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Handy Tricks and Tips for Family Law Arbitrators

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This note is written for Alberta and British Columbia lawyers who are new to arbitrating family law disputes. It provides a number of suggestions and practice recommendations drawn from my experience as an arbitrator, and may have the coincidental effect of providing useful insight for lawyers taking family law files to arbitration as counsel.

I. Communicating with lawyers and parties without counsel

Communications between the arbitrator and the lawyers and parties must be carefully managed to preserve both the reality and impression that the arbitrator is and remains strictly impartial in the dispute.[1] One of the primary attributes arbitrators bring to the table is their neutrality, and the parties' perceptions of their arbitrator's independence and impartiality must be zealously safeguarded.

Moderating initial contact

An arbitrator's first contact with someone interested in retaining the arbitrator's services is usually initiated to learn about rates, check availability and discuss the arbitrator's approach to dispute resolution. However, lawyers and parties contacting arbitrators to retain their services are often inclined to pitch the merits of their case to a potential arbitrator as they would to a judge. This risks the creation of obstacles to concluding the retainer should one of the lawyers or parties develop the impression that you have formed a bias as a result of the content or nature of the initial communication.

Ideally, initial contact would come in the form of a joint letter from counsel, or a non-partisan letter from one lawyer clearly copied to opposing counsel. This will not always be the case. While there is nothing prima facie wrong or improper about ex parte communications, there are a few steps that can be taken to moderate initial contact and preserve the parties' perceptions of your independence.

A. Publish the most commonly-sought information

The easiest way of moderating initial contact is to publish the information most commonly sought by lawyers and parties on your website. This will include a basic statement of your fees and expectations for the payment of disbursements, as well as a publicly-accessible calendar showing your availability.[2] Other

[1] Throughout this note, when I write *lawyers and parties* and *lawyers or parties*, I am referring to the arbitrator's interactions with *lawyers* representing clients in the arbitration and with *parties* who are arbitrating without representation. The arbitrator will usually only communicate directly with represented parties at applications and hearings.

[2] A number of web-based services exist that allow the sharing and integration of public calendars into websites, including Timely, the service I use. I use Timely to mark specific days as *unavailable*, *reserved* or *booked* through its online application, while also displaying the public feed from a shared calendar I've set up on my office computer for shorter periods of time.

useful information might include any standardized participation agreements you use, a description of your approach and a statement of your areas of special expertise and interest.

B. Provide guidelines for making initial contact

Publishing guidance for initial contact on your website may also help. Guidelines for contact should: explain the nature of the information you would like to receive, and that which you do not; include a warning about the potential impact of parties or counsel providing an unbalanced, parti pris description of the circumstances of the dispute; give notice that all written communications will be copied to the other people involved in the dispute; and, ask parties and counsel to refrain from ex parte communication with you to the extent possible.

That being said, the point of first contact is also a useful opportunity to obtain basic information about the dispute. The most useful information to obtain at initial contact is likely that necessary to open a file, including:

a) identifying information sufficient to perform a conflicts check;

b) the names of the lawyers and parties involved and their contact information;

c) the place proposed for the hearing; and,

d) a rough estimate of the time required for the hearing.

For lawyers, my website states that:

> If we should be opening a file, the basic information we'd like to get, all without impacting John-Paul's impartiality, includes:
>
> 1. the names of each lawyer and their telephone numbers and email addresses;
>
> 2. the full names of the parties;
>
> 3. the names and ages of the parties' children;
>
> 4. a neutral description of the essence of the conflict, such as "a mobility dispute," "the appointment of a third-party guardian," "supervised contact and a trust claim against property" and so on, we don't need any more details of the dispute than that;
>
> 5. a neutral description of any pending events such as hearings or trials, the expiry of limitation periods or agreed deadlines, and any circumstances giving rise to urgency; and,

6. the name of the town or city in which any in-person conferences, meetings or hearings are likely to be held.

If contacting us in writing, please copy opposing counsel on your email, and we will provide our reply to both of you.

For parties without counsel, my website states that:

> The best way to hire us is through a lawyer, if you have one. … If you can't do that, the next best thing is for both of you … to send us an email together. You should each provide your contact information and both of you should write your names at the end of the email. You might want to give a short description of the nature of your disagreement, like "we can't agree about parenting issues" or "we have a problem about spousal support."
>
> If that isn't possible either, then write to us yourself, remembering that the other person will get a copy of your email and will be reading it *very* carefully for anything they think might be unfair or untrue. What we'd really like to see is an email like this:
>
> > "My name is Shirley Singh. I am involved in a parenting dispute with Sam Singh about our two children, Sarah Singh and Stanley Singh. I would like to know whether you are able to arbitrate/mediate our dispute in the next two or three months.
> >
> > "I do not have a lawyer and can be reached at _____
> >
> > "Sam also does not have a lawyer. He can be reached at _____
> >
> > "I look forward to hearing from you as soon as possible, and to learning more about your rates, payment and retainer expectations."
>
> That sort of email would be ideal. You haven't told us anything about the nature of your disagreement, except that it involves the parenting of two children. You haven't criticized Sam or given us any other description about the circumstances that might make Sam feel that you'd tried to influence John-Paul in your favour. You've also given us a sense of the timeline in which you'd like to wrap everything up, and that's usually very helpful.

My website also contains a caution that I will be copying the other party on my reply to the initial communication. My hope is that the warning will help to moderate the tone taken by the party contacting me, knowing that the other party will be reading it, and I copy my reply and the original email to the other party so they know exactly what's been said to me.

C. Copy initial ex parte communications and your reply to the other parties or opposing counsel

It is good practice, in my view, to copy the other parties, when contacted by an unrepresented party, or other counsel, when contacted by a lawyer, on any ex parte email communications you receive. Preferably, your reply to the initial communication should include the other parties or counsel involved,

all in the “to” line of your email rather than the “cc” line. If their contact information is not provided in the initial communication, I suggest that you forward the initial communication and your reply to the other parties or counsel when their contact information is obtained, as part of an email confirming your retainer. The purpose of this is to ensure transparency about the initial communication and undermine any concerns that your view of the case has been tainted as a result of that communication.

Where the initial communication contains prejudicial information, you may also wish to add a comment in your reply to the effect that you have disregarded the partisan aspects of the party’s or lawyer’s description of the case and maintain an open mind as to the facts and circumstances relevant to the dispute; the facts underlying the dispute will be conclusively determined at the hearing.

Where the ex parte communication occurs by telephone, you may wish to redirect the call to your assistant to collect the requisite intake information, which you can later use to contact both lawyers or parties. If you elect to take the call yourself, I suggest you warn the person initiating contact, at the outset of the call, that you will be summarizing the content of the communication for the other lawyer or party, and steer the conversation toward collecting the basic information about the file described above.

Communications following retainer

Communications after you have been retained will generally concern matters relevant to the management of the file. Regardless of the nature of the communication, it is vitally important that you retain your neutrality and avoid using any language that might be read as suggesting that you favour one party over the other or have formed any conclusions about the potential outcome of and application or the case.

This is more difficult than it seems. It can help to bear in mind just how deeply invested the parties to a family law case are in its outcome, that the parties will read and re-read your communications, and that the parties will be inclined to read between the lines of your communications and perceive meanings you had not intended. You will particularly want to avoid expressing empathy for a lawyer, a party, a position or a circumstance.

Perhaps because I provide services throughout all of two provinces, the vast majority of my communication with lawyers and parties occurs by email, while meetings before and after the hearing are held by group teleconference and videoconference. I have very little contact with counsel or parties by one-on-one telephone calls and tend to discourage this sort of communication.

D. Copy all communications to all parties or all counsel

As a general rule, the arbitrator should refrain from any ex parte email communications with one party or one lawyer after being retained. All written communications related to the file, no matter how mundane, should be copied to all other parties or counsel, even where originating communications are not. This will

promote transparency and encourage similar behaviour on the part of counsel and parties, and reinforce the perception that you are rigorously impartial in your dealings with counsel or the parties.

Where an ex parte communication occurs by telephone, I suggest that you either ask the person contacting you to send you an email instead or continue the call with a caution, at the outset of the call, that you will be summarizing the conversation in an email to all of the lawyers or parties involved in the dispute. Such summaries should be brief and factual:

> On 23 March 2019, I received a telephone call from Ms Yuen, counsel for Ms Singh. Ms Yuen asked me about the pending steps in this file. I reminded her of the schedule for disclosure and the exchange of interrogatories established at the pre-hearing conference, described in my memorandum to counsel dated 18 March 2019.
>
> Ms Yuen also wanted to discuss the potential subject matter of application she is considering. As I told Ms Yuen, this is a conversation I would prefer to have with both of you. May I please have your dates over the next week for a short, half-hour conference call?

It likely goes without saying that you must refrain from any discussion of strategy, the merits of a party's position and potential outcomes in any one-on-one telephone calls.

E. Identify any other people who should be copied on email communications

Counsel will often include assistants and paralegals on their communications to you, and at times communications will also originate from assistants, paralegals, articled students and other lawyers. I have received emails with a string of four or five other people copied on the email to whom I have never been introduced and whose role in the dispute is unknown to me. This, frankly, makes me uncomfortable, especially when a person not previously introduced to me by counsel purports to provide instructions regarding the handling of a file.

At the outset of the file, the arbitrator should ask counsel to identify any individuals who have the authority to send communications on their behalf, especially instructions and should be copied on any communications. Once the complete group of people to be included has been identified, my originating and reply communications are uniformly sent to that group of people and to no others.[3] I do not include unknown persons in my replies, even where the unknown person has been included in an originating email from counsel. Any policies to this effect should be communicated to counsel.

Where a party is not represented by counsel, people other than the opposing lawyer or party should generally not be included in communications in order to preserve the confidentiality of the arbitration

[3] Email programs usually allow users to create groups of recipients who can be included in emails. Apple Mail, the program I use, allows me to drag the email addresses of recipients into custom groups I define in Contacts, which I then copy or drag into the "to" and "cc" fields of outgoing emails as needed.

process. The arbitrator may wish to consider adding other persons with a relationship to the party, such as non-lawyer advocates and McKenzie friends, on a case by case basis and in consultation with the other parties or counsel involved in the case.

F. Assume that all written communications will be read by the parties

It is good practice, I suggest, to draft all communications to counsel on the assumption that they will be read by the parties. Among other things, this means being aware of the potential for perceptions of bias and paying scrupulous attention to humour, language expressing empathy and sympathy, and commenting on the merits of the case or an application.

II. Initial steps in a file

Immediately following the parties' informal agreement to retain your services, you should direct counsel or the parties to turn their minds to determining:

a) the mode of arbitration;

b) the rules that will govern the arbitration process;

c) the site of the arbitration; and,

d) whether the arbitration will be decided by reference to law and, if so, the jurisdiction of the law to be applied.

These questions are fundamental to the entire arbitration proceeding and will ultimately be determined at the pre-hearing conference, however it is useful to encourage discussion between counsel and clients as early as possible in every new file to maximize the likelihood that the implications of each decision have been carefully and expansively considered.

Mode of arbitration

Arbitrations may be handled as a strictly adversarial decision-making process or as an adversarial process combined with an effort to reach settlement. When resolution will also be sought through mediation, the mediation phase may be either neutral or directive, also known as "evaluative" or "rights-based" mediation. As the mode of arbitration will play a critical role in the choice of rules, the drafting of the participation agreement and the processes leading to hearing, it is good practice to reach a firm agreement on the process to be used as early in each file as possible.

G. Publish information about procedural options

Some lawyers, and unrepresented parties in general, will be unaware that arbitrations can be conducted with an element of mediation. It will be helpful to provide a short description of the procedural options, and their advantages and disadvantages, on your website that can be linked to rather than laboriously restated in your initial written communication to counsel or the parties.

As the content of participation agreements will change according the mode of arbitration, you may also find it helpful to post copies of your standard agreements to your website, making sure of course that any information particular to a case has been redacted.

Rules of arbitration

Many lawyers approach arbitration as they do litigation, and understandably assume that all of the procedural components of litigation processes will or ought to be available in arbitration. While this at least has the merit of providing a common baseline for both counsel and arbitrator, it can blunt lawyers' ability to critically reflect on the processes that are absolutely necessary for the successful prosecution of their case and those which are not. It is not always true, for example, that an arbitration must include:

a) exhaustive pre-hearing disclosure;

b) examinations for discovery / questionings, interrogatories and notices to admit;

c) oral evidence, in direct- or in cross-examination;

d) evidence from persons other than the parties, including expert evidence;

e) oral argument, in opening or in closing;

f) an in-person hearing; or,

g) written reasons for the arbitrator's decision, or even full reasons for the arbitrator's decision.

As the duration of an arbitration will inevitably expand with the degree of process available, truncating or eliminating the range of processes will speed the time to resolution and decrease the cost to the parties. Any such truncation or elimination must of course be proportionate to the importance, value and complexity of the case, and must not materially impair the likelihood that you will be able to reach a fair decision.

H. Develop resources to help parties and counsel select the rules of arbitration

In general, whatever information can be provided to help counsel and the parties assess the necessity of arbitration processes should be provided. My website repeatedly emphasizes the importance of creative thinking about the choice of process, and I have published a set of rules developed for family law arbitrations that includes seven procedural alternatives, presented as a sort of prix fixe menu of processes, ranging in scale from a decision based on written argument without evidence or hearing, to a procedure that includes all of the processes available in litigation, to an inquisitorial procedure designed for parties without counsel.[4] The rules are introduced by separate prefaces written for parties and for counsel that summarize the processes available in each procedure.

I have also published a pick-list on my website – included in this note as an appendix – that provides a more or less comprehensive overview of all of the available process choices, including pre-hearing disclosure and discovery, the presentation of evidence, pre-hearing applications, the exchange of statements of agreed facts, arguments and books of authority, and the nature of the arbitrator's award. I say this about the pick-list:

> One of the most important benefits of arbitration is that the parties to a family law dispute are able to design the arbitration process to suit their issues, their needs and their finances. While litigation processes provide a one-size-fits-all service, almost every aspect of the arbitration process can be tailored to the specific needs of the specific people involved in a specific dispute, giving those individuals the opportunity to create a process that is genuinely proportionate to the complexity, importance and value of the issues in their dispute.
>
> The following are the procedural elements that the parties to an arbitration can change to suit their circumstances. They cover most aspects of the arbitration process, including exchanging documents and information, deciding how evidence will be presented and the basis on which a party will be able appeal the arbitrator's award. Use this list before the pre-arbitration conference to decide which procedural elements are important, which can be abbreviated and which are entirely unnecessary. Remember that the longer an arbitration takes to complete, the more money it will cost!

Parties and counsel may download the pick-list as a resource to stimulate their thinking about the necessary rules or use it as a check-box tool to help define the rules they would like to govern their arbitration.

[4] I developed these rules in 2018 but have increasingly had second thoughts about them as time has passed. They are too complex and too lengthy, and too closely resemble traditional rules of court. I will be preparing a revised set of model rules in the near future, as my schedule may allow.

III. The pre-hearing conference

The pre-hearing conference may be held by teleconference, by videoconference or in person. The primary subjects of this conference will usually include:

a) identifying and clarifying the legal issues to be addressed in the arbitration;

b) determining the mode and means of arbitration;

c) determining the rules of arbitration;

d) determining the site and jurisdiction of the arbitration;

e) nominating each of the parties as claimant or respondent, for the preparation of the parties' statements of position and developing the order of proceedings;

f) determining the need for expert evidence;

g) determining how information about the views of any children will be presented;

h) identifying any physical or other accommodations that need to be made to ensure the site of the arbitration is accessible;

i) determining the process to be followed in, and scheduling if possible, any applications that may be brought before the hearing;

j) scheduling the steps that must be taken leading up to the hearing; and,

k) determining the status of any recordings you may make of any applications and the hearing.

The decisions made at this conference will direct you in the drafting of the participation agreement and the rules of the arbitration.

Managing the conference and its outcomes

The pre-hearing conference will be your first opportunity to discuss the case in any depth with counsel, or with parties who are unrepresented. It sets the tone for the arbitration and helps to establish your role and authority in the proceeding. It is also a critical early opportunity to discuss the management of the case, how any children can be protected from the conflict between their parents, the steps to be taken in advance of the hearing and how the hearing itself will be conducted.

You will want to take careful, detailed notes of all decisions made at the conference. Following the conference, it is good practice to diarize all time limits and deadlines. While it is not your role to remind counsel of pending deadlines – how you handle the question with respect to parties without counsel is another matter – you do need to be aware of missed deadlines and you ought not depend on counsel to bring such matters to your attention.

I. Develop and maintain a standard agendum

You may find that your pre-hearing conferences tend to follow a similar course. If so, you can economize your time by developing a standard conference agendum that you can cut-and-paste, adapting as necessary for each file, into emails to counsel or the parties. This will help ensure that you capture all of the key points to be canvassed at the conference and creates a precedent that can be reused and updated as time passes.

If you would rather not run your conferences with a prescribed agendum, I suggest that you consider at least preparing a checklist to ensure that you do not overlook critical matters such as the mode of arbitration, the choice of law and the legal issues to be addressed.

J. Manage videoconferences and teleconferences with care

It is often easier to hold pre-hearing conferences by video- or teleconference as the lack of travel time reduces the amount of time that must be blocked off in the calendars of counsel or the parties, facilitating earlier scheduling than may otherwise be possible. It is also a necessity when dealing with out of town counsel or parties. I prefer videoconferences to teleconferences as cross-talk is minimized, it is easier for participants to signal that they wish to speak and it is always clear who is speaking.

Videoconferencing has experienced significant growth in functionality as business use has expanded. Take advantage of any webinars offered by your service provider to familiarize yourself with the management options available. I suggest that you disable any chat functions or at the least disable participants' ability to send private messages to you. You should consider locking the videoconference until you have logged in, and taking advantage of the recording options many service providers offer.[5]

Teleconferences are slightly more difficult to manage, but only because the participants cannot be seen and are more likely to talk over each other. It may be also be more important to control participants who are monopolizing the conversation to ensure that all participants may be heard.

K. Be as specific as possible in all decisions reached and follow up with a memorandum

Decisions made at the pre-hearing conference should be as specific as possible to avoid misinterpretation and opportunistic reinterpretation. Deadlines, for example, should not be expressed as "next Monday" or

[5] All of these options and more are available through Zoom, the service provider I use.

"next Monday at the close of business," but as "5:00pm on Monday 20 May 2019." The same principle applies with respect to other time limits, page limits, the questions experts will be asked to address, limits on the number of witnesses, limits on the amount of time available for direct- and cross-examination, descriptions of the documents a party must produce and so on.

My practice is to summarize all of the decisions reached at the pre-hearing conference in a memorandum to counsel or the parties. This ensures a mutual understanding of the decisions made, gives counsel or the parties the chance to identify and correct any errors, and forms an invaluable part of the arbitrator's record when drafting awards.

L. Encourage counsel to minimize processes to the extent possible

When developing the rules that will apply to an arbitration, even if only by identifying and eliminating unnecessary processes usually available in litigation, I encourage you to press counsel to minimize the scope and complexity of the processes they wish to have available. While procedural fairness, the importance, complexity and value of the issues in the case, and the need to minimize the children's exposure to their parents' conflict remain overriding concerns, where a proposed process appears to have marginal utility, counsel should be asked to explain:

a) the necessity of the process they wish to have available for the prosecution of their case;

b) the cost and time the process will likely consume relative to the benefits it is expected to produce; and,

c) the prejudice a party will suffer if a process is not available, and whether there are alternative, more efficient means by which any such prejudice can be ameliorated.

Remember that you will usually have discretion with respect to costs, and that your considerations in making costs awards may include the extent to which a party has wasted time or inconvenienced another party without good cause.

M. Encourage cooperation and good behaviour on the part of both counsel and parties

Arbitrators have an ability to shape proceedings and their management rarely enjoyed by judges. This is one of the more important benefits offered by the arbitration of family law disputes. My website, the rules of arbitration I have developed, and the conversation I generally have with counsel or the parties at the pre-hearing conference all emphasize the importance of acting in good faith generally, and of:

a) behaving with civility, courtesy and respect;

b) protecting children from conflict;

c) making complete and clear disclosure voluntarily and promptly;

d) maintaining a cooperative attitude and conceding applications and claims that are bound to prevail;

e) refraining from advancing unreasonable positions and claims; and,

f) consenting to extensions and delays sought for good reason where the extension or delay will not prejudice the client.

In short, you can and should encourage counsel and parties toward good behaviour, honesty, rationality and tolerance, while emphasizing the importance of maintaining a mindset that is open to settlement and reasonable compromise.

Planning for the hearing

A number of important issues relating to the conduct of the hearing and the parameters of the arbitrator's jurisdiction should be canvassed at the pre-hearing conference. Matters relating to jurisdiction primarily concern identifying the legal issues and the governing arbitration legislation. Matters relating to the conduct of the hearing range from the mundane, such as determining the date, site and place of the hearing, to the critical, such as determining the mode of arbitration and the rules which will govern your conduct of the hearing.

N. Clearly define the legal issues to be addressed

The scope of your jurisdiction will be defined by the legal issues and choice of law identified by the parties at the pre-hearing conference and subsequently enumerated in your participation agreement, subject to any statutory conditions or limitations imposed by the governing legislation.[6] Because of the dire consequences exceeding your jurisdiction may entail, it is important to be as clear as possible on the legal issues you are being asked to determine. For many issues, a simple statement such as "determining the parties' incomes and the amount of child support payable" will suffice. However, a statement such as "determining the division of family property" may not suffice if there are third party interests, liens and

[6] Section 2 of British Columbia's Arbitration Act, for example, provides as follows for matters dealing with the care and control of children and relocation:

> (2.1) In relation to an arbitration respecting a family law dispute, …
> (b) an arbitrator, in making an award that deals with a matter referred to in
> (i) any of Divisions 1 to 5 of Part 4 of the Family Law Act, must consider the best interests of the child, as set out in section 37 of that Act only, and
> (ii) Division 6 of Part 4 of the Family Law Act, must consider, in addition to section 37 of that Act, the factors set out in section 69(4)(a) of that Act.

Alberta's Arbitration Act, on the other hand, says nothing to fetter the jurisdiction of arbitrators in family law disputes.

encumbrances, claims of unjust enrichment or trust, or claims under the equitable presumptions of gift or advancement.

O. Clarify the status of your personal recording of the proceedings

A party may arrange for the hearing to be recorded or transcribed by court reporter, usually at the party's own expense, for the purposes of potential appeals. Apart from any record counsel or the parties may wish to make, you may record the proceedings yourself. I have found such recordings to be extremely useful in supplementing my notes and ensuring I have accurately understood a submission or accurately quoted oral evidence in my award, and I recommend the practice.

It is, however, important to clarify the status of your recording at the pre-hearing conference – and I remind counsel and the parties about the fact that I will be recording the proceedings and the status of my recording at the beginning of the hearing – to address questions such as whether the parties may access my recording and whether my recording forms a part of the formal record of the arbitration in the event of an appeal. The approach I prefer to take is to advise counsel or the parties that:

a) the recording belongs to me and is made solely for my own purposes in conducting the arbitration proceeding and drafting my award;

b) neither parties nor counsel may have access to my recording;

c) my recording will not form a part of the record of proceedings; and,

d) I will delete the recording once the time period for the parties to seek the correction or clarification of my award or further reasons has expired.

In cases where my participation agreement fails to reflect these terms, I ask counsel or the parties acknowledge the status of my recording and the use to which it may be put at the outset of the hearing, and reference their acknowledgments in my award.

P. Determine the rules of arbitration

I have found that it is not always necessary to deploy a formal set of written rules. At times, a common understanding of the available process and their limits will suffice, providing that you adhere at all times to the principles of fundamental justice and clearly express that understanding in a memorandum. Using a pick-list of procedural alternatives will help to ensure that counsel or the parties have considered the full breadth of pre-hearing disclosure processes, processes for argument and the introduction of evidence at the hearing, and the options for your award. Developing a common understanding may be as simple as selecting from among the alternatives set out in a pick-list and summarizing the agreement reached in the memorandum you distribute after the pre-hearing conference.

Again, I encourage you to press counsel and the parties to minimize the scope and variety of processes available. Fewer processes means a shorter hearing and a shorter time to get there, and reduced cost to the parties as a result.

Steps leading to the hearing

Broadly speaking, the procedural steps leading to the hearing generally include some or all of the following: applications for interim awards for substantive relief, such as an interim award on the payment of child support, or for interim orders on procedural questions, such as fixing the date for a response to a notice to admit; discovery and disclosure processes; and, the preparation and exchange of materials that will be used at the hearing, such as books of authority, statements of agreed facts and arguments. Decisions on all of these steps should be made at the pre-hearing conference and be included in the rules of arbitration for the file or in your memorandum describing the common understanding of the arbitration processes agreed to.

It is important to be aware of:

a) any actual or practical limitations on your jurisdiction with respect to interim orders, especially regarding restraining orders and enforceability;

b) any actual or practical limitations on your jurisdiction with respect to your ability to compel the evidence of, or production of documents from, third parties;

c) the extent of the court's jurisdiction over administrative and other matters relating to the arbitration; and,

d) the use that can be made of the courts by yourself, by counsel and by the parties with respect to the conduct of the arbitration and questions of law arising during the arbitration.

Q. Determine the process to be followed in any pre-hearing applications

Counsel or the parties should be asked at the pre-hearing conference whether any applications are coming down the pike and, if so, a schedule should be set for the hearing of the application and the exchange of statements of position and supporting documents. Whether any applications are foreseeable or not, the conference provides an opportunity to discuss the process for bringing applications generally.

Decisions about the application process at the pre-hearing conference should address:

a) delivery of the applicant's statement of position and any documents in support of the applicant's position;

b) dates for delivery of the respondents' statements of position and any documents in support of the respondents' positions;

c) dates for delivery of the applicant's response to the respondents' positions;

d) whether evidence will be required and, if so, the means by which evidence will be adduced and whether the evidence must be given on oath or affirmation, or on a witness' promise to tell the truth; and,

e) whether oral argument or evidence is required and, if so, whether the application will be heard by teleconference, videoconference or in person.

All such decisions should be summarized in the memorandum to counsel or the parties.

R. Identify the nature and scope of any necessary discovery and disclosure processes

In family law matters, discovery and disclosure processes are especially important. Sufficient – but not necessarily exhaustive – evidence will be required to establish: income, for the purposes of support and the payment of any special and/or extraordinary expenses; the value of personal property, pensionable assets, real property, ventures, sole proprietorships, partnerships and corporations; and, the amount of any shareable debt. Lawyers accustomed to litigation processes will usually pursue the maximum discovery and disclosure available. This is a rational approach, to be sure, however expansive disclosure often comes at a cost to both parties and may not always be necessary.

With respect to the production of documents, the "income information" described at s. 21 of the federal Child Support Guidelines is a good starting point when support is at issue. The presumptive three-year time frame adopted by the Guidelines may also be applied to the production of bank statements, credit card statements, loan documents, report cards, counselling records, health care records and so forth, unless there is an objectively sound reason to go further back in time. The value of real property can often be adequately established through property tax statements for the relevant dates, current offers to purchase and realtor's estimates rather than costly appraisals, while the value of RRSPs, LIRAs, pension plans and other retirement savings vehicles can often be determined by the production of statements for the relevant dates rather than hiring actuaries to provide a valuation. In fact, determining the value of pension plans may be altogether unnecessary in jurisdictions which provide a formulaic approach to the determination of entitlement, unless the party with the pension is seeking to retain the whole of the pension against an interest in another asset.

With respect to the evidence of the parties and other individuals, well-drafted interrogatories and notices to admit may obviate the need for time-consuming and costly examinations for discovery or questionings. Requiring the production of will-say statements for any witnesses providing oral evidence may also be useful.

Any decisions affecting the scope of pre-hearing discovery and disclosure processes should also be summarized in your memorandum to counsel or the parties.

S. Require the use of joint experts and define the questions experts will be asked to address

In order to avoid the dueling-experts phenomenon, I prefer to identify the need for any expert evidence at the pre-hearing conference and require that experts be jointly retained and jointly instructed. Counsel or the parties should be asked to identify the specific questions the experts will be asked to address and the background facts and documents to be provided to the experts.

Determining these issues, including the choice of the experts themselves, may require your intervention following the conference. Where agreement is unlikely, consider attempting to resolve the matter through a further conference or application before allowing the parties to retain separate experts. It is far easier to parse the evidence of a single expert working on a single set of assumptions to address a single set of questions than to attempt to reconcile the evidence of multiple experts preparing separate reports using different methodologies and relying on different premises.

I further suggest that a party wishing to present the evidence of a rebuttal report be required to apply for leave where the other party objects to the admission of the report. Such reports often have a limited utility relative to their cost given the constraints under which their authors are required to work.

IV. The participation agreement

The participation agreements you will prepare for each file are of critical importance. They constitute your retainer agreement, they describe the obligations of counsel or the parties, they describe the mode of arbitration, they bind the parties to the arbitration process and its outcomes, they limit the grounds of potential appeal, they state the terms of your remuneration and compensation for disbursements, and, most importantly, they define the issues that the arbitrator is authorized to determine. Because of the tremendous significance of the participation agreement, my practice is to:

a) distribute a draft participation agreement for the review of counsel and parties immediately upon being hired for their review and comment;

b) ask counsel to review the terms of the agreement with their clients, and execute the certificates of independent legal advice appended to my agreement; and,

c) where a party is not represented by counsel, require the party to meet with a lawyer to obtain independent legal advice about the meaning and effect of the agreement, witness the party's signature on the agreement and execute the attached certificates.[7]

You will want to have your participation agreement executed around the time of the pre-hearing conference, before the conference if possible. As you will be spending a significant amount of time on the file even before the hearing, you do not want to let counsel or the parties drag their feet on signing your agreement lest the arbitration collapse and your services go uncompensated. To facilitate timely execution, and in part because I am often dealing with out-of-town counsel and parties, my agreement provides that it may be executed in counterpart.

T. Revise your participation agreement to reflect the mode of arbitration and the parties' representation

Any standard participation agreement you may have will need to be adjusted to reflect the mode of arbitration chosen and perhaps also adapted where a party is not represented by counsel. The key differences between the participation agreements I use where the parties are represented and the agreements I use when a party is not, are that the latter:

a) make somewhat greater use of plain language;

b) include different arrangements for my retainer and payment of my accounts;

c) include a special statement about the duties of the parties;[8]

d) state that the parties must copy each other on their emails to me, and provide that I may produce a written summary for both parties of any oral communications I have with just one of them; and,

e) encourage the retainer of counsel for independent legal advice on the meaning and effect of the agreement and the applicable law.

Where an arbitration will include a mediation phase, the participation agreement should discuss the nature of mediation generally, how you will address any issues settled in mediation in your award and provide that your award may not be challenged on the ground of bias merely because you have acted as mediator. This last point must be particularly emphasized in cases where you are taking a directive

[7] The requirement of independent legal advice hopefully has the collateral benefit of ensuring that the unrepresented party also receives information and advice about the law and the range of likely outcomes to the dispute.

[8] My statement of the parties' responsibilities presently provides that:

> 12. Shirley Singh and Sam Singh each agree to:
> a) comply with their obligations under this agreement;
> b) read and follow the Family Law Arbitration Rules as adopted for this arbitration as best they can;
> c) cooperate with the Arbitrator and take part in the arbitration process in good faith; and,
> d) promptly produce any information, records and documents that the Arbitrator may request.

approach to the mediation phase, and the participation agreement should be clear that the parties have asked you to take a directive approach. The recitals to my directive mediation-arbitration agreement provide, in part, as follows:

> A. Directive mediation is a confidential, private process in which an impartial person, a mediator, facilitates communication between the people involved in a legal dispute and attempts to promote mutual understanding, reconciliation and/or a settlement of the dispute, while providing an assessment of the strengths and weaknesses of each person's case.
>
> B. Arbitration is a confidential, private process in which an impartial person, an arbitrator, listens to the evidence and arguments of the people involved in a dispute and then makes a decision resolving the dispute.
>
> C. In mediation-arbitration proceedings, an impartial person serves as both mediator and arbitrator, and tries to settle a dispute through evaluative mediation before turning to arbitration and making a decision resolving the dispute. …
>
> F. The parties to this agreement, their lawyers and the mediator-arbitrator for the dispute that is the subject of this agreement intent to participate in these proceedings honestly, cooperatively and in good faith.

The operative terms include these clauses:

> 10. The Mediator-Arbitrator will:
>
> a) remain independent and impartial in all contacts with Sarah Singh, Sam Singh and their lawyers;
>
> b) treat Sarah Singh and Sam Singh fairly and equally, while also assessing the strengths and weaknesses of their respective positions;
>
> c) not advance the interests of one party over those of the other; and,
>
> d) at all times remain open to persuasion.
>
> 26. In order to attempt to resolve the legal issues between the parties to this dispute, the Mediator-Arbitrator will, in the mediation phase of this mediation-arbitration proceeding, attempt to:
>
> a) isolate points of agreement and disagreement;
>
> b) explore alternative solutions;
>
> c) assess the strengths and weaknesses of each party's case; and,

d) identify potential accommodations and areas of compromise.

49. Sarah Singh and Sam Singh expressly agree that the Mediator-Arbitrator is not disqualified from adjudicating any of the legal issues as arbitrator because he has acted as a mediator with respect to those issues, expressed his views on those issues or provided his assessment of the parties' positions on those issues.

Anything that can be done to insure against appeals based on allegations of bias arising from your role in the mediation phase should be done.

V. Getting to the hearing

The steps to be taken before the hearing date will include exchanging statements of position as well as one or more of the following:

a) hearing applications for procedural orders and interim awards;

b) making disclosure and discovery of material documents and physical evidence;

c) obtaining production from third parties in possession of material documents;

d) conducting examinations for discovery / questionings;

e) delivering and replying to interrogatories;

f) delivering and replying to notices to admit;

g) arranging for and delivering experts' reports, including the reports of appraisers, valuators, actuaries, tax and other financial specialists, vocational assessors, child specialists, physicians, psychologists and clinical counsellors;

h) exchanging up-to-date financial statements, where the issues to be resolved include child support, spousal support, the division of property or the allocation of debt;

i) delivering any affidavits intended to be entered into evidence at the hearing;

j) delivering will-say statements for any witnesses who will be providing oral evidence; and,

k) delivering opening arguments and books of authority,

as well as two important further steps that require counsel to work together:

l) preparing joint books of documents; and,

m) preparing a statement of agreed facts.

With the exception of unexpected applications, all of these steps should have been addressed and timetabled at the pre-hearing conference.

I encourage counsel to work together as much as possible. Preparing a statement of agreed facts often yields surprising efficiencies and the discovery of significant areas of agreement, which in turn may encourage a more cooperative, collegial approach to the dispute. Producing a joint book of documents reduces the potential for confusion as well as the cumbersome necessity of navigating multiple large binders during any oral evidence.

Finally, if you are going to be using any technology at the hearing, such as a videoconferencing or teleconferencing service, audio recorders, tablets and smartboard technologies, test your equipment in advance of the hearing and ensure that you are fully versed in its functioning.[9] Not only will you wish to minimize any delay resulting from fiddling with your devices, you will also wish to avoid the accompanying embarrassment.

U. Limit the content of statements of position

Most lawyers will be comfortable drafting a statement of position following the basic format required by the statements of claim, statements of defence and counterclaims used in litigation proceedings in their jurisdiction. Any form of statement, formal or informal, will do, as long as the statements set out the essential elements of the pleading.

Where the parties are represented by counsel, the minimum elements of the claim include:

a) a statement of the facts relevant to the claimant's case;

b) a statement of the relief sought; and,

c) where applicable, a statement of the law relied on in support of the relief sought.[10]

The elements of the defence include:

[9] Be sure to have at hand all of the cables, chargers, adapters, dongles and spare batteries you need to guarantee your technology will work throughout a full-day hearing.

[10] Where a statement of the law is required, it is helpful to ask the lawyers to provide pinpoint references to the law in support of their client's position. "Part 4 of the Family Law Act of British Columbia" is singularly unhelpful. What I really prefer to see is a statement to this effect: "An order that Ms Singh's parenting time be supervised, pursuant to s. 45(c) of the Family Law Act." Specific references to any application legislation are much to be preferred.

a) a statement of the facts relevant to the respondent's position on the relief sought by the claimant;

b) a statement of the relief consented to, consented to on conditions, and opposed; and,

c) where applicable, a statement of the law relied on in support of the respondent's position.

The elements of the counterclaim include:

a) a statement of the facts relevant to the respondent's case;

b) a statement of the relief sought; and,

c) where applicable, a statement of the law relied on in support of the relief sought.

Respondents' statements of position can, and often do, combine the defence and counterclaim into a single document.

Where the parties are not represented by counsel, it will usually be necessary to adopt a greater degree of informality. Statements of facts can, and perhaps should, be limited to the salient dates in the parties' relationship, such as: the dates of cohabitation, marriage and separation; the dates of the children's birth; and, the dates of the acquisition and disposition of property. The values of any property and debt, and the amounts of a party's income or the children's expenses, can also be included. (For reasons that I will address in a moment, it is often helpful to minimize the opportunity for narrative statements.) It may also be necessary to help the parties develop the relief they each seek as many unrepresented parties will not be able to couch the awards they are hoping to obtain with the desirable degree of clarity and precision, and yet each party must be able to succinctly state the awards they hope to achieve and their views on the awards sought by the other. Statements of the law relied on cannot usually be provided and may be more trouble to prepare than they are worth.

Whether the parties are represented by counsel or not, it is important to reduce the use of narrative to the extent possible. The basic purpose of statements of position is, in my view, to provide a concise explanation of the when, what and how of each party's position with sufficient detail that the other party can understand the relief claimed and formulate a reply. A check-box, fill-in-the-blanks approach, such as that used in the pleadings prescribed by British Columbia's Supreme Court Family Rules, will do admirably. A format that allows parties to explain why they are asking for a certain award invites partisan commentary that can exacerbate enmity and ill-will, entrench positions, discourage cooperation in the arbitration proceeding and reduce the likelihood that settlement short of a contested hearing can be reached.

A check-box form may be as simple as this:

I am asking for awards about:

- ☐ decision-making about children
- ☐ parenting time or contact with children
- ☐ child support
- ☐ paying for children's expenses
- ☐ spousal support
- ☐ the division of family property
- ☐ the division of excluded property
- ☐ the allocation of debts

Tables can be used to create a form that allows the party to explain the relief claimed while minimizing the space available for unhelpful narrative:

Awards sought by the Claimant:

	Terms of award sought
Children and parenting	
Guardianship	
Decision-making	
Parenting time / contact	

As a less structured alternative, you could simply ask that counsel or the parties provide their statements of facts and statements of relief sought in point-form as neutrally as possible, refraining from rhetorical flourishes and minimizing their use of adjectives and adverbs.

V. Limit your reading

Before materials begin to accumulate on your desk, check with counsel and determine what you should read and what you may read. You must obviously familiarize yourself with the parties' statements of position, and you may also decide to read the parties' opening statements, the reports of any joint experts and the statement of agreed facts. However, as a general rule, you should refrain from reviewing:

a) individual and joint books of documents (firstly, in case the admissibility of any documents is challenged at the hearing and, secondly, in the event that one or more documents aren't referred to in evidence or in argument);

b) will-say statements, affidavits, answers in response to interrogatories, answers to notices to admit, and financial statements (in case the complete admissibility of a document is challenged);

c) transcripts from examinations for discovery / questionings (counsel will refer you to the handful of specific questions and answers they wish you to read); and, most importantly,

d) books of authority (counsel will refer you to the specific paragraphs of each authority they say bear on the case).

This approach has two distinct advantages: it helps you to avoid claims that your view of the facts has been tainted by reading material later deemed inadmissible; and, it reduces the volume of material you are expected to familiarize yourself with. (Why slog through a dense, 100-page Supreme Court of Canada decision when counsel are likely to cite only two or three paragraphs?) In order to limit my reading after the hearing, if there will be one, I advise counsel or the parties at the outset that I intend to review only those documents and cases to which they specifically draw my attention and that I may not review any more of those documents or cases than the portions to which they have referred.

W. Monitor critical due dates that may derail the hearing if missed

In general, it is not the arbitrator's job to monitor compliance with the deadlines set out at the pre-hearing conference; if counsel or a party is inconvenienced by a missed due date, they will bring the problem to you for resolution.[11] However, you should diarize the deadlines for your own record as the parties' compliance, or lack thereof, may play a role in your determination of costs. I also ask to be copied on all emails delivering documents pursuant to the schedule created at the conference.

Having said this, it is important to pay close attention to critical deadlines set within two or three weeks of the start of the hearing that, if missed, may force an adjournment, such as due dates for the delivery or exchange of:

a) experts' reports;

b) financial statements;

c) affidavits intended to be entered into evidence; and,

d) the joint books of documents.

VI. Conducting the hearing

The parties' impressions of your demeanour and conduct have a significant impact on their perceptions of your professionalism, independence and neutrality. You will want to:

[11] Although the British Columbia Arbitration Act is silent on the matter, the Alberta legislation provides that:

> 4. A party to an arbitration who is aware of a non-compliance with a provision of this Act, except with a provision referred to in section 3, or with the arbitration agreement and who does not object to the non-compliance within the time limit provided or, if none is provided, within a reasonable time, is deemed to have waived the right to object.

a) be early in arriving each day, and prompt in returning after all breaks;

b) remember that you are not friends of counsel or the parties, which requires adopting a distant demeanour, avoiding expressions of sympathy, monitoring your body language and ensuring that small talk at breaks and before and after a hearing day excludes subject matter relating to the arbitration;

c) have meals by yourself, before, during and after each hearing day, and avoid socializing with counsel generally throughout the hearing and until you have rendered your award;[12] and,

d) ensure that your treatment of the parties is as even-handed as their own conduct permits.

Managing the hearing

Your role at the hearing is to receive the evidence and arguments presented, while addressing objections and maintaining order in the manner of an umpire. Although managing the hearing itself will usually be the easiest part of your role as arbitrator, it is your responsibility to ensure that you have fully heard and understood the parties' evidence and submissions. This will require you to:

a) interrupt counsel, the parties and witnesses as necessary to maintain order and civil conduct (I usually take a fairly relaxed approach and allow counsel to debate with each other, but I do step in when necessary);

b) interrupt witnesses as necessary to ensure you have understood the evidence given, which may include asking questions of your own;

c) caution counsel or the parties to avoid gratuitous ad hominem attacks and the use of inflammatory rhetoric (such behaviour is universally aggravating and does nothing to help you reach your decision);

d) maintain a clear record of your rulings on the admissibility of evidence and, if admitted, whether you must also determine the weight to be given to that evidence;

e) maintain a list of any exhibits tendered apart from individual and joint books of authority, that clearly identifies those exhibits; and,

f) strictly manage the use of time by counsel or the parties to maximize the likelihood that the hearing will complete within the allotted time.

[12] Remember that clients are often perplexed to see their lawyers chatting and joking with each other during breaks in hearings and trials. They expect the relationship between their respective counsel to be as rancorous as their own, and sometimes find the collegiality commonly enjoyed by counsel to be off-putting. This may, depending on the personalities involved, also apply to their perception of the relationship between the other party's lawyer and the arbitrator.

I prefer to take a relatively casual approach to arbitration; the choice to obtain a conclusive resolution to a dispute outside of the inflexible and rigidly formalized structure required by litigation sometimes plays a key role in the decision to arbitrate. However, the arbitrator must maintain a balance between informality and the need to maintain control and the respect for the arbitrator's authority maintaining effective control demands. Remember that the essential goal of arbitration is fairness in both process and outcome.

X. Address foreseeable procedural questions and set the ground rules at the beginning of the hearing

Your introductory remarks at the outset will set the tone for the remainder of the hearing. They give you the opportunity to clarify the parties' positions, define the ground rules for the conduct of the hearing and provide an explanation to the parties about what they should expect as the hearing unfolds. Among other matters, my introductory remarks cover the confidentiality of the arbitration process and usually address:

a) the materials I have read to prepare for the hearing and my policy about the documents I will review when writing my award, generally only those to which my attention has been directed in evidence or in argument;

b) how important it is that I exactly understand the evidence provided by the witnesses and the arguments made by counsel or the parties, and that, because I will be taking careful notes, I need everyone to speak slowly and clearly and avoid interrupting each other;

c) the recording I will be making of the proceeding, and the agreement we have made that the recording is being made for my purposes alone and will not form part of the record of the arbitration for the purposes of appeal;

d) the need for everyone to retain a calm, mutually-respectful demeanour even though emotions will rise from time to time;

e) the daily schedule of the hearing, including start and end times, the timing of breaks and lunches, and the need for everyone to be prompt in returning to the hearing;

f) the order of events during the hearing, including which side will go first, the order of the direct-, cross- and redirect-examination of witnesses and the delivery of closing arguments; and,

g) the date by which I will provide my written award.

I also use my opening remarks to address certain procedural issues, obtaining the consent of counsel or the parties when necessary. I usually:

a) confirm the terms of any agreements that have been reached prior to the start of the hearing, and confirm that I will be pronouncing those agreements as consent awards;

b) obtain the parties' agreement to pursue the settlement of any issues through negotiation or mediation should the opportunity arise;

c) determine whether the witnesses will be sworn or affirmed, or simply give their evidence on their promises to tell the truth;

d) confirm that I will be entering any individual or joint books of documents as exhibits, subject to my determination of any objections that may be raised with respect to specific documents in those books in the course of the hearing;

e) remind the parties that while they are under cross-examination they may not discuss the case or their evidence with their lawyers or with any parties aligned in interest, a warning I repeat at breaks and adjournments; and,

f) determine, in consultation with counsel or the parties, whether the parties will be obliged to seek to enter the terms of my award as a consent order to wrap up any litigation that may be underway.

Y. Manage hearing time creatively but carefully

Most litigators have had the misfortune of being bored gormless in court while opposing counsel trudges through the painful but irrelevant minutiae of bank statements with a witness or indulges in a seemingly endless series of questions on trivial matters with only tangential relevance to a case. While the majority of judges are reluctant to interfere with such effluvia for overcautious fear of appeal, you are under no such constraints. Arbitration offers much more latitude for your control and management of a hearing than is available to the court at trial.

While you must always be careful to allow counsel or the parties to fully develop their cases, a number of steps can be taken to compress the length of time required for evidence. You could:

a) allow witnesses to adopt their will-say statements as a part of their evidence in direct;

b) accept an affidavit in lieu of all or some of a witness' evidence in direct;

c) allow counsel to lead witnesses through their evidence in direct;

d) with the consent of the other counsel or parties, infer that a pattern established to exist in certain circumstances repeats in other similar circumstances, such as inferring from proof that the deposit of an amount of money from a specific source in three consecutive months is the deposit

of the witness' salary that similar deposits from the same source in other months also represents the deposit of the witness' salary;

e) not require that read-ins from the examination for discovery / questioning of a witness actually be read into the record, and instead allow counsel to simply provide a list of the questions asked and answered;

f) ask counsel to curtail repetitive or redundant questions, or explain their relevance to a matter at issue; and,

g) require that closing arguments be provided in writing after the end of evidence, or be provided in writing coupled with a follow-up oral hearing in-person or by videoconference.

Z. Take careful notes on procedural issues and your determinations

The notes you take will be the foundation for your eventual award. They are also essential for your record of events occurring during the hearing, including your determination of procedural questions including any objections. Among other important matters, your notes should record:

a) any agreements on procedural questions reached during your opening remarks;

b) any objections made to the admission of documentary or physical evidence, and your determinations resolving those objections;

c) any objections made to the admission of oral evidence, and your determinations resolving those objections, including whether there is a question of the weight to be given to any contested evidence you decide to admit; and,

d) all documents introduced as exhibits, including individual and joint books of documents, and the number of each exhibit.

I make a habit of diagramming the seating arrangements in my notes, both to avoid forgetting a person's name and to jog my memory of the hearing when I begin to write my award; this is especially useful when an arbitration involves more than two parties. I also make note of the start- and end-times for each step in the arbitration, such as the beginning and end of the direct-examination of a witness or the submissions of counsel, so that I can easily find the step in my audio recording.[13]

[13] Many audio recorders, including the Sony ICD-UX560 I use, allow users to make time marks in the audio file as recording is underway that you can later use to zip to the marked portions of the recording.

Hearing the voice of children

The United Nations Convention on the Rights of the Child gives children the right to "express [their] views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." In both arbitration and litigation proceedings, information about the views of children is typically provided through: the usually contradictory evidence of the children's parents; the evidence of third parties with direct knowledge of the children and their parenting, such as extended family members, teachers, counsellors and therapists; "dear judge" letters and videos; evaluative or non-evaluative views of the child reports; experts' parenting assessments; and, the submissions of counsel for the child.[14]

The means by which the children's views will be heard should be determined at the pre-hearing conference. However, if information about the children's views is not or will not be presented at the hearing, you may decide to speak to the children yourself.[15] Such an approach, while imperfect, has at least the merits of being direct, quick and inexpensive. If you decide to interview the children, you will need to determine the following questions, in consultation with counsel and the parties:

a) whether the children are capable of forming and expressing their views and, if so, whether there are any reasons why it would be inappropriate to consider their views;

b) how the children will be told about and taken to the interview;

c) how, when and where the interviews will take place (the site of the hearing is neutral territory relative to the parties' homes, and may be preferred as a result);

d) whether anyone else will be present during your interviews (although the parties should not be present in order to reduce loyalty conflicts and the resulting stress on the children, it may be helpful to have counsel in the room);

e) whether you will record your interviews (I suggest you do so, and that your recording be made on the same terms as your recording of the hearing); and,

f) how you will report the children's views to the parties.

[14] The British Columbia Arbitration Act requires arbitrators to determine claims concerning parenting arrangements and certain other matters by considering the best interests of the child as set out in s. 37 of that province's Family Law Act, and s. 37(2)(b) imposes a rebuttable presumption that children's views will be heard "unless it would be inappropriate to consider them." The Alberta Arbitration Act does not require that the best-interests factors identified in the Alberta Family Law Act be applied, however it is worth noting that s. 18(2)(b)(iv) of the Family Law Act includes "the child's views and preferences, to the extent that it is appropriate to ascertain them" among those factors.

[15] I strongly recommend that arbitrators considering interviewing children obtain at least some training in interviewing children, and the practical and ethical questions that may arise, such as that available through the BC Hear the Child Society.

Counsel or the parties should address the weight to be given to the children's views and the impact of those views on the parties' positions in their closing arguments.

VII. After the hearing

Once the hearing has concluded, you will either proceed to prepare your award or schedule a date for any closing oral arguments that have not concluded, and prepare your award thereafter. (If closing arguments were not completed at hearing, you should immediately send a copy of the list of exhibits for the reference of counsel.) When your award is complete, you should notify counsel or the parties that your award is ready and render your final account.

Your participation agreement should include terms that allow you to withhold delivery of your award until your fees and expenses are paid in full. The agreement I use when the parties are not represented by counsel provides as follows:

> 60. Sarah Singh and Sam Singh agree that the Arbitrator may withhold delivery of the final award until the Arbitrator's accounts are paid in full.
>
> 61. In the event that one of the parties fails or refuses to pay their share of the Arbitrator's account, the Arbitrator may accept payment of the defaulting party's share from the other party and exercise his discretion regarding costs to require the defaulting party to reimburse the other party for the amount of any such share.

After your account has been paid and you have delivered your award to counsel or the parties, you may decide, or the parties may ask you, to correct any typographic, clerical or arithmetical errors in your award. Such changes or requests must be made within a fixed period of time.[16] Depending on your participation agreement and the situs of the arbitration, the parties may also apply to you to clarify your award by providing additional reasons, also within a fixed period of time.[17]

When the time period for corrections and clarifications has expired, you are relieved of your formal obligations to counsel and the parties. Whether an appeal of your award is pending or not, you may then delete any audio or video recordings you may have made of the pre-hearing conference, any applications and the hearing, providing your participation agreement allows you to do so.

[16] In British Columbia, s. 27(2) of the Arbitration Act gives the parties 15 days to apply to the arbitrator to correct the award, while s. 43(1) of the Alberta Arbitration Act gives the parties 30 days to request a correction.

[17] Under s. 27(4) of the British Columbia Arbitration Act, the parties have 15 days to apply to the arbitrator to clarify the award.

Appendix: Arbitration rules pick list

One of the most important benefits of arbitration is that the parties to a family law dispute are able to design the arbitration process to suit their issues, their needs and their finances. While litigation processes provide a one-size-fits-all service, almost every aspect of the arbitration process can be tailored to the specific needs of the specific people involved in a specific dispute, giving those individuals the opportunity to create a process that is genuinely proportionate to the complexity, importance and value of the issues in their dispute.

The following are the procedural elements that the parties to an arbitration can change to suit their circumstances. They cover most aspects of the arbitration process, including exchanging documents and information, deciding how evidence will be presented and the basis on which a party will be able appeal the arbitrator's award. Use this list before the pre-arbitration conference to decide which procedural elements are important, which can be abbreviated and which are entirely unnecessary. Remember that the longer an arbitration takes to complete, the more money it will cost.

Choice of process

❑ We will attempt to reach a resolution of our dispute through mediation before moving to resolve our dispute through arbitration, and would like the arbitrator to:

> ❑ Conduct the mediation in an evaluative manner.
>
> *or*
>
> ❑ Conduct the mediation in a strictly neutral manner, without providing an opinion of the merits of our respective cases or the likelihood of our respective success.

Exchanging and producing information before the hearing

❑ We will exchange the following information about our income: *(check all that apply)*

> ❑ Part 1 (Income) of the Financial Statement.[18]
>
> ❑ Our personal income tax returns, complete with all schedules and attachments, and notices of assessment for the last _____ tax years, plus the most recent statements of our income from all sources.

[18] The financial statement referred to is a simplified form I have developed based on the Form F8 Financial Statement prescribed by the British Columbia Supreme Court Family Rules. Part 1 deals with income, Part 2 deals with expenses, Part 3 covers property and Part 4 deals with debt.

❑ The corporate income tax returns, complete with all schedules and attachments, notices of assessment and financial statements for all of our businesses and companies for the last _____ fiscal years, as well as: *(check all that apply)*

❑ Statements breaking down all money paid or benefits provided by our businesses and companies to people with whom we do not deal at arm's length.

❑ Statements breaking down all money paid or benefits provided to ourselves from our businesses and companies.

❑ Statements breaking down the income of our spouses or romantic partners for the last _____ tax years.

❑ _____

❑ We will exchange the following information about our expenses: *(check all that apply)*

❑ Part 2 (Expenses) of the Financial Statement.

❑ Statements breaking down our average monthly living expenses.

❑ Statements breaking down the special and/or extraordinary expenses of the children.

❑ _____

❑ We will exchange the following information about our property: *(check all that apply)*

❑ Part 3 (Assets) of the Financial Statement.

❑ Statements breaking down the fair market value of all real property, personal property, businesses, companies, savings, investments, pensions and other assets we each owned at: *(check all that apply)*

❑ The date we began to live together.

❑ The date of our marriage.

❑ The date of our separation.

❑ A date which is not less than two months before the date of the arbitration hearing.

❑ Tax assessments for _____

❑ Valuations or appraisals of _____

❑ _____

❑ We will exchange the following information about our debts: *(check all that apply)*

❑ Part 4 (Liabilities) of the Financial Statement.

❑ Statements breaking down the mortgages, debts, loans, judgments and other actual or potential liabilities encumbering all real property, personal property, businesses, companies, savings, investments, pensions and other assets we each owned at: *(check all that apply)*

❑ The date we began to live together.

❑ The date of our marriage.

❑ The date of our separation.

❑ A date which is not less than two months before the date of the arbitration hearing.

❑ _____

❑ We will exchange Demands for Disclosure listing the documents and information we would each like to get from the other party.

❑ We will exchange Lists of Documents describing the documents in our possession or control relating to:

❑ All of the matters at issue in this arbitration.

or (check all that apply)

❑ The children and their past and future parenting arrangements.

❑ Support and the children's special and/or extraordinary expenses.

❑ The division of property and debt.

❑ _____

❑ We will consent to documents relating to the matters at issue being released to the other party by _____ , who are third-parties not involved in this arbitration.

❑ We will exchange Interrogatories listing the questions we would like the other party to answer before of the hearing, and the number of questions we can ask each other is:

❑ Unlimited.

or

❑ Limited to no more than _____ questions.

❑ We will each be questioned by the other party before the hearing, and the length of the questioning will be:

❑ Unlimited.

or

❑ Limited to no more than _____ hours.

Experts

❑ We will each be able to hire our own expert to prepare an opinion on:

❑ Any of the matters at issue in this arbitration.

or (check all that apply)

❑ The children and their past and future parenting arrangements.

❑ The calculation of income, support and the children's special and/or extraordinary expenses.

❑ The division of property and debt, including the division of pensions and tax issues relating to the division of property.

❑ _____

❑ We will each be entitled to hire a rebuttal expert to reply to the opinions of the other party's expert, and the rebuttal expert:

❑ Will be allowed to examine or test the things, documents or people examined or tested by the other party's expert so that the expert may reach his or her own conclusions on the matters addressed by the other party's expert.

or

❑ Will be limited to commenting on the methodology, analysis and conclusions of the other party's expert.

❑ We will jointly hire an expert to prepare an opinion on:

❑ All of the matters at issue in this arbitration.

or (check all that apply)

❑ The children and their past and future parenting arrangements.

❑ The calculation of income, support and the children's special and/or extraordinary expenses.

❑ The division of property and debt, including the division of pensions and tax issues relating to the division of property.

❑ _____

❑ We agree that the arbitrator may hire experts to provide opinion evidence as the arbitrator may deem necessary in consultation with ourselves.

Hearing from the children

❑ We will obtain a views of the child report that:

❑ Is evaluative and will be prepared by a mental health professional.

or

❑ Is non-evaluative and may be prepared by a legal or mental health professional.

And the report will:

❑ Address the child's general views about the child's past and future parenting arrangements.

or

❑ Be limited to addressing _____

❑ We will obtain a parenting assessment from a mental health professional that:

❑ Addresses the future parenting arrangements that are in the best interests of the child.

or

❑ Addresses the future parenting arrangements that are in the best interests of the child, as well as _____

or

❑ Is limited to addressing _____

❑ We agree that the arbitrator will interview the child to get information about the child's general views about his or her past and future parenting arrangements.

❑ We will retain a lawyer to separately represent the interests of our child, and the lawyer will:

❑ Act on the child's instructions.

or

❑ Act on the lawyer's views of the child's best interests.

or

❑ Act on the child's instructions and make submissions on the lawyer's view of the child's best interests.

Applications before the hearing

❑ Before the hearing begins, either of us may apply for: *(check all that apply)*

❑ Interim awards relating to the matters at issue in this arbitration.

❑ Orders and directions on procedural matters, including the exchange of documents and information and the conduct of the hearing.

Preparing for the hearing

❑ We will work together to prepare an Agreed Statement of Facts before the date of the hearing.

❑ We will exchange statements summarizing the evidence we expect will be given by the witnesses we will each be calling to give oral evidence at least two weeks before the hearing.

❑ We will exchange Books of Authority at least two weeks before the hearing.

❑ We will exchange our written opening arguments before the date of the hearing.

The hearing

❑ We agree that we will not have an oral hearing and that the arbitrator will decide our dispute on the basis of: *(check all that apply)*

- ❑ Written arguments.
- ❑ The written statements of ourselves and our witnesses.

❑ We agree to have an oral hearing.

- ❑ The oral hearing will be held:
  - ❑ In person at _____

  or

  - ❑ By teleconference.

  or

  - ❑ By videoconference.

- ❑ We agree that people other than ourselves, our lawyers and the arbitrator may attend the hearing, namely _____

- ❑ We will make our opening arguments: *(check all that apply)*
  - ❑ In writing.

❑ Orally.

❑ We may each present the evidence of ourselves and:

❑ An unlimited number of other witnesses.

or

❑ No more than _____ other witnesses.

❑ The evidence of the witnesses we each present will consist of: *(check all that apply)*

❑ The written statements of those witnesses.

❑ Our direct examination of those witnesses.

❑ Our direct examination of our witnesses will be:

❑ Limited to _____ minutes per witness.

or

❑ Limited to _____ minutes per witness, except for the direct examinations of ourselves.

❑ We will be entitled to cross-examine:

❑ All witnesses called by the other party to give oral evidence, including the other party.

or

❑ Only the other party and the witnesses who provided evidence for that party through written statements.

or

❑ Only the other party.

And our cross-examination of these witnesses will be:

❑ Limited to _____ minutes per witness.

or

❑ Limited to _____ minutes per witness, except for the cross-examinations of ourselves.

❑ We will provide our closing arguments: *(check all that apply)*

❑ In writing.

❑ Orally.

After the hearing

❑ We agree that the arbitrator's award will be limited to an oral award providing only summary reasons for the arbitrator's decision.

❑ We agree that the arbitrator's award will be in writing and will:

❑ Be limited to summary reasons for the arbitrator's decision.

or

❑ Provide full reasons for the arbitrator's decision.

❑ We agree that the arbitrator's written award may be appealed to the court: *(check all that apply)*

❑ On questions of law.

❑ On questions of fact.

As you go through this list of procedural options, try to keep your choice of process as simple and streamlined as possible. This can mean making some difficult decisions, like agreeing to present only three witnesses instead of ten, agreeing to limit the length of time for the cross-examination of witnesses instead of exploring every nook and cranny available, or agreeing that some or all witnesses will provide their main evidence in writing instead of through oral testimony. John-Paul Boyd will help you finalize these choices at the pre-arbitration conference.

Do your best to think outside the box and challenge your assumptions about the kind of process you need. Remember that a successful arbitration can consist of nothing more than oral argument over the telephone, it can be an in-person hearing that includes all of the processes and procedures available in court, or it can be something in between these extremes. In general, most people who are planning an

arbitration should try to balance speed and efficiency and the complexity, importance and value of the issues in their dispute.