

# AMERICAN ARBITRATION ASSOCIATION

In the matter of the Arbitration of:

Claimant

Case No.

vs.

Jerome F. Rock, Arbitrator

Respondent

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## ***Narrative Written Witness Statement Protocol***

### ***Introduction***

**What is a narrative written Witness Statement?** It is a method for presenting Direct Testimony of Fact Witnesses under your control in Arbitration Hearings. The Witness' entire testimony is set forth in question-and-answer format, signed under Oath, and will be entered on the record, as long as the witness is available for cross examination at the Hearing. At the Hearing the Witness does not have to repeat the entire Narrative Witness Statement, but you may be given an opportunity for a short (e.g. 15-30 minute) live direct examination to introduce the Witness and highlight portions of the witness' written Narrative. Normal cross examination follows.

**How does this differ from an Affidavit?** Contrasted to an Affidavit that attempts to establish a fact, the Narrative Witness Statement is in question and answer format, intended to be the entire direct testimony of the witness, and will be subject to cross examination.

**What is the Protocol?** Consider the Protocol as a standard procedure or set of instructions to assist Counsel in completing the Narrative Witness Statements. It is a suggestion coming from the Arbitrator, ideally presented to Counsel before the first Pre-Hearing Conference, reviewed and discussed by the Parties at the first Pre-Hearing Conference, modified as necessary, and then incorporated into the Pre-Hearing or Case Management Order.

### **The Benefits From the Arbitrator's Perspective:**

- a. The Arbitrator is committed to making the Arbitration process more efficient, and less costly, without sacrificing the quality of justice. The Arbitrator's expectation is that the early exchange of prospective direct testimony of witnesses will focus the claims and defenses of the parties, streamline discovery and may eliminate or reduce the cost or duration of necessary depositions.

- b. At the Hearing, there are no surprises, the parties are well prepared in advance, the Direct Examination is expedited, but complete, the cross examination is well prepared, direct, and effective. As a result, the duration of the Hearing can often be reduced. And formal transcripts of the Hearing are seldom necessary.

In more complex matters where multiple attorneys, experts, principals and staff as well as court reporters are required, the cost of a Hearing day can range from thousands to tens of thousands of dollars a day. Narrative Witness Statements reduce the time devoted to presenting Witness testimony, thereby reducing the number of formal Hearing days required. Reduction in Hearing days provide measurable cost reductions for the parties. For simple matters, the parties may be satisfied with the information contained in the Narrative Witness Statements in advance of the Hearing, and agree to a modified Document Only Review by the Arbitrator using the Narrative Witness Statements.

- c. The Arbitrator has a better understanding of the dispute having the benefit of prospective witness testimony, improving the Arbitrator's guidance on pre-hearing matters, and effectively focusing on the major issues at the formal Hearing. The Narrative Witness Statements reduce the distraction associated with Arbitrators taking extensive and sometime garbled notes during the direct examination and cross examination of witnesses. There is a clear record of the testimony, and the Award writing process is enhanced.

**The Benefits From the Claimant's Perspective:** The Narrative Witness Statement is the final work product of the attorney's pre-Hearing preparation for each Witness' testimony. Counsel can be confident all the material elements of the Witness' testimony will be presented accurately and completely, while reducing the stress to the witness during direct examination at the Hearing. Your witness will never be confused or forget how to respond to your questions. In general, Counsel will call the Witness, the Witness will be sworn, and Counsel will lead the Witness to verify the accuracy and truthfulness of the Narrative Witness Statement. The Narrative Witness Statement will be offered as evidence of the Witness's testimony. If Counsel considers it necessary, and with the approval of the Arbitrator, Counsel may present the Witness for a short (e.g. 15-30min.) live direct examination to introduce the Witness and highlight portions of the witness' written Narrative. Normal cross examination follows.

In the event discovery of new information requires that the Narrative Witness Statements be supplemented or amended after they have been exchanged, upon request by a party, the Arbitrator will consider the request to Supplement the Narrative Witness Statements.

**The Benefits From the Respondent's Perspective:** Since the Narrative Witness Statements are exchanged well in advance of the Hearing, the Respondent's cross-examination can also be prepared well in advance, thus saving time, and likely improving the quality and effectiveness of

cross-examination. The Respondent is also better prepared to present impeachment or rebuttal witness testimony, as necessary.

### **Narrative Witness Statement Protocol**

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

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

1. The Narrative Witness Statement should be equivalent in content to Direct Examination of the Witness, using the conventional direct examination format permitting leading questions; Attorney question first, then *Witness* answer. *When preparing the Questions to Ask*, establish the foundation, avoid speculation and hearsay, be cautious about straying into unsupported opinion and argument. In general, Counsel should prepare their direct examination as if they expect objections *and* rigorous cross examination from their adversary. *Don't forget, this is the Witness' story, and in the Witness' words. This is not the testimony of the attorney. Put your effort into well crafted Questions.* The Attorney questions can be printed as Q: with the Witness response labeled A: .

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

- a. The full name and address of the Witness;
- b. Their present or past association with the parties;

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

- f. Include an affirmation of the truth of the Narrative Witness Statement, signed by the Witness under Oath.
2. Narrative Witness Statements are not appropriate for the following Witnesses:
  - a. Any person not under the control of the party, or whose attendance is compelled by Subpoena. The party requesting the Subpoena shall provide a general summary of the expected testimony of the witness and shall produce the summary no later than the schedule established for exchange of the Narrative Witness Statements unless otherwise directed by the Arbitrator.
  - b. Rebuttal Witnesses.
3. Number each Question and each Answer for the Narrative Witness Statement. The Q/A format makes it convenient for future reference. Use Q 1, Q 2, Q 3, etc. for the Question from the attorney, and A 1, A 2, A 3, etc. for the Answers from the Witness.
4. Hearsay testimony is problematic in all Arbitration Hearings. Counsel should assist the Witness to avoid Hearsay testimony not supported by an exception. When exceptions to Hearsay exclusions apply, Counsel should footnote that part of the Narrative Witness Statement accordingly. During Cross examination, the Arbitrator will consider objections to unsupported Hearsay statements contained in the Narrative Witness Statement. Admissibility, relevance, materiality, and weight of the evidence will be determined by the Arbitrator.
5. The Narrative Witness Statements will be submitted to the Arbitrator and Opposing Counsel in advance of the Hearing, the time schedule generally covered in Preliminary Hearing Scheduling Orders. The schedule for exchange of the Narrative Witness Statement of the adverse party will generally be set by the Arbitrator after the exchange of the Narrative Witness Statements of those Witnesses under the direct control of the Claimant. When prepared early, and exchanged early, Narrative or Written Witness

Statements should lessen the need for depositions since the cross-examining party has detailed advanced notice of the witness' direct testimony and can be prepare for effective cross examination.

6. At the Hearing, each Witness will be Sworn under Oath, and attest to the accuracy and completeness of the Narrative Witnesses Statement. The Narrative Witness Statement is presented as direct evidence. At the Hearing you may be given an opportunity for a short (e.g. 15-30 minute) live direct examination to introduce the Witness and highlight portions of the witness' written Narrative. Normal cross examination follows.
7. Supplements to the Narrative Witness Statement. In the event discovery of new information presents the need to supplement or otherwise amend or supplement a Narrative Witness Statement after it has been exchanged with opposing Counsel, upon request by a party and with approval of the Arbitrator, counsel may provide supplemental Questions (SQ) and Answers (SA) to the Narrative Witness statement consistent with the newly discovered information.
8. Format for Supplemental Information.
  - a. *If the need to Supplement the Witness Statement is limited to a few Questions and Answers, insert the Supplemental Questions and Answers (SQ/SA) into the sequence of the existing Narrative Witness Statement relating to the same topic as the supplemental information. For example, if the supplemental information relates to the topic in Question 45 /Answer 45, use the format SQ 45.1, SQ 45.2, SQ 45.3, etc. and SA 45.1, SA 45.2 and SA 45.3 etc. where the decimal is used to reference the necessary string of additional Supplemental Questions (SQ) and Supplemental Answers (SA) to be inserted at that point in the Narrative Witness Statement.*
  - b. If the Supplemental information will involve a more extensive series of Questions and Answers or where Supplemental Information relates to topics not included in

the existing Narrative Witness Statement, the Supplemental information may be presented in a separate “Supplemental Witness Statement”. The Supplemental Information will be referenced with the new Q/A numbering.

9. Opposing Counsel may cross exam the Witness at the Hearing. The Arbitrator requests that to the extent practical all cross-examination directed to a witness refer to specific numbered Q/A statements of the Narrative Witness Statement.
10. Counsel may agree to waive cross examination of a Witness, in which case the Narrative Witness Statement will stand as direct evidence without the need for the Witness to be present at the Hearing. This might occur in the case of secondary Witnesses whose testimony is straight forward and non-controversial or used as a way to authenticate documents or records. The Narrative Witness Statement can thus reduce the cost of pre-hearing discovery when used as a fact-finding tool.
11. Redirect examination of a Witness after Cross Examination is permitted, but limited to new topics raised on cross examination.
12. If Counsel anticipates Rebuttal Witnesses, they are encouraged to make arrangements for presenting the Rebuttal Witness without unnecessary delay to the Hearing.
13. Expert testimony will follow the Narrative Witness Protocol, and the Arbitrator may customize the Protocol to suit the needs of the case.
14. By stipulation of counsel, or as determined by the Arbitrator, a Witness who has submitted and exchanged a Narrative Witness Statement need not be present at the Hearing if they are able to participate in the Hearing by video conference, subject to opportunity for cross examination.

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**Arbitrator**