under California law, CCP 1281.3, permits a party to petition the court to consolidate separate arbitrations.

If you want to discuss any of my comments further, please feel free to give me a call. Thank you.

AAA Panelist Comment #6

Panelist: **Robert L. Arrington**
Law Firm: **Wilson Worley**
City: **Kingsport, TN**
Date Received: **2/11/25**

All of the proposed changes are either neutral (Rule 7) or beneficial (Rule 33).

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AAA Panelist Comment #7

Panelist: **Anonymous**
Date Received: **2/11/25**

The new rule makes virtual hearings the default method absent other circumstances. While I have no objection to holding virtual hearings, I think the parties should not have to prove the need for an in-person hearing, especially in this employment cases where determining credibility of the witness plays an essential role in determinations. This rule should be reworded to recognize the parties' agreement (in their contract or before the tribunal) will be the default method for determining the type of hearing, with the virtual hearing being one of the options available to them.

AAA Panelist Comment #8

Panelist: **Anonymous**
Date Received: **2/12/25**

The 7-calendar day limit in proposed rule R-37(b) strikes me as unduly inflexible and unnecessary. In my view, the arbitrator should be given discretion to deal with circumstances which may arise even if outside the seven-day limit.

AAA Panelist Comment #9

Panelist: **Hon. Dan Hinde**
Law Firm: **Dan Hinde PLLC**
City: **Houston, TX**
Date Received: **2/12/25**

I am writing to provide comments on the proposed revisions to the AAA Employment Rules.

I have been on the Employment Panel for several years and have handled numerous employment arbitrations. I do not think the rules regarding dispositive motions (old Rule R-27, proposed Rule R-32(b)) provide sufficient guidance. These rules provide no standard to guide an arbitrator on whether to grant a motion and dispose of (or narrow a case).

For example, Federal Rules 12 and 56 provide well known standards for when a court may dismiss a claim or grant a summary judgment without a full trial on the merits. But old Rule R-27 and proposed Rule R-32(b) do not state what the movant must show (or what the responding party may show in response) to determine whether to grant the motion in whole or in part.

Since one of the few grounds for vacating an arbitration award is when an arbitrator "refus[es] to hear evidence pertinent and material to the controversy," (FAA s. 10(a)(3)), this lack of any standard for determining when to dispose of a case without a Final Hearing is problematic and could build in grounds for vacatur of a decision granting a dispositive motion.

I suggest revising the rules on dispositive motions to state some sort of standard, whether it be failure to state a claim on which relief can be granted, no evidence to support an essential element of a claim, conclusive proof of a defense, etc.

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AAA Panelist Comment #10

Panelist: **Anonymous**
Date Received: **2/13/25**

I have been on the Employment Panel since approximately 1997. Here are some thoughts I have on the proposed Revised Employment Rules. Some of my comments are about Rules that are not proposed to be changed from the current version, but I don't recall having an opportunity to comment on the Employment Rules in the past. My comments are numbered to correspond to the numbers of the proposed Revised Rules.

Rule 5(d) appears to be self-contradictory. At the outset it states that the AAA may in "its sole discretion" decide which arbitration provision applies then concludes by stating that the final determination is to be made by the Arbitrator. Perhaps it should state that the AAA makes the *initial* determination in its sole discretion subject to a final determination by the Arbitrator.

Rule 7(b) doesn't make sense to me. How can an arbitration clause standing alone survive a finding that a contract which contains the agreement to arbitrate is null and void? In what circumstance could an Arbitrator enforce an agreement to arbitrate within a contract that has been determined by the Arbitrator to be null and void? This is an especially troubling concept if the Arbitration Demand contains a breach of contract claim that would disappear upon a finding that the underlying contract is null and void. Perhaps the intent of the Rule is to afford the Arbitrator, not the Court, the power to determine if the contract containing the arbitration clause is null and void.

Rule 7(c). If a challenge exists, the Arbitrator should be required to make the decision on arbitrability at the outset as a preliminary matter and not defer the decision until the Award. By deferring a decision that a matter is not arbitrable the parties may incur significant wasted time and expense to proceed all

of the way through a hearing only to be told that the matter is not arbitrable which is contrary to the goal of arbitration to provide a speedy and economical forum to resolve disputes.

Rule 8. I believe that the last sentence should be stricken. Once the Arbitrator is appointed, he/she should be the interpreter of all Rules, not the AAA.

Rule 10(b) states that if the AAA declines to administer a matter the parties may choose to submit their dispute to court. The AAA's determination to decline or cease administration cannot make a new contract for the parties and nullify their agreement to arbitrate. I think that Rule should not be included in the revised Rules.

Rules 18(a) and 41(a) should be revised to permit the direct exchange method which is a much more speedy and efficient way to transmit papers and communications and frees the AAA staff from mundane clerical tasks.

Rule 21 should be revised to expressly permit depositions and interrogatories as does the current Rule 9. As written the proposed Rule 21 implies that document exchange is the only discovery permitted. I do not see parties agreeing to arbitrate employment disputes if discovery is limited to document exchange.

Rule 21 (d) implies that the AAA's Initial Discovery Protocols apply only if the parties agree that they should be employed. I believe that the Initial Discovery Protocols are a very effective tool for launching discovery and I routinely order that it be employed in all employment cases that I arbitrate and in some commercial cases as well. I urge that the Initial Discovery Protocols be mandatory in all employment cases or at the very least Rule 21(d) expressly state that the Arbitrator may order that they be employed.

Rules 31(c) and 34(a) conflict. Rule 31(c) requires that alternative methods of presenting evidence through a witness must afford the opportunity for cross examination while that requirement is not included in Rule 34(a) which permits evidence from a witness by written statement. I don't have a preference as to which Rule ought to apply but the inconsistency should be eliminated.

In the last sentence of proposed Rule 46(c) I suggest that the word "employer" would be more appropriate than "business".

Thank you for this opportunity to comment. If you have any questions about my comments, please get back to me.

AAA Panelist Comment #11

Panelist: **Anonymous**
Date Received**: 2/20/25**

I have reviewed the proposed rule revisions and generally agree with the changes. I have the following additional comments:

(1) I am concerned that the more detailed procedures for preliminary hearings in the revised rules will drive parties and the arbitrator into a more formal process that closely resembles litigation in court. In my experience, most counsel for the parties try to do that anyway, and I believe such detailed specifications for the preliminary hearing will aid that tendency, resulting in a process that takes longer and is more expensive. We need to be wary of arbitration becoming so formalized that its advantages over court litigation are lost.

(2) I am concerned that the more detailed terms of the rule on exchange of information may have the same effect as noted above.

(3) I suggest eliminating the two-step process for dispositive motions. It creates redundancy, and the ruling on the initial question of whether a dispositive motion will be allowed telegraphs how the arbitrator views the proposed motion if one is allowed. Just let the arbitrator build deadlines into the case schedule for parties to file dispositive motions and have them decided. Most counsel, if they are sensitive to costs, will not file a dispositive motion unless they think it has a good likelihood of success.

(4) If it is possible, set some non-binding benchmarks for how long it should generally take cases to get from filing of the demand to the evidentiary hearing. I am used to litigating in courts that move cases along, and I try to follow that model in managing my docket as an arbitrator, yet most lawyers tend to request unreasonably long case schedules. I find that I often have a greater desire for expediting cases than the attorneys do, and some benchmarks as a reference point would help to adjust the expectations of attorneys and litigants for how long an arbitration case should take from filing to final disposition. The benchmarks could vary based on the number claims, number of parties, complexity of the case, etc.

AAA Panelist Comment #12

Panelist: **Anonymous**
Date Received: **2/25/25**

Hello and thank you for providing this opportunity to comment on the Draft Amendments to the AAA Employment Arbitration Rules.

I am concerned about potential confusion and/or needless litigation that may arise from the Proposed Rule 56 “Remedies for Non-Payment.” As AAA is aware, California has a robust and comprehensive statutory scheme within the California Arbitration Act that addresses this issue. (See Cal. Code Civ. Proc. §§ 1281.97, 1281.98, 1281.99.) Indeed, AAA has made a practice of inserting language in their letters accompanying initial invoices that references these precise statutory provisions and California courts

have cited that language in decisions regarding application of this statutory scheme. (Doe v Superior Court (2023) 95 Cal.App.5th 346, 351-52) In multiple published decisions, the California Courts of Appeal have implemented these provisions strictly. (See e.g., id. at 358-60.)

The fundamental difference between Proposed Rule 56 and the California statutory scheme lies in the remedies. To begin, the California statutory scheme removes the decision as to remedy from the arbitrator or the provider and places it exclusively in the purview of the Claimant. (Cal. Code Civ. Proc. §§ 1281.97(b), 1281.98(b).) Secondly, the remedies outlined by the California statutory scheme are much broader and more robust than in Proposed Rule 56. (Id. at §§ 1281.97(b)(1)-(3), 1281.98(b)(1)-(4).)

Proposed Rule 56 fills an important gap in the rules for arbitrations that are set in jurisdictions outside of California or any other jurisdiction that may have provisions similar to those in California. However, Proposed Rule 56 contains no caveat or reference to the fact that the law applicable to a particular arbitration (e.g., an arbitration set in California or that otherwise incorporates California law) may provide for different procedures or available remedies. Without that express caveat, the door is open for advocates to argue that Rule 56 may apply to an arbitration where the arbitration contract calls for incorporation of AAA Employment Rules. While questionable in its strength and potential success, it unnecessarily muddies the waters that California courts repeatedly have recognized as crystal clear and will lead to time consuming collateral litigation.

Proposed Modification to Proposed Rule 56: The remedy for this problem is simple and easily accomplished: Insert the verbiage “Unless the law provides otherwise . . .” at the outset of the rule. This type of reference or similar references to “the law” is made in many other parts of the Employment Rules and effectively eliminates confusion or potential for collateral litigation. (See e.g., Rule 12(b), 17(a)(iii), 22(e), 24, 25, 26, 30, 33(d), 36(e), 42(a), 43(a), 44, 45(a), 46(a), 46(c), 48, 49, 54.)

Thank you for considering this feedback; I am happy to speak with any AAA representative to answer any questions.

AAA Panelist Comment #13

Panelist: **Anonymous**
Date Received: **2/28/25**

Hello.

I am concerned about **Rule 21 - Exchange of Information**.

The new rule makes no reference at all to interrogatories or depositions. It seems to focus entirely on document production. I think there needs to be the same reference to "deposition, interrogatory, document request or otherwise" that was in the old Rule 9. The omission of this could be seen as precluding or disfavoring other forms of discovery.

One other comment, please do not print the headings in yellow ink... it is so hard to read when you are in a hurry scanning the rules. Thanks!

I do like a lot of the changes. I am in favor of preferring virtual hearings. Thank you for your hard work!

AAA Panelist Comment #14

Panelist: **Anonymous**
Date Received: **3/3/25**

The rule on summary judgment motions states in pertinent part, "Where a party seeks to file a dispositive motion, the arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines the moving party has shown that the motion is likely to succeed and to dispose of or narrow the issues in the case."

This standard is problematic. Is the arbitrator to pre-judge the motion? Where is the fairness in that? If one party wants to file such a motion, but the arbitrator denies that party the opportunity, and that party ultimately succeeds, doesn't that add to the costs? Does that also raise a fairness issue? This threshold showing is not required in court. It should not be required in arbitration.