

## WHAT TO EXPECT AT YOUR EMPLOYMENT ARBITRATION

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The arbitration of disputes between individual employees and employers is developing into a new and distinctive area of practice for labor arbitrators who are being called upon to resolve matters involving claims ranging from age, race, and sex discrimination matters to contractual breach and tort claims, among many others. The arbitration of such disputes requires that the arbitrator possess a different set of legal knowledge and procedural skills, some of which are complex in nature, from that expected of the traditional labor arbitrator. Moreover, the arbitrator will be dealing in this forum with a different group of advocates consisting primarily of attorneys whose primary specialty is the litigation of claims on behalf of an individual plaintiff-employee and/or a respondent-company.

Furthermore, in an employment arbitration case, the arbitrator is more actively involved with the advocates prior to the arbitration hearing, especially during the prehearing conference and its follow-up. In a sense, the arbitrator is assuming a role that most closely resembles that which is performed by federal magistrates and judges in employment litigation matters. Therefore, it becomes important that the arbitrator be aware of the pretrial, trial, and posttrial substantive and procedural law relied upon by the advocates and the judges in such matters because the same will be relied upon by the arbitrator in employment arbitration cases. Disclosure of documents, the scope and conduct of depositions, the issuance of protective orders and confidentiality stipulations,

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\*[**Editor's Note:** The session on "What to Expect at Your Employment Arbitration" consisted of a mock prehearing conference. Rosemary A. Townley, Member, National Academy of Arbitrators, Riverdale, New York, who served as the arbitrator, prepared this summary of the proceeding. Alfred G. Feliu, Partner, Paul, Hastings, Janofsky & Walker, New York, New York, and Wayne N. Outten, Partner, Lankenau Kovner Kurtz & Outten, LLP, New York, New York, served as advocates for the respondent and plaintiff, respectively. The materials were prepared by the three members of the mock session.]

and the admissibility of evidence at the liability versus damages portions of the hearing are but a few of the issues with which the arbitrator will need to become thoroughly familiar in order to effectively serve the parties in these matters.

### **The Prehearing Employment Arbitration Conference**

In this session, a mock prehearing conference was presented to illustrate the elements of such a conference. The purpose of such a conference is to provide the arbitrator and the advocates with the opportunity to address certain discovery matters and preliminary motions that will establish the foundation for the scope and direction of the arbitration hearing.

The materials specially prepared for the presentation include a fictitious fact pattern (Exhibit A), excerpts from a personal services agreement (Exhibit B), arbitrator's prehearing checklist (Exhibit C), excerpts from a stipulation of confidentiality (Exhibit F), and the arbitrator's posthearing scheduling/discovery order (Exhibit G). Excerpts from the transcript of the prehearing conference appear in Exhibits D (Discovery I: Document Production) and E (Discovery II: Depositions). The materials provide an overview of the aspects of the prehearing conference and include the scope of issues and procedures that the arbitrator must be prepared to handle at the conference; the typical colloquy that the arbitrator can expect the advocates to engage in with respect to discovery matters; those rulings that the advocates will expect from the arbitrator during the course of the conference and those that may be deferred to a later date; and the type of written order that should be issued by the arbitrator following the conference to confirm the rulings and timetables agreed upon at the conference.

As is evidenced by the "Fact Pattern" (Exhibit A) and the excerpts from the "Personal Services Agreement" (Exhibit B), the mock case that was addressed during the conference dealt with issues that are not normally raised in a simultaneous manner in a labor arbitration setting, such as age discrimination, defamation, breach of contract, and tortious interference with contract.

The Arbitrator's Prehearing Checklist: Employment Arbitration Cases/Prelitigation Matters (Exhibit C) is intended to assist the arbitrator in preparing for the conference, keeping the conference "on track," and ensuring that all the necessary preliminary issues are fully explored with the advocates at the conference so as not to delay the commencement of the arbitration at a later date.

The exhibits also include excerpts from a transcript of the mock conference that provide an overview of the spirited colloquy that set forth positions taken by the advocates, Wayne N. Outten, for the plaintiff-doctor, and Alfred G. Feliu, for the respondent-medical group, regarding two critical areas of discovery: document exchange and the depositions of potential witnesses (see Exhibits D and E).

With respect to the issue of document exchange, a review of the excerpts from the transcript will show the range of issues that can arise during the conference, which includes a review of the differences in burdens of proof between a typical labor arbitration case and an employment case; the types of requests normally made by a plaintiff's attorney regarding document production, the typical respondent attorney's objections to such requests, the rulings of the arbitrator and the basis for such rulings; the relevance of a "Stipulation of Confidentiality" with respect to disclosure of certain of the documents (see Exhibit F); the distinction between the evidence that may be relevant to the liability phase of the arbitration hearing, as opposed to the damages phase; the disclosure of e-mail correspondence; and the typical counterclaims of the respondent employer in such a case (see Exhibit D).

With respect to the issue of depositions, a review of the transcript excerpts will indicate the types of arguments that are made by the advocates when requesting that certain individuals be deposed before the arbitration hearing in order to determine whether they have evidence that may be relevant and material to their respective positions. The transcript excerpts also provide the reader some indication of the typical positions advanced by the advocates regarding the deposing of potential key witnesses, and the types of rulings that the arbitrator will be expected to make. These rulings involve issues such as who should be deposed, the length of the depositions, the timetable for such depositions, and whether depositions will be used in lieu of live testimony (see Exhibit E).

A reading of the transcript excerpts will also reveal certain additional generalizations regarding the difference between labor arbitration and employment arbitration. For example, the challenging colloquy between the advocates, which the arbitrator must keep under control in order to move the conference along, deals with subject matter not normally found in the labor arbitration setting and underscores the need for the arbitrator to become aware of the purpose and scope of discovery in litigation, as well as the case law within the relevant jurisdiction that addresses discov-

ery issues, in order to rule intelligently on the objections. In addition, the transcript excerpts give some examples of those areas that the arbitrator will not be able to rule upon immediately and might instead request that the advocates submit a postconference, prearbitration hearing brief to address fully the relevant case law so that the ruling may be an informed one (see Exhibits D and E).

Finally, the materials contain excerpts from the arbitrator's "Posthearing Scheduling/Discovery Order" that is issued after the prehearing conference as a reminder to the parties of the agreements and rulings made during the hearing, as well as a confirmation of the timetable established for the disclosure of documents, the taking of depositions, and the submission of prehearing briefs, among other matters (see Exhibit G).

#### EXHIBIT A

### FICTITIOUS FACT PATTERN: ORTHO-MED VERSUS DR. CHARLES GILCREST

Dr. Charles Gilcrest is a 65-year-old orthopedic surgeon who is renowned for his expertise in the treatment of shoulder disorders. He has been a partner with the ORTHO-MED Institute for Sports Injuries (ORTHO) since 1986.

In 1988, Dr. Gilcrest developed the "GIL-CUFF," an artificial rotator cuff, which has been successfully implanted in hundreds of patients, including many prominent baseball players. It has earned him much personal publicity. Dr. Gilcrest never sought the formal approval of the Management Committee of ORTHO when working on this device. ORTHO did, however, display a sample of the device in a glass case in its reception area. Dr. Gilcrest earned hundreds of thousands of dollars from his rights to the device, which he sold to a major manufacturer of prosthetic devices in 1995. He continues to make paid personal appearances to promote the device. In February 1993, Dr. Gilcrest was appointed Chief of Orthopedic Surgery for ORTHO and executed the attached Personal Services Agreement (Agreement) at that time. The three-year Agreement was renewed for an additional three years by its own terms.

In 1996, a new Management Committee took over the governance of ORTHO and terminated Dr. Gilcrest's Agreement for cause. The reasons for termination were contained in a letter from the Chair of the Management Committee, Dr. Denise LaMonica,

who noted the fact that Dr. Gilcrest never sought formal approval for his work on and the promotion of the “GIL-CUFF.” The letter also stated that his time spent promoting the device seriously detracted from his efforts on behalf of ORTHO, which was struggling financially in a marketplace dominated by large managed care companies.

ORTHO selected Dr. Louis Sobin as its new Chief of Orthopedic Surgery. Dr. Sobin is 45 years old. Within 30 days of the termination of the Agreement, Dr. Gilcrest became a partner in another practice with offices in New York City that specialized in severe orthopedic injuries. Dr. Gilcrest lives and works exclusively in Greenwich, Connecticut. Dr. Gilcrest brought an action in federal court alleging (1) age discrimination in the termination of his Agreement with ORTHO, (2) defamation, (3) breach of contract, and (4) tortious inference with contract. ORTHO moved to compel arbitration of Dr. Gilcrest’s action in district court, which stayed the federal action and compelled arbitration in accordance with the Agreement. The parties selected Arbitrator Rosemary A. Townley.

#### EXHIBIT B

### FICTITIOUS PERSONAL SERVICES AGREEMENT [EXCERPTS]

**1. SERVICES.** ORTHO agrees to retain Gilcrest to serve as Chief of its Orthopedic Surgery Department. Gilcrest shall split his time and maintain offices in both the New York City and Greenwich offices. . . . Gilcrest agrees to attend to the best interests and general welfare of ORTHO and to devote his full time, skill, and energy to the performance of his duties under this Agreement and in promoting the business and reputation of ORTHO. **2. COMPENSATION.** Gilcrest shall be compensated under this agreement as follows: . . . Gilcrest shall be awarded 25 percent of ORTHO’s gross billings for orthopedic patient consultations, surgical procedures, and related services provided by the Orthopedic Surgery Department in any fiscal year in which ORTHO, employing generally accepted accounting procedures, shows a net profit of 10 percent for that fiscal year (Profit-Sharing Payment). **3. TERMINATION.** This Agreement may be terminated prior to the Termination Date as follows: *For Cause.* The Management Committee may terminate the Agreement for cause. “Cause” for purposes of this Agreement

shall be limited to: . . . (iii) any act or omission that constitutes a material breach under this Agreement, including the refusal or failure to perform any material duties reasonably required hereunder; or (iv) any willful or negligent conduct that is detrimental to the business, good will, or good name of ORTHO. **4. NON-COMPETITION.** Gilcrest agrees and covenants that because of the confidential and sensitive nature of the proprietary information he obtained while employed by ORTHO and because the use or disclosure of this confidential information may cause irreparable damage to ORTHO, Gilcrest shall not either during his employment with ORTHO, or for one year thereafter engage, directly or indirectly, in any business substantially similar to that of ORTHO within 25 miles of the ORTHO office. Gilcrest agrees that this restriction is necessary for the protection of ORTHO's legitimate business interest and is reasonable in scope and content and that money damages would be an inadequate remedy for a breach of this restriction. Accordingly, ORTHO may seek and obtain injunctive relief against the breach of or threatened breach of this paragraph. **5. CHOICE OF LAW.** This Agreement shall be governed by the law of the State of New York.

#### EXHIBIT C

### "ARBITRATOR'S PREHEARING CHECKLIST": EMPLOYMENT ARBITRATION CASES/ PRELITIGATION MATTERS

1. **BACKGROUND/DISCLOSURES:** Case name and number; appointing agency; date of conference; parties (counsel for plaintiff/respondent and addresses); confirmation of disclosures (past/present relationship with parties/firm members).
2. **PRELIMINARY PAPERS:** Claims; pleadings; responses; answers; amendments; counterclaims; choice of law addressed.
3. **CONSIDERATION OF MEDIATION**
4. **WRITTEN SUBMISSION/AGREEMENT TO ARBITRATE:** Provisions/issues in dispute; applicable rules referenced; full statutory remedies to apply; final and binding or advisory decision.
5. **RULES OF EVIDENCE:** American Arbitration Association/Federal Rules of Evidence/State Law; burdens of proof.

6. **STIPULATIONS/DECLARATION UNCONTESTED FACTS/EXHIBITS/ETC.**
7. **DISCOVERY:** Interrogatories; requests for admissions; depositions (number and length anticipated by claimant/respondent; timetable; use of deposition excerpts in lieu of live testimony); document exchange (categories; types anticipated by claimant/respondent; timetable, confidentiality stipulation); witnesses (exchange of lists/dates/additions; scope of testimony; expert witnesses/exchange of curricula vitae/reports).
8. **PREHEARING MOTIONS**
9. **PREHEARING BRIEFS:** Statutory case law to be addressed; choice of law issues; page limits; simultaneous exchange/date; response briefs/dates; briefs serve in lieu of or in addition to opening statements.
10. **HEARING PROCEDURE:** Estimated number of days; number of witnesses/availability; length of hearing day; location of hearing; allocation of time, if any, between parties (maximum time for opening/closings, time limits for presentation of evidence); court reporter (who to arrange/pay); oral closing arguments or posthearing briefs (simultaneous or responsive); bifurcation of hearing for damages/relief issues; set hearing date(s)/location.
11. **FORM OF AWARD:** Decision only; abbreviated findings and decision, full opinion and decision.
12. **BILLING ISSUES:** Advance deposit in escrow/trust account (private cases); if hourly versus per diem; additional deposit required for additional hearing days; cancellation policy of arbitrator.
13. **POSTHEARING SCHEDULING ORDER:** To confirm agreed-upon timetables for depositions and document production; rulings of arbitrator regarding prehearing motions unresolved at conference; expected date of issuance of final order.
14. **PREHEARING/POSTDISCOVERY STATUS CONFERENCE**

#### EXHIBIT D

#### DISCOVERY I: DOCUMENT PRODUCTION

**Arbitrator Rosemary A. Townley:** Let's discuss document exchange. I'm assuming that you have some notion, at this point, as to the

types, or at least the categories, of documents you may be seeking. Now, Mr. Outten, you're the moving party, why don't you start.

**Wayne N. Outten:** As you know, in an employment case, particularly a discrimination case, the plaintiff typically has the burden of proof, but the defendant is the one with most of the documents and most of the witnesses. That's why discovery is so important in these kinds of cases, so the plaintiff may be placed in a position to meet the burdens of proof and burdens of going forward. There are a lot of documents, for example, that we are going to need from the defense.

**Arbitrator Rosemary A. Townley:** Why don't you give me some examples?

**Wayne N. Outten:** For example, in connection with our age claim, I would like to have the ages of all the partners and doctors who have worked at the medical center at any time since 1993, when the contract was entered into, right up to the present.

**Alfred G. Feliu:** Dr. Gilcrest was the chief of the department, he knows the ages. I'll be happy to provide them.

**Arbitrator Rosemary A. Townley:** Your next request?

**Wayne N. Outten:** And that, of course, applies to people who are current employees who have come since my client was there, as well as former employees who have left.

**Alfred G. Feliu:** So anyone who was employed from 1993 to the present, is that what you're asking for?

**Wayne N. Outten:** Right. And I'm not going to focus, at this point, on the staff people. I'm talking about the professionals.

**Alfred G. Feliu:** The physicians. I understand that.

**Wayne N. Outten:** I would like to get any documents that exist, whether it's notes or memos or minutes or whatever, pertaining to any discharges by the management committee in the last three-year period, other than my client, which I'm going to ask for separately, because I want to see who else has been terminated, and what deliberations and discussions went into that.

**Alfred G. Feliu:** To the extent that those are reflected in the documents, we will object to that request.

**Arbitrator Rosemary A. Townley:** On what basis?

**Alfred G. Feliu:** We are talking about a specific set of facts. He was terminated for a single reason. If in discovery, Mr. Outten were to find that there were terminations, although he will not find anything close or related to the termination or the facts here, then we will address it, but we are not going to disclose personnel files, and otherwise confidential documents on the remote possibility



that there might have been a connection between the two. If, in discovery, he draws a connection, and finds, for example, that the same decisionmakers, in fact, the executive committee, were involved in other terminations during this period of time, I might accede, but otherwise there is no basis to do so. Whatever other terminations there were, were completely unrelated to this set of facts.

**Wayne N. Outten:** First, let me point out that one of the concerns that Mr. Feliu raised is confidentiality of the personnel records.

**Alfred G. Feliu:** A serious concern.

**Wayne N. Outten:** I have no problem with that concern and I have, in fact, taken from another case I'm in the process of handling, a stipulation of confidentiality that was entered into in that case. I've brought a copy of that, which I'm prepared to discuss with you and revise to conform to the facts of this case, to provide that any documents pertaining to other personnel, and, for example, financial information, will be held in confidence and used for the purpose of this proceeding only.

**Alfred G. Feliu:** I want to hear whatever he has to say, but there's a difference between giving Mr. Outten "attorney's-eyes-only" access versus giving Dr. Gilcrest access to certain documents. So let's see what you're asking for and I'll respond.

**Wayne N. Outten:** You're not going to tell me that I can't consult with my client about the documents that are produced in the discovery in this case? I will represent that there will be no personal possession of such confidential documents outside of my office, but my client must have the right to review and discuss with me any and all documents that we adduce during discovery.

**Alfred G. Feliu:** I don't concur in the least. And we were previously discussing financial records.

**Arbitrator Rosemary A. Townley:** Let's stick with the personnel records first, which is what you were addressing, before we discuss any requests for financial records.

**Alfred G. Feliu:** It is our position that Mr. Outten's client is only entitled to access to those cases that he was involved in or had notice of.

**Arbitrator Rosemary A. Townley:** So you have no objection to disclosure of the personnel records assuming they are accompanied by a confidentiality stipulation?

**Alfred G. Feliu:** No. Let's go back a step. I said it's our position that we will object to any request that smacks of a fishing expedition about every disciplinary or termination action in the last X amount

of years. If there's a particular set of circumstances that would further his case, then I might accede. I suggest, here, that there is not. But, if in discovery he finds something, we can talk about it. But, in the abstract, I'm not going to say that we'll disclose all personnel files related to every termination in the organization for a certain period of time.

**Arbitrator Rosemary A. Townley:** First of all, you are restricting your request to physicians, correct? Are you including other professionals?

**Alfred G. Feliu:** That is the organization, along with a couple of secretarial types and a few administrators. People leave for different reasons. There are ethical concerns, there are some, shall we say, malpractice type of concerns, and I'm certainly not going to make those records available if they are not related to this case, and I suggest that they are not.

**Arbitrator Rosemary A. Townley:** Dr. Gilcrest has a discrimination claim pending and it seems to me that this request, narrowly tailored as Mr. Outten has presented it, would be an acceptable one. The material might very well be relevant and material to this case.

**Alfred G. Feliu:** If the termination of a physician is because of a problem he may have had with a hospital, unrelated to this, how could that possibly further his discrimination case, his tortious interference case, or his defamation case? It simply cannot. In fact, there is a situation like that, a licensing/malpractice-related issue with a hospital that resulted in the termination of one of our physicians. I can't conceive of how that's relevant.

**Arbitrator Rosemary A. Townley:** So you're not willingly going to disclose it?

**Alfred G. Feliu:** I'm not going to willingly disclose.

**Wayne N. Outten:** We are jumping far ahead into all of these, because I haven't given all the specifications of what I would like. I'm willing to consider the idea that, if there should be any particular documents of a similar, sensitive nature that he is concerned about, those would be examined in camera by you for your determination as to whether they are conceivably relevant to the discovery issues.

**Alfred G. Feliu:** That's acceptable to us.

**Arbitrator Rosemary A. Townley:** Fine. So I'll note that there will be an in camera review of the personnel records.

**Wayne N. Outten:** This would be on a document-by-document basis. I'm not referring to this as a general proposition. Just any

particular one that he represents presents highly confidential areas having to do with professional licensing or malpractice-type concerns.

**Arbitrator Rosemary A. Townley:** I understand your arguments on this issue. Let's move on to the financial records because I wish to hear your positions on that issue.

**Wayne N. Outten:** Of course, my client was a partner in this firm and had access while he was a partner, to financial records of the partnership, but that ended over a year ago. Even then, he didn't have copies of all the records that were relevant when he was employed. So there are a number of financial documents that we would like to obtain, relevant to our damages issues, particularly about the revenues and profits of the partnership, because that pertains to my client's entitlement to a profit-sharing bonus under the terms of the contract.

**Alfred G. Feliu:** Maybe this raises another issue, before we even get there. I think that perhaps we should talk about the topic of bifurcation, because when we talk about partnership income, I suggest to you that the issues are not going to be easily defined or understood. Regarding the profit sharing, he was terminated on April 1.

**Wayne N. Outten:** A year ago.

**Alfred G. Feliu:** A year ago, three months into the year. So we certainly can do a quarterly report. I don't know that I would agree to any disclosures after his termination, if, in fact, as I understand it, his profit sharing cut off the day of his termination. In any event, in terms of damages, if he should have been employed on a going-forward basis, I do think it gets rather complex, and I don't know that we need to address that.

**Arbitrator Rosemary A. Townley:** Do the financial records go at all to the liability phase of this case?

**Wayne N. Outten:** Not really, except to the extent that the defendant may try to contend that the reason for terminating my client had to do with financial problems that the partnership was having. There's been some glimmer of that, but I don't know whether that's a position they are going to take or not, and if it is, then it would be relevant to the issue of liability, as well.

**Arbitrator Rosemary A. Townley:** Is that your position?

**Alfred G. Feliu:** Yes, it is. He has the information. Up to the point of his termination, he was acutely aware of the difficult situation the partnership was in, so there's nothing secret about those numbers. He is acutely aware of the damage that managed care has done to

the business, so there's nothing—it doesn't go to the liability in the sense of particular numbers. There is a fact that he cannot contest, and does not contest as far as I understand, namely, that the partnership was hurting, that ORTHO was hurting during this period of time.

**Wayne N. Outten:** Are you contending that this is part of good cause for terminating him?

**Alfred G. Feliu:** That his failure to contribute in the way that was expected, yes, we do. We do.

**Wayne N. Outten:** In that case, he is bringing the financial condition into issue and I'm entitled to discovery on that.

**Alfred G. Feliu:** I'm putting in issue the performance of Dr. Gilcrest. That's the issue.

**Arbitrator Rosemary A. Townley:** It appears that the two issues are intertwined.

**Alfred G. Feliu:** When he doesn't perform, when the business hurts and suffers because he is in a sailboat somewhere near Maine, then that is the kind of financial injury that he personally did to the organization.

**Arbitrator Rosemary A. Townley:** But, nonetheless, whatever your claim might be, it does appear that it would impact during the liability phase of the hearing.

**Alfred G. Feliu:** The fact that there was a decline—yes, it would. There are certain basic revenue numbers that he has, and if he doesn't have them, we'll be happy to reproduce or make them available to him.

**Wayne N. Outten:** That's all we are asking. I don't know what we are arguing about. He had access to this when he was a partner, and all he is asking is to have access again. Incidentally, Mr. Feliu, you've got it wrong when you say that the information was relevant only up to the time of his termination, because the contract specifies that the profit-sharing payment is to be based on what it should have been for the fiscal year in which he was terminated. On the damages issues, at least, I'm entitled to the financial records through the end of calendar year 1996.

**Arbitrator Rosemary A. Townley:** So I assume, therefore, you would not have any objection?

**Alfred G. Feliu:** No objection.

**Arbitrator Rosemary A. Townley:** Fine.

**Wayne N. Outten:** This is a little aside from the document production, but I just would like to raise the issue that, if after I get those documents, I feel the need to send in an auditor to examine any of

their books, I would like to reserve the right to request that. I don't presently anticipate that being the case, but I did want to mention it, so in case it should come up later it's not a surprise.

**Arbitrator Rosemary A. Townley:** I'll note that you're making that request at this time, I'll reserve on it, and if, indeed, this becomes an issue again, we can have a telephone conference call to resolve the matter. Given the underlying activity, I assume you've thought through some of the other categories of documents that you will be seeking. So why don't we review some of those requests at this point.

**Wayne N. Outten:** In addition to the documents that I have already mentioned, there are numerous other categories. For example, anything that remotely pertains to my client during the last three-and-a-half years since the contract was entered into, such as his entire official personnel file, as well as any unofficial personnel files. By that I mean any files that are in the bottom of the drawer of the managing partner of the firm or wherever they may be. I want to receive any and all documents that pertain to the decision to terminate his employment, whether it's in the form of memos, interoffice memos, e-mails, recorded voice mail messages, anything that relates to the discussion among the partners or the management committee, to the decision to terminate my client.

**Arbitrator Rosemary A. Townley:** Let's start with the personnel files.

**Alfred G. Feliu:** Personnel files, clearly he will get, or he will get promptly. I know of no "shadow" personnel file but I will inquire. In terms of documents, there are certainly memos related to his termination, which I believe to be in the file, but I will confirm. There may have been a set of board minutes that would be relevant. In terms of voice mail, I don't know that voice mails are preserved but I will inquire. It has been a year, as you know. As for e-mail, ORTHO tends not to be, as I understand it, an e-mail-oriented organization. If there were e-mails preserved on the system, related to termination, I understand those would be disclosed. I certainly am not conceding anything beyond that. Wayne mentioned "remotely related." I assume that's an exaggeration. For example, anything related to a patient that Dr. Gilcrest may have seen, or anything in that vein, you're not interested in, correct?

**Wayne N. Outten:** That's right.

**Alfred G. Feliu:** So with that understanding, I think we probably can agree on the relevant documents.

**Wayne N. Outten:** Similar to the auditor issue, I do want to reserve the right to consider sending in someone to check the e-mail computer database, because even though mail might have been erased, they remain on the hard drive and if we believe, based on what we do or see, that there may be e-mail material, then we would reserve the right to request to have an expert go in and examine that. Since the company did have two offices, one in Greenwich and one in New York, there was fairly extensive use of e-mail, and we believe that may well have been part of the communications between the management committee members during the period when they were deciding to terminate my client.

**Arbitrator Rosemary A. Townley:** Would you have any objection to that?

**Alfred G. Feliu:** Probably, but let me discuss it with my client. Certainly, e-mails related to the termination—and I disagree that there was a kind of usage that Wayne is suggesting—but putting that aside, with confidentiality concerns in mind, maybe we can address them before an expert would walk in. Given that we are talking about confidential medical records, I'm not interested in having someone wander through the e-mail system. If there's a targeted request and we can focus the expert on what Wayne is looking for, then perhaps we can work something out.

**Arbitrator Rosemary A. Townley:** We will address that issue if, and when, it arises. Any other documents you would like to request?

**Wayne N. Outten:** Yes, but I don't want to be limited to what we are discussing here today.

**Arbitrator Rosemary A. Townley:** This is a preliminary conference.

**Wayne N. Outten:** Right. There is one other important category and that is the apparent contention that my client was failing to perform his services properly and not taking care of his patients. I would like to receive any and all documents relating to anyone, patients or otherwise, complaining about the services my client had provided.

**Alfred G. Feliu:** I would be delighted to provide those in triplicate.

**Arbitrator Rosemary A. Townley:** By the way, I will be issuing a written postconference order that will cover all of the points that we are discussing here, as a reminder to both of you as to what you are going to be producing. Mr. Feliu, what documents will you be requesting?

**Alfred G. Feliu:** Remember, I have a counterclaim and we expect the measure of our other damages to be his income during the period that he was competing contrary to paragraph 4 of the

Agreement. So, we certainly want anything indicating his income during this period of time. We will be issuing, or we would ask the arbitrator to issue, a subpoena to his current employer asking for some of the details of the relationship, for example, any equivalent agreement that he may have entered into.

**Wayne N. Outten:** I do not want him harassing or bothering my client's current employer. The kind of documents that he has suggested he could receive by simply asking my client if he has them and, if so, we will be happy to supply those kinds of things.

**Alfred G. Feliu:** There is a basic loss of trust between my client and Dr. Gilcrest so we would like to confirm that there were not, for example, discussions before with this current employer. It was only in retrospect that we found out that he began working with the new employer relatively promptly after his termination, which was a little bit surprising to us. We would also request that the arbitrator issue a subpoena to the manufacturer of the GIL-CUFF. It is our contention that he was spending an inordinate amount of time promoting this product rather than doing his work at ORTHO. So we will be following up on that lead as well. But we will propose that to you subsequent to this hearing.

**Arbitrator Rosemary A. Townley:** Once I see a copy of this subpoena, and if Mr. Outten has any further concerns, we can address them at that time. Mr. Feliu, will there be any other documents that you will be requesting?

#### EXHIBIT E

### DISCOVERY II: DEPOSITIONS

**Arbitrator Rosemary A. Townley:** Why don't we move on to depositions. I am assuming that by now you know of certain key individuals that you wish to depose. Let's begin with Mr. Outten.

**Wayne N. Outten:** Of course, I want to take the deposition of Dr. LaMonica, who was the Managing Partner and the one who sent the discharge letter. I also want to take the deposition of the other three members of the management committee.

**Alfred G. Feliu:** Come on, Wayne.

**Arbitrator Rosemary A. Townley:** Let him finish. Go on, Mr. Outten.

**Wayne N. Outten:** These are the people who made the decision to interrupt my client's career so precipitously after all these years and I have the right to find out what their reasoning was for this

action. He had been there for 10 years, and I would think that if they had a good reason they would be happy to explain it in a deposition.

**Arbitrator Rosemary A. Townley:** Any others that you will request to depose?

**Wayne N. Outten:** There are certain others that I wish to reserve for consideration later after the document production and after I complete the first round of depositions. For example, I may like to take the deposition of Dr. Sobin, who was the individual who replaced my client as the Chief of Orthopedic Surgery. I may also wish to take the deposition of the bookkeeper and/or the outside auditor for the company on the financial issues. I hope that that will not be necessary, but it may arise after I've had the chance to review the discovery regarding the documents and the depositions of the management committee members.

**Arbitrator Rosemary A. Townley:** Mr. Feliu, would you care to respond to these requests?

**Alfred G. Feliu:** In reverse order, the bookkeeper/auditor may be an issue if we bifurcate the hearing. We need to decide that question before we can talk about those depositions. With respect to Dr. Sobin, I can't imagine what relevance that has to this proceeding. Dr. Sobin was hired after the termination and had nothing to do with the performance-based termination decision. It seems to be totally irrelevant and designed to harass my client. To depose all of the executive committee members and Dr. LaMonica seems excessive to say the least. There is no question Dr. LaMonica is the key person here. She can speak to the particulars. The five did participate in a series of meetings when the decision was made and some of it was documented.

**Arbitrator Rosemary A. Townley:** Did they all vote on the termination decision?

**Alfred G. Feliu:** Yes, they did.

**Wayne N. Outten:** There is truly a pattern emerging here. Mr. Feliu is expecting me to take his word for what people did and didn't do. I have the right to ask these people under oath to answer those kinds of questions and I do not have to accept Mr. Feliu's representation.

**Alfred G. Feliu:** This is arbitration and not litigation. There must be some bounds to the discovery we conduct here, or we might as well be in court. He lost once and he is trying to relive the same agony again in a different forum.

**Arbitrator Rosemary A. Townley:** Now gentlemen, there is no jury sitting here. Let's just keep moving along on the issues.



**Alfred G. Feliu:** The issues are clear. It is a performance-based termination. He will hear everything he wants to hear from Dr. LaMonica. If he wants a second person, perhaps to confirm, fine, but I don't see the purpose of asking five people the exact same set of questions when they are going to say the same exact set of things. They were all in the same meeting and it's memorialized to a certain extent. So why don't we take one deposition, look at the documents, and then see if there is need for additional depositions.

**Arbitrator Rosemary A. Townley:** Was this a majority vote?

**Wayne N. Outten:** They never told us what the vote was.

**Alfred G. Feliu:** It was unanimous vote, so it doesn't much matter.

**Arbitrator Rosemary A. Townley:** It appears that the deposition of all of the committee members would be relevant and material to this case, given that they all voted on the termination.

**Alfred G. Feliu:** Can we limit the time then?

**Arbitrator Rosemary A. Townley:** Well, we are going to get to that in a minute. Let's continue to address some of the other issues that were just raised.

**Wayne N. Outten:** I still wish to address Mr. Feliu's reference to Dr. Sobin. Mr. Feliu is telling me that Dr. Sobin was hired after my client was terminated and one thing had nothing to do with the other. Well, I don't know that to be so. For all I know, they decided to hire Dr. Sobin because he is younger and therefore they fired my client. I have the right to know when and how he was hired. That is the reason why I want to examine the management committee about these issues and maybe take Dr. Sobin's deposition as well.

**Alfred G. Feliu:** And what is Dr. Sobin going to say? "Yes, I was hired on this particular day." You have no need to take a deposition of Dr. Sobin. If you want to ask those questions, you should ask Dr. LaMonica and she will tell you very clearly why Dr. Sobin was hired. That's all you need to know.

**Arbitrator Rosemary A. Townley:** Given that Dr. Sobin was the replacement for Dr. Gilcrest, there might be something that is very critical to Mr. Outten's case. I don't see that request to be outside the bounds of proper discovery or overbroad in any way.

**Alfred G. Feliu:** Was Dr. Sobin involved in the age discrimination? Was Dr. Sobin involved in the defamation? Was Dr. Sobin involved with the breach of contract? No. In the damages? There's no relevance.

**Wayne N. Outten:** He may have relevant knowledge about each of those things from the period before he was hired and certainly afterwards.

**Alfred G. Feliu:** That's creative lawyering and how, pray tell, might that be the case?

**Wayne N. Outten:** The reason for my client's termination is at the heart of this case and if the reason was so that they could hire Dr. Sobin to replace him because he is younger and maybe cheaper, that's certainly relevant to the issue of whether there is good cause to terminate, instead of the trumped-up reasons that he was not adequately performing his services. I'm entitled to know what Dr. Sobin's role was when he got involved and also his relative qualifications which are very relevant to the issue of age discrimination. What are his qualifications compared with Dr. Gilcrest?

**Alfred G. Feliu:** He was hired because he was ready to do the job that Dr. Gilcrest was not prepared to do. What are you expecting to hear from this deposition? "So, sir, when they interviewed you, did they tell you that they were hiring you because you were younger than Dr. Gilcrest?"

**Arbitrator Rosemary A. Townley:** Nonetheless, this is the type of deposition that is allowed in an age discrimination case, at minimum. I don't see any problem with compelling the deposition of this particular individual. Now, let's address the issue of deposing the bookkeeper and/or the outside auditor.

**Alfred G. Feliu:** Well, it's the same issue I raised before. I see no need for us to get into the damages aspect of this when we can bifurcate the matter.

**Arbitrator Rosemary A. Townley:** Well, I am not sure how the liability part of this case is related to financial information at issue.

**Wayne N. Outten:** I'm certainly willing to discuss the merits of bifurcating the hearing itself. There are certain economies in presentation to address the liability phase first and then presumably the damages phase. But it would be unprecedented in my experience to bifurcate the discovery and to proceed to a hearing on liability and then, and only then, conduct the discovery on damages in preparation for a damages hearing. I would vigorously object to any suggestion that we bifurcate the discovery phase.

**Alfred G. Feliu:** So we are going to take discovery on a matter that may not be heard? How is that adding to the efficiency of the proceedings on this issue?

**Wayne N. Outten:** Have you ever seen any judge order bifurcation?

**Alfred G. Feliu:** We are not before a judge.

**Arbitrator Rosemary A. Townley:** Nonetheless, I'm going to be guided by the case law that interprets the relevant statutes. If this

is an issue that the judges in this jurisdiction have ruled on, then I will follow their lead.

**Wayne N. Outten:** Well, I can tell you based on my 20 years of practice in the federal courts in New York that I have never had a defense counsel even suggest bifurcation of damages during discovery.

**Arbitrator Rosemary A. Townley:** I want to get back to the issue of bifurcation later on because I think that it's important in terms of the efficiency and economy of this proceeding, in terms of bringing in witnesses and running up extra days of hearing. But at this point, I believe that it is best that you submit a posthearing brief on this matter so that we can move along.

**Wayne N. Outten:** I think we can put that aside for now because I'm not sure that I'm going to do it and I'm sure we are going to be having some conference calls between now and the conclusion of discovery, and if I should decide that I need that and Mr. Feliu won't cooperate in that process, we will talk about it then.

**Arbitrator Rosemary A. Townley:** Why don't we move on to the number and the length of the depositions, at least with respect to Dr. LaMonica, the members of the management committee, and Dr. Sobin.

**Alfred G. Feliu:** This is cumulative and repetitive. It seems to me if you are going to allow the other four to be deposed after Dr. LaMonica, you should make them very short and sweet so we don't sit there wasting the time of very important people.

**Wayne N. Outten:** I'm not willing at this point to agree to some arbitrary period of time. I have every incentive, I assure you, to be as efficient and as quick as possible in doing these depositions. If nothing else, my client is paying for it in the deposition transcripts and in my time, and there is no point in engaging in unnecessary depositions or making them last longer than is necessary. So you have my representation that I will conduct the depositions in an efficient and productive manner. But to set an artificial time that it will be 45 minutes or an hour, I think, is inappropriate because I don't know at this point what I am going to find out once I start the taking of the deposition.

**Alfred G. Feliu:** Then why don't you take Dr. LaMonica's and then we will see where we go from there; you may not need the other four.

**Wayne N. Outten:** I'm going to need all of the members of the management committee.

**Arbitrator Rosemary A. Townley:** I have already said that those depositions will be relevant and material and that you will be allowed to depose them. I have found that limiting depositions to a certain number of days to be a very effective and efficient way of going about it, as opposed to a specific length of time. Because, again, I remind you that, we are trying to make this an expeditious process.

**Wayne N. Outten:** I'm all in favor of that.

**Alfred G. Feliu:** I don't understand how days works better than hours. I think hours works better than days.

**Arbitrator Rosemary A. Townley:** In any event, this is something we will pick up again during the course of our telephone conference, but I do want to set down a specific schedule so we don't lose time on this. Assuming that you get your documents within two to three weeks, I assume that we could start depositions shortly thereafter.

**Wayne N. Outten:** I would like one week from the time I get all of the documents before the first deposition. So assuming I give you the document production request in a week, and then I get the documents two weeks after that, then we will be able to hold depositions beginning one month from now.

**Arbitrator Rosemary A. Townley:** So we are looking at the end of June?

**Alfred G. Feliu:** We will work on a calendar when we find out who he wants to depose and in what order.

**Arbitrator Rosemary A. Townley:** I would suggest you exchange your list of deponents simultaneously.

**Alfred G. Feliu:** Dr. Gilcrest, that's all I need. I may take third-party depositions depending on what I find.

**Arbitrator Rosemary A. Townley:** So a simultaneous exchange, with a copy to me so I can keep track of it.

**Alfred G. Feliu:** Fine.

**Arbitrator Rosemary A. Townley:** Have you discussed the use of deposition excerpts in lieu of testimony?

**Alfred G. Feliu:** Certainly, if he is planning to take a deposition of the entire executive committee, then there may very well be an opportunity to use the transcripts. I do not want to have to bother these people for that.

**Wayne N. Outten:** I'm willing to work on that as well. We don't have a jury here and you as the decisionmaker certainly know how to read a deposition transcript. So if we can avoid inconveniencing someone unnecessarily, then I'm certainly willing to consider that.

**Arbitrator Rosemary A. Townley:** After the entire discovery process is completed, it will be worthwhile to have a prehearing status conference by telephone. If you get bogged down during the course of any of these matters, a quick telephone conference call will suffice. I will make my ruling at that point and follow it up in writing.

EXHIBIT F

STIPULATION OF CONFIDENTIALITY [EXCERPTS]

1. The following are deemed Confidential Information:  
(a) any documents, tangible things, or information, provided to any party by another party or by any of the persons or entities to whom plaintiff will have executed a release for records of medical, psychological, and/or psychiatric treatment or consultation, including but not limited to records, notes, reports, billing information, and prescriptions. (b) Any documents, tangible things, or information provided to any party by another party pertaining to: (i) personnel records of any employee or partner of either party, and (ii) any trade secrets, proprietary information, or other confidential information pertaining to or regarding the business, investments, or other remunerative activities of any party or pertaining to any patient, client, or customer of any party.
2. Confidential Information, and information obtained from Confidential Information, may be disclosed only to the following persons: outside counsel or co-counsel of record for any party; expert witnesses retained by a party, provided that any such expert witness signs the Statement of Confidentiality; court reporters to the extent necessary to perform their customary tasks in connection with this action; and the arbitrator.
3. If Confidential Information is produced by plaintiff in redacted form, defendants may apply to the arbitrator for an inspection in camera of the redacted portions. If the arbitrator orders, after such an in camera inspection, that the Confidential Information must be produced in unredacted or partially unredacted form, plaintiff may apply for a protective order. If the arbitrator orders after such an in

camera inspection that the redacted portions need not be produced, defendants may apply for an order compelling production.

4. All Confidential Information that is filed with the arbitrator, and any pleadings, motions, or other papers filed with the arbitrator disclosing any Confidential Information, shall be filed under seal and kept under seal until further order of the arbitrator. Where possible, only confidential portions of filings with the arbitrator shall be filed under seal.
5. Nothing herein shall prevent counsel of record for any party in this action from submitting, referring to, quoting from, paraphrasing, or otherwise using any Confidential Information at any trial or hearing in this litigation or in any testimony, transcript, brief, or other document submitted to or filed with the arbitrator in this action, provided, however, that reasonable notice is given to the opposing party that such use at trial or hearing is intended, so as to permit the opposing party to apply to the arbitrator for a protective order.

EXHIBIT G

SAMPLE POSTHEARING SCHEDULING/  
DISCOVERY ORDER

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**In the Matter of the Arbitration Between the  
Dr. Charles Gilcrest,**

**Plaintiff,**

**-against-**

**ORTHO-MED Institute for Sports Injuries,  
Defendant.**

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**Appearances: For the Plaintiff**

**Wayne N. Outten, Esq.**

**LANKENAU KOVNER KURTZ & OUTTEN, LLP**

**For the Defendant**

**Alfred C. Feliu, Esq.**

**PAUL, HASTINGS, JANOFSKY & WALKER**

**Before: Rosemary A. Townley, Esq., Ph.D.**  
**Arbitrator**

- I. **BACKGROUND AND SCOPE OF ARBITRATION:** Date/location of prehearing conference; review of disclosures/outcome; issue(s); applicable rules; statutory remedies to apply; choice of law to apply; type of decision to be issued.
- II. **DISCOVERY RULINGS:** Regarding each item set forth on #7 of Arbitrator's Prehearing Checklist.
- III. **WITNESSES:** Lists to be exchanged; dates of exchange; potential Arbitrator disclosures.
- IV. **PREHEARING MOTIONS:** Summary and rulings by Arbitrator, if applicable.
- V. **PREHEARING BRIEFS/STIPULATIONS:** Length of briefs; simultaneous exchange and date; date of submission of uncontested facts.
- VI. **HEARING PROCEDURE:** Rulings/agreements regarding each item set forth in #10 of Arbitrator's Prehearing Checklist.
- VII. **BIFURCATION OF HEARING:** Liability versus damages phases.
- VIII. **FORM OF AWARD:** Full opinion and award; award only.
- IX. **BILLING ISSUES:** Fees/expenses/escrow accounts.
- X. **PREHEARING STATUS TELEPHONE CONFERENCE:** Approximate date(s).