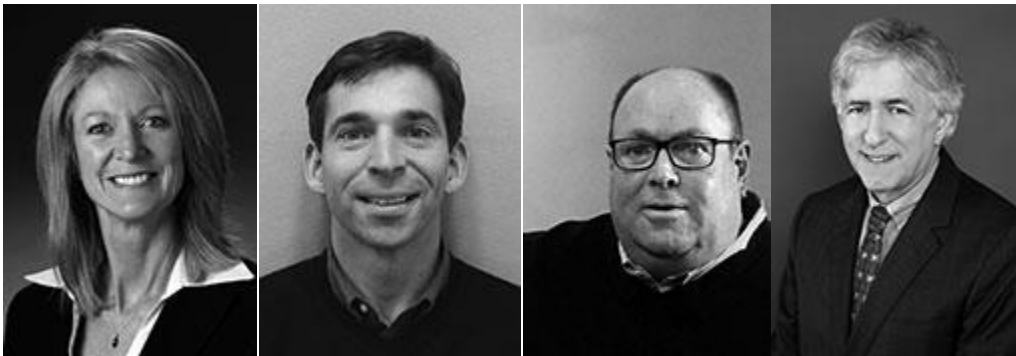


How Much Process Is Due? Procedural Issues In Arbitrations



By Katherine Billingham, Jamie Scrimgeour and Paul Thomson, moderated by Peter Chaffetz

MR. CHAFFETZ: Everyone will agree that arbitration should focus on the merits of the parties' disputes. Unavoidably though, arbitration is a process, and virtually every case also involves ongoing dispute over what the scope of that process should be. How much document discovery is reasonable? How many depositions will there be? How much scrutiny should the panel give to claims of privilege? Does the panel's concern to ensure that it allows due process sometimes lead to too much process relative to what is at issue? These endemic procedural disputes can consume substantial attorney and arbitrator time and materially increase the cost of the proceeding. Counsel and parties frequently complain about this aspect of arbitration, even though they necessarily are a contributing source of the problem. The ARIAS Quarterly Editorial Board thought that it would be useful to hear what arbitrators themselves think about the question, "How Much Process is Due" We therefore convened a panel of three arbitrators who have participated in reinsurance arbitrations in various roles and who come from different backgrounds to engage in a conversation about these issues. Our three panelists are Kathy Billingham, Jamie Scrimgeour and Paul Thomson. Peter Chaffetz of Chaffetz Lindsey agreed to moderate that discussion, which took place on October 20, 2015. We present an edited transcript here.

Does Arbitrators' Fear of Vacation Proceedings Affect Their Procedural Rulings?

MR. CHAFFETZ: The due process standard is embodied in Section 10.C of the FAA, which provides for vacation of an award: where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced. There is a feeling among some counsel that arbitrators have an exaggerated fear of being reversed under this statutory standard, and that this has led to an unnecessary escalation of proceedings. So to start our conversation, I will ask each of the panelists whether they agree with that proposition.

MR. THOMSON: Arbitrators are aware that their work may, under narrow circumstances, be reviewed and, like judges, they do not want to be reversed. That does not mean, however, that everything thing we do is motivated by, or factors into the prospect of, such a challenge. My philosophy is to abide by the parties' arbitration agreement, apply industry custom and practice as appropriate, and make decisions based on what I think is fair given the evidence presented. Based on the arbitrations that I have been involved in, the panel and the parties' counsel work cooperatively to assure that due process is afforded the parties and that the disputed issues are given a fair and full consideration, both in the presentation of the parties' competing positions and the consideration of everything presented to the panel.

MR. CHAFFETZ: I'm going to push back a little, Paul. My concern, and I have certainly heard others who share this view, is not that there is a problem with parties getting due process, but rather the opposite -- that the concern over due process has led to an undue expansion of the proceedings. I gather from what you just said that you don't think that's a real concern?

MR. THOMSON: Personally, I don't. We have to remember that arbitration is being done by agreement and the parties can agree to how much or little they want to make the arbitration look or feel like litigation. Assuming the parties cannot agree, experienced panels, acting affirmatively, should put in place and then require all to adhere to reasonable and detailed schedules that frame how the arbitration will be conducted. The panel must strongly communicate that expanding or delaying the process is not acceptable and address those process-related elements that might lead to problems later on up front and early in the process.

MR. SCRIMGEOUR: First off, I think that most arbitrators understand that the actual chances of a decision being overturned under the FAA rule that you cited, Peter, are very slim. I think that the bigger concern, from an arbitrator's perspective is a fear that these decisions are going to be made public if they are challenged. And even if their decisions are entirely defensible and reasonable -- and they usually are -- they still are made public and sometimes without sufficient context to avoid creating misimpressions. And so what happens is that the arbitrator's opinions on a particular matter are now potentially open to the public, for use by future litigants. This could potentially cause arbitrators to lose appointments or be stricken from umpire slates in future arbitrations. In addition, the umpire is going to suffer some injury to reputation, whether it's warranted or not, because there will be folks who are disgruntled. There's going to be the inner circle of law firms and companies that were on the receiving end of whatever the decision was. So I think that it's not really the fear of reversal. It's the fear of publicity. But I do think the result is the same because a party is more likely to challenge an award if it is unhappy with the process. There is an escalation of proceedings. I may disagree with Paul here a bit, but my feeling is that some arbitrators tend to do more than they need to, to allow folks perhaps too much discovery, perhaps too many depositions, perhaps not enough

effort to focus discovery, because in the back of their minds they are thinking this decision could become public and it may not be popular with everyone.

MR. THOMSON: I want to comment on what Jamie said. Rather than challenges brought on due process bases, there has been a fairly recent trend of prevailing parties rushing to court to enforce panel awards that results in the disclosure of private and confidential arbitration information, including awards and the identities of the parties, panel members and counsel. That development certainly adds an element of concern for the industry about whether it is any longer reasonable to assume that there will be confidentiality of the process. It's a given that when courts become involved, there is a strong competing interest to keep things that are in the public domain accessible and transparent. The end run around confidentiality orders and/or agreements is perhaps a larger and more prevalent problem as respects the "publicity" concerns that Jamie raises. Other than cases that we have all read recently, I cannot recall from personal experience where vacatur on due process grounds was a great concern. I think that's so because the parties and panel members work very well together and are committed to really get the process and results right.

MS. BILLINGHAM: I agree with Jamie that the panel is mindful not only of the possibility of being overturned, even though slim, but the potential for challenge itself, and also there is sometimes a concern about upsetting one law firm or another, and this tends to drive compromises on some level. Having said that, panels generally try to do the right thing, and to do the best they can to manage discovery issues fairly so that decisions are reasonably defensible. Panels do routinely set limits. Recently, I was the umpire in a case where a party was asking for records on claims unrelated to that party. The panel said no, especially since course of conduct and/or general claims guidelines had not been issues in the case.

Potential Impact of Revisions to the Federal Rules of Civil Procedure

MR. CHAFFETZ: When we were discussing among ourselves to get ready for this conversation, Jamie directed our attention to the revised Federal Rules of Civil Procedure which now move the requirement of "proportionality," which I take to mean cost-benefit analysis, into the definition of what is discoverable under Rule 26(b). Other changes in the amended rules appear to be aimed at reducing the burden of discovery. Do you think that arbitration panels will be receptive to the new emphasis on cost benefit analysis in discovery that the federal courts are going to be implementing on December 1?

MR. SCRIMGEOUR: Well, I hope so. In fact, we already have that type of guidance. If you look at the ARIAS Practical Guide, Chapter 4, Comment E, it reads very much like the new Federal Rules. It acknowledges that the arbitrator has great discretion but directs arbitrators to "exercise the discretion to strike an appropriate balance between the relevant discovery necessary to the

respective cases and protecting the streamlined, cost-effective intent of the arbitration process." So this is what arbitrators should already be doing. With respect to the Federal Rules of Civil Procedure changes, I have a couple of observations I would like to share. First, ceding companies, reinsurers and many corporations have signed onto letters in support of the proposed rules. They signed on to the stated purpose of the proposal as well – which was to reduce discovery costs and make discovery more efficient. So in my opinion arbitrators should keep this in mind when approaching expensive discovery that is unlikely to lead to evidence that goes to a material issue in the case – especially when the amount in controversy is relatively small. It just makes sense. We need to figure out a way to resolve these smaller dollar issues without spending the same amount of money that's at issue in discovery costs.

MS. BILLINGHAM: I agree that arbitrators will take guidance from the Federal Rules. I also agree that the new Federal Rules should encourage panels to put limits on broad discovery requests, since they have done away with the broad "reasonably calculated to lead to the discovery of admissible evidence" standard. New Rule 26(B)(1) now authorizes discovery of "any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case"

MR. THOMSON: I find it interesting that we now look to the Federal Rules for guidance. As to the Federal Rule amendments that Jamie and Kathy mentioned regarding proportional discovery, I think that's where most arbitration panels that I've served on have been all along. I go back to the early '80s when I first was involved in arbitrations between ceding companies and reinsurers. At that time, there were not too many, maybe two or three or four arbitrations that I can recall throughout the '80s, that my company became involved in. And in those instances where it did, there was literally no discovery other than producing the documents that were accessible via the customary operation of the reinsurance contracts' access to records clauses. And there were no depositions. Documents were exchanged and reviewed, and the parties made competing presentations in one afternoon. Arbitrators listened to and questioned both sides, and decisions were made. Obviously, we have moved the process of arbitrating disputes into a very different environment over these past 30 years. In particular, I remember in 1990, when I first was serving on arbitration panels, the panel members were very much inclined to keep the process lean and to encourage that the parties adhere to schedules that kept the process efficient. And we weren't confronted by expansive privilege claims or extensive motion practice. Even operating in today's environment, as a general matter, I think the panels have done a pretty good job -- in my experience -- of keeping the process focused and being diligent by not letting the process itself go to excesses. This is dependent, however, on the composition of the panel. If you have experienced and confident and assertive individuals, the process can work pretty efficiently. Based on my experience, one could say that the new proportionality rule in the Federal Rules is a little late to the party.

Determining the Right Number of Depositions

MR. SCRIMGEOUR: I, too, am aware of the good old days where reinsurers only demanded access to privileged documents in very rare circumstances and ceding Companies were not overly aggressive in their claims of privilege. But nowadays, in light of the way discovery has escalated, do you still see parties asking or agreeing that there should be no depositions?

MR. THOMSON: Yes. Again, I go back to how the process gets joined initially. And I think that's a critical period for any arbitration. The panel can encourage that the parties meet and confer and address those process-related things that can lead to problems with efficiency. I'm seeing more and more, where one side might be targeting five to ten depositions, while the other side might be saying we only need one or two. Panels can say we are going to limit the number of depositions to two or three a side, and should there be a belief by one or both of the parties that additional depositions are needed, either may come to the panel and demonstrate why we should allow additional depositions. And in almost every instance, the parties just don't come back to the panel. And the documents that are going to be of interest to the panel and bear on the issues presented to witnesses are typically transactionally involved in, say, the handling of a claim or the underwriting of a risk. And we end up with a process where, instead of having 10 or 12 witnesses deposed, you have one or two or three from each side, and the process moves right along. But it all starts with the way in which the arbitration process is initially framed and a detailed and realistic schedule is formulated, agreed to and then enforced.

MS. BILLINGHAM: I agree with Paul. I too recall the arbitrations of the mid-80's when depositions were unheard of. There were very few (if any) live witnesses at hearings, and testimony was often introduced via affidavit. Hearings were a couple of days and results were still pretty fair. When issues are not fact-driven, parties should be able to agree to a deposition limit and the panel should set clear expectations during the organizational meeting, subject to reasonable modifications as things develop.

MR. CHAFFETZ: I'm going to take a step out of my role as moderator to respond to the comments from Paul and the other panelists on the importance of firm leadership or guidance from the panel, and in particular from the umpire. I think most trial lawyers would agree that that is really the key to the parties' satisfaction with the process. While that approach is not as common in arbitration, there are some arbitrators who have developed a reputation for providing strong guidance when they sit as umpire. And I think those arbitrators get a lot of calls to be umpire because that is really what we need. The bottom line is that arbitration is a product. And we have to make sure that the product is valuable to its users.

Rethinking e-Discovery

Now, I'm going to change the subject slightly. I think we should just have a word on e-discovery. And again, I'm prompted by the changes in the Federal Rules that are designed to address concerns about the burdens of discovery. This can be seen in the way Rule 37(e) approaches the subject of sanctions for failure to maintain electronic records. The new wording provides that in the event a party has failed to maintain electronic records that it should have maintained, the court is only authorized to impose that sanction which is adequate to compensate for the prejudice caused. Sanctions are not supposed to be punitive. However, if the court finds that a party acted with intent to deprive another party of the deleted information's use in litigation, sanctions may include a presumption that the information was unfavorable to the party that lost it, instructing the jury to draw a negative inference against the party, or dismissal of the action or entry of a default judgment.

Kathy, do you think that that standard is consistent with what presently occurs in arbitrations or not?

MS. BILLINGHAM: I agree that the remedy should not be punitive. Also, the problem caused by non-production can sometimes take care of itself, because when it appears that a party's failure to maintain or retain pertinent records is disingenuous, that can affect the party's credibility on all issues, even without any formal sanction or adverse inference ruling. That's the real harm to the recalcitrant party. I would also say that if there is a way to restore the missing data, but that solution drives up discovery costs for the other side, then the panel should consider some form of compensation, especially where the documents sought are clearly relevant. I would consider that type of cost award to be in the nature of a "make whole" remedy and not punitive.

MR. THOMSON: I agree with Kathy. I have served on panels where there have been some issues about e-document preservation and production. And if the manner by which documents are produced markedly increases the costs of the process, that's something that can be addressed by the panel by the way it crafts its award or, as you mentioned, making certain inferences when they deliberate.

MR. SCRIMGEOUR: I agree that the sanctions for failure to maintain electronic data generally shouldn't be punitive. But I also assume that even under the proposed Federal Rules, there has to be an exception to that principle where there was intentional spoliation or deletion of electronic data. Regardless, I think that it's usually within an arbitrator's discretion to award attorneys' fees, and I believe that could be considered where there has been intentional bad faith action to delete relevant records.

Summary Judgment in Arbitration

MR. CHAFFETZ: I'm going to turn our conversation to another topic on which I have heard criticisms from trial lawyers. It has become almost routine to set a pre-hearing schedule that leaves weeks of

additional time between the close of discovery and the hearing to accommodate a briefing schedule for potential summary judgment motions. And yet, in my experience, summary judgment motions are rarely granted, certainly much less often in arbitration than in court. Do our panelists agree, and if so what is the reason?

MS. BILLINGHAM: Panels I've served on are seeing more motions for summary judgment. When they are appropriate, I like them, because if nothing else, the panel gets a pretty good preview of the relative positions. Also, even if the panel ultimately denies the motion, the process can assist everyone in focusing on the real issues. Further, I know that some arbitrators are reluctant to grant summary judgment because they think it is unfair not to permit both parties to present their witnesses at a hearing. However, if an umpire is comfortable that summary judgment is warranted by the facts and the controlling contractual language and legal or business principles, then it should be granted. It is unfair even to the losing party to allow it to incur more time and costs in a case the panel now knows it cannot win. Having said that, if it is clear before the briefing that there will be genuine factual issues and the motion will impose unnecessary cost and delay, then a party should refrain from bringing the motion. An astute panel will take a dim view of such a strategy and try to discourage it. Finally, panels have an obligation to ensure that the process is fair and efficient. Certainly umpires should not be concerned about a reduction in fees due to a truncated case, but unfortunately, I have seen such a dynamic. There will always be more cases for a competent umpire. In a recent case where I served as umpire, there were oral arguments at the final hearing and pre-hearing briefs but no depositions and no live witnesses. That's an alternative approach that can work.

MR. THOMSON: I think there is little doubt that panels have the authority to grant summary adjudication, and in just the past four or five years, I would say that roughly half a dozen or maybe ten matters were decided via summary adjudication of either a particular issue or the entire case. The panel can signal that there may be an issue or that the whole case might be ripe for disposition by motion. I have never been on a panel that refused to hear a motion for summary adjudication. However I have been on panels where we have signaled to the parties that it might not be the most cost-efficient way of proceeding, because the likelihood that summary adjudication will be granted is, in the panel's judgment, problematic.

MR. CHAFFETZ: I think it happens that when you have a summary judgment motion that the panel knows in advance is almost certain to be denied, this takes up weeks. It's a huge briefing exercise. It takes a lot of panel time. And then you will have to go back and re-brief everything in your pretrial briefs. While Paul has said that panels may discourage the filing of such a motion, why should they be reluctant to direct the parties to skip that phase?

MR. THOMSON: Well, again, it's my experience that in most instances where the panel indicates to the parties that a summary judgment motion might not gain traction with that particular panel on specific issues or a particular issue, the parties usually do not present dispositive motions to us. However, if it is the strong preference of one or both of the parties to present a matter for summary adjudication, it's my experience the panels will hear them.

MR. SCRIMGEOUR: I agree with Paul for the most part, and I also think that summary judgment isn't used quite often enough. I have rarely had the experience where someone has filed for summary judgment and the panel has just denied it and moved on to the hearing. In fact, I'm thinking about the last few years, and I have had six summary judgment motions, five of which were acted upon and resulted in a conclusion of the matter. Only one of them was pushed off to have a final hearing at a later date. I also agree there's an uptick in the number of summary judgment motions and I think that we should continue to see an increase for the foreseeable future. In general, my view is that parties should do it more often, not less often. But they have to be strategic and smart about the way they do it and signal to the panel early that that's where they are going. I think you should put a marker down with your organizational meeting statement. If the issue is strictly a contract interpretation question, then two counter-parties operating under the honorable engagement principle should want to have their issue resolved on summary judgment. And so, if you are the umpire and you get a sense that this is the only material dispute is the contract interpretation, then I think the view should be, "all right, let's get to the heart of that." In other circumstances, where there are genuine questions of underwriting intent and it would add something to the hearing to hear from the underwriters, then maybe we have to have their live testimony. I think it's being used more. And I agree with Paul that most of the time it's being used, it's appropriate and the matter is either resolved or the issues are narrowed considerably for trial by the Panel's decision.

Motion Practice

MR. CHAFFETZ: Now I would like to ask for your views on how the principles of strong case management and cost-benefit analysis come to play in the specific context of discovery motion practice. Do you have any specific guidance for parties seeking to limit discovery?

MR. SCRIMGEOUR: I think part of what is needed is some guidance from the panel initially that discovery needs to be targeted to the issues in dispute. And there needs to be at least some justification provided by the proponent of the discovery as to why it's necessary for the case. I think it is often more effective for the umpire to help by pushing the parties to address these scope of discovery issues early on. I think that parties are going to be a little more candid with the umpire than when they are negotiating with a counterparty about something. So I think that there is an early role for the panel in that process. Finally, as far as effective arguments, the lawyer should try to keep the

arguments focused on the material issues and whether the discovery that is sought is relevant to the material issues.

MR. THOMSON: I agree that panel has a great opportunity at the organizational meeting to set the tone. We'll have had a chance to review the parties' preliminary position statements. We have a rough idea of what's going to be at issue in the arbitration and what discovery may or may not help move the process along. The panel may signal, very directly, at the organizational meeting, that it is not going to entertain carpet bombing discovery requests. We want laser precision, if possible, in requests for documents and the requesting party should be required to explain why those documents are vital to moving the process forward. Making sure the parties understand that we are not going to accommodate a broad, turn-over-every-stone approach to discovery, and that they will need to explain to us why they need certain discovery, dramatically improves the process. When that tone is established early on and is reinforced throughout, things run efficiently. Along the same limes, I think panels should require monthly status reports that specifically comment on where the parties are with discovery and whether schedule deadlines are being met. The parties should also tell us whether and what categories of documents are or are not being timely produced. Panels should stay involved in the process. If all of a sudden, we are almost three-quarters of the way through the schedule and all sorts of things crop up that increase the costs of the process and cause delays, finger pointing may start at the party level, but blame for the breakdown and inefficiencies is shared by all.

MR. SCRIMGEOUR: And I think now, with the Federal Rules, we have an opportunity as umpires to cite to the principles underlying those rules. And it gives you additional support and confidence that if you exercise your discretion and you do a balancing test -- in a low dollar suit, for example -- that you are not going to be overturned and it's not going to be subject to any significant challenge. So these rules that are going to be out in December of this year will hopefully be something that the Panels can get behind. They should be familiar with these principles and put the lawyers on notice that, "we're going to be circumspect to discovery requests and we're going to expect that they are targeted, and that they meet the notions of relevance and proportionality in the new 26(b)(1) rule" which eliminates the "reasonably calculated" standard language. If arbitrators announce that they are aware of that and they intend to strongly support reduced discovery costs at the outset, this is definitely something that will make for a user friendly process.

MR. THOMSON: Just one more thought on that. For the most part, I just bring my business perspective and experience to the disputes, which is what I think the participants in arbitration are looking for. I know from that experience what type of documents and testimony is necessary so that the panel is positioned to make informed and fair decisions. And we'll take it from there, use and apply our collective industry experience and work to get it right.

MS. BILLINGHAM: Jamie made a good point about cases where the dollar value is small. The amount at issue should be taken into consideration when it comes to discovery matters. This is an opportunity for a panel to honor the spirit of why the reinsurance industry opts for arbitration. As Paul said, the panel is charged with bringing common business sense to the process.

MR. CHAFFETZ: I noted Paul's reference to his business perspective and applying business common sense in evaluating these disputes. This reminded me of my early experiences with reinsurance arbitration years ago, in which panels were almost disparaging and some counsel were disparaging of arguments based on the Federal Rules of Evidence or the Rules of Civil Procedure. My impression is that over the years, panels have become more receptive to the argument that these rules are the product of the courts' vast empirical experience with the same issues and that in most cases, their purpose is to reflect the same practical considerations that a businessman would apply.

Paul, are you turned off by an argument based on federal practice?

MR. THOMSON: Well, I think it's important to not lose sight of the fact that the reason we're on the panels is because we bring our business expertise and experience to a disputed issue between parties that are in our business. Many of us are long accustomed to making challenging decisions about cases that involve underlying legal disputes over insurance coverage triggers and viable defenses to potential liabilities. We expect that we will be presented with legal, procedural and factual elements of the at-issue dispute, but we should not lose sight of the fact that we are business people and we need to bring and apply our practical experiences to these matters. That's why we're serving on a panel in the first place. And many treaties contain an honorable engagement clause that relieves the panel from the strict rules of law which is instructive and evidences that the parties intended that any arbitration would be less formal than a court proceeding and run in a way that is informed by, and consistent with, industry custom and practice.

MR. SCRIMGEOUR: I just want to make one point about that. I was merely saying that the FRCP changes provide arbitrators some additional tools to get them to where their business intuition knows is the proper place. Company executives know that the whole purpose of arbitration is to provide a streamlined, cost-effective process for people to resolve their disputes. We see these discovery disputes develop and know through our business experience that the requested discovery is not going to present information material to the dispute, we should have the confidence to shut it down. A recent public example of discovery being severely limited in reinsurance arbitration is the widely discussed arbitration decision from last year where the umpire was retired federal judge John Martin. So I agree we should be out in front – as arbitrators who know the business – of these efficiency concepts suggested in the revised Federal Rules of Civil Procedure because we're operating under an honorable engagement standard in most cases and are expected to apply our industry knowledge to help resolve disputes, especially discovery disputes. We're applying good faith

business principles to resolve these disputes in a fair manner but also resolve them in an efficient manner. Efficiency is one of the major reasons that companies choose arbitration and companies are going to choose arbitrators who are able to provide the efficient process they bargained for.

Questions of Privilege

MR. CHAFFETZ: Let me take a slightly different approach to the question of what works and what doesn't work in discovery motion practice. Are there approaches or types of argument that you would flag as likely to turn off the panel? Can you give any guidance for practitioners?

MR. THOMSON: One approach that advocates take in the discovery process that has played out over and over again in recent years, is where there are very broad assertions of privilege typically involving a dispute over a claim that is settled and allocated by the cedant and presented for collection from the reinsurers. There's a rush to cloak the cedant's claims-related documents and communications that flow from transactional realities and inform the business decisions of the ceding company when it evaluated, quantified, settled and then allocated a claim or claims. I'm referring to documents such as a coverage counsel's evaluation letters. While every panel member I've ever served with is sensitive to and knowledgeable about waiver concerns, a party seeking to shield documents and communications from the process should be required to identify and explain specific waiver concerns. It's vital to the integrity of the arbitration process that the parties provide the panels and each other with access to information that will let us understand the disputed issues, see what was done in regards to that issue and position us to make informed decisions.

MR. CHAFFETZ: I think Paul's comment reflects the tension between the imperative of due process, which weighs towards disclosure of information that is relevant and the principle underlying privilege, which is designed to shield even information that's relevant. What I heard Paul saying was that if a privileged communication is actually relevant to determining what a party actually did, then maybe the privilege shouldn't be recognized. I don't think that's how it would work in court, and I was going to ask you, Jamie, for your views on that.

MR. SCRIMGEOUR: Yes, I agree with you. I don't know of a case in court that says the access to records clause means you get access to privileged documents. But you still hear that argument and you hear it a lot in arbitrations. And you hear that argument from reinsurers during the course of everyday business life. The problem of course is that the documents are created and are privileged because of a dispute with the policyholder. A dispute in which, oftentimes, the insuring company has with multiple policyholders, that is, other very similar disputes involving very similar issues and similar jurisdictions. Most companies and claim executives recognize the value of preserving privilege and have a financial interest in maintaining it. Ask a reinsurer whether they would like to potentially waive their privilege regarding coverage advice they received pertaining to a particular

phrase in one of their excess of loss reinsurance contracts. I've seen this play out in retrocessional arbitrations and reinsurers are just as protective as cedants when the shoe is on the other foot. And so to me it is obvious that arbitrators should be very protective of any coverage opinions. There is a genuine concern about waiving privilege when the ceding company has other claims that are identical and they have other policyholders that are making motions for reinsurer communications. So it is a big issue for insurance and reinsurance companies. It can come back to hurt both of them if the privilege is potentially waived as the result of an arbitration panel's ruling. My experience is that reinsurance companies understand the concern, but try to minimize it. For cedants, it is a big concern. I see two ways for a panel to avoid potentially ordering a party to waive privilege unnecessarily. I think, first of all, the panel can obviously review documents in camera to make sure they are truly privileged, and Panels should review the law of privilege in order to make that determination. Second, any discovery targeted to get privileged documents, should be reviewed for whether it's going to lead to discovery of evidence that is material to the dispute. And just because a company may be getting advice from their lawyers about settlement valuation or the basis for the settlement, it does not mean it is relevant to the reinsurance dispute. If the cedant doesn't say, "we're relying on advice of counsel to justify the settlement" then the legal advice is likely irrelevant, and certainly protected. Often the reinsurers are asking for the information because they hope to show that the allocation is in bad faith or is inconsistent with the underlying dispute. But in many instances the standard for assessing the ceding company's decision is whether the decision is objectively reasonable. Under that standard, the subjective thought processes of the ceding company and its counsel aren't usually relevant. In other words, if an arbitrator looks at an allocation through an objectively reasonable standard, does it matter what your lawyers are telling you? What matters is what was the exposure based on the objective facts? Was there some objective basis to reasonably allocate to the policies that it was allocated to? Was the claim arguably covered? Was it allocated to the reinsurance contract in an objectively reasonable manner? These are objective determinations that arbitrators can answer using their business judgment without digging into one party's subjective motivations as potentially reflected in communications with counsel.

MR. THOMSON: Having heard what Jamie had to say, I think it's important as a panel member to give appropriate deference to the follow the settlements principle. At the same time, arbitrators must also assure that the party being held to that obligation is positioned to know that the reinsurance presentation is objectively reasonable and made in good faith. This is made easier to the extent that there are claims-related documents that were prepared during the evaluative process, the settlement process and the allocation process, that show what was done and support that there is not some disconnect between the underlying work that was done, the business decisions that were made, the settlement that was effected and the allocation that flowed from those business decisions. The withholding of relevant information, even under a claim of privilege, makes our process at getting to the truth and getting to the right decision much more difficult.

MR. SCRIMGEOUR: Well, as always, there are shades of gray. And there could be situations where privileged information is relevant. One of them obviously would be where you would put privilege documents at issue or you say that you are relying on the advice of counsel for a particular allocation or so forth. But arbitrators are dealing with two professional organizations, right? And they both know the law. They both know how to handle a claim and how claims get settled and the basis for the settlements based on the parties' public positions. And they both can read the briefs in the underlying coverage case and determine the parties' positions that they took in their briefs. And if they happen to get confidential, privileged advice that was contrary to the positions they ultimately took in their briefs, well, I don't see how that's relevant, honestly.

MR. THOMSON: Well, let me go back in time a little bit. I mean, you go back into the early '80s when I first started doing assumed reinsurance all the way through the mid '90s. And I can't think of a situation where we as arbitrators did not have access to the type of information that's housed in a claims file, which included all coverage opinions and the dialogue within the company as to reserving and settling. And then even the decision on how to allocate was there. You could reach out and touch it and understand it. We didn't have as many disputes really because I think the reinsurers could see what was done and it made sense to them. Starting in the mid-'80s or early '90s, with advent of asbestos and pollution claims, cedents and asked reinsurers to sign confidentiality agreements, but we were still given access to that information. But somewhere that whole process has kind of fallen onto hard times. And I think that the broad claims of privilege is one of the reasons. It just makes the process of getting to what happened and why decisions were made more difficult. You know, you look at how complex some of these settlements are. The people that are transactionally involved are considering a dozen or more moving parts. And all have different weights assigned to them and there are different contingencies. One development can happen, and it can affect dramatically not only the settlement value, but the way it is allocated to the policies. So if we are not getting access to that type of information, I think it makes our task and the process just harder.

MS. BILLINGHAM: Paul's right – in the 80's this was not an issue, and that is partly because there weren't asbestos and pollution claims and the associated allocation issues then. And a reinsurer had access to the cedant's claim files. Then in the 90's as asbestos became an issue, we used confidentiality agreements to overcome the problem. Now panels grapple with outright claims of privilege. I also agree that panels do not want to do anything that deems a ceding company privilege to be waived when that could be harmful.

MR. CHAFFETZ: I'm again going to step outside my role of moderator to say this: First, I agree with everything Paul and Kathy said, and in particular with Paul's comments about efforts to stretch the legal privilege to extend it to the activities of claim personnel who happen to be lawyers, but who aren't providing confidential legal services. But I hear Paul saying that perhaps privilege should not

be asserted or respected by panels, even if the requirements for protection are met, if the result is to prevent the panel from reviewing relevant information. This makes me think there may be a disconnect between the way that lawyers and non-lawyers view privilege. It makes me think that we lawyers should not just assume that everyone else shares our view that the ability of a client to have a confidential communication with his attorney is critical to the adversary system working. That privilege shouldn't be abused. But people need to be able to communicate genuinely confidential information with their attorney without risking it being disclosed. Maybe ceding companies can do more to explain all the reasons it is so important for them to maintain privilege. They are at the front line against an extremely aggressive, well-coordinated, information-sharing plaintiffs' bar who are doing everything they can to get behind that privilege. Compared to what is at stake in an individual reinsurance arbitration, the ceding company could be facing overall exposure under all of its policies of hundreds of millions or billions of dollars. It's in everybody's interest that they are able to defend effectively against that liability without losing their ability to communicate confidentially with coverage counsel. What I'm taking from this is that the advocates who are representing the interests of the ceding company have to do a better job of explaining, one, why the privilege needs to be maintained, and two, that no panel can guaranty that disclosure of privileged information within the scope of the proceeding before it, even if compelled by the panel and subject to confidentiality, will not later be found to be a waiver of privilege by another panel or court. Panels can try to prevent a waiver from being found. For example, they can deem the disclosure confidential, or they can rule that the disclosure is protected by common interest privilege. But the law throughout the 50 states is so varying and unpredictable that the arbitrators in one arbitration simply do not have the ability to guarantee that the disclosure of privileged communications in their case will not ultimately lead to disclosure to the policyholder bar.

MS. BILLINGHAM: Peter, what you say makes perfect sense. Counsel can articulate the reason behind the claim for privilege and educate the panel on the current case law on attorney client and work product privilege, and the common interest doctrine. That will go a long way to assisting the panel get to the right result.

MR. THOMSON: No reinsurer and no panel wants to compel the production of documents that are going to cause harm to the ceding company or the ceding company's business practices. But I can tell you that in most claims-related arbitrations, privilege issues are springing up and you don't typically hear any explanation about an actual or perceived or valid and ongoing concern about how producing the withheld documents and communications that are on some extensive privilege log could cause that type of business harm. For the most part, it's simply we have, within the four corners of the privilege, the right to assert it and we're going to assert it. Panels should want to know why the privilege is being asserted. And we want to make informed decisions about privilege claims because we recognize that the documents, if produced, may be available outside of the confines of the arbitration's confidentiality provisions or could be used to create arguments that there's been a

waiver. And the panels and parties don't want that to happen. But at the same time, if you come to the panel and you explain that this is the reality and this is the concern, and that there are 45 other claims that are pending that are right on point, and that the production of any of this stuff could cause harm to the ceding company, panels will take that into consideration. That is not the situation I'm talking about. I'm concerned with the purely technical claim; someone makes the determination it's privileged and therefore, it goes on a log and it doesn't get produced.

MR. SCRIMGEOUR: There is a very suspicious and parochial attitude among certain arbitrators who are unwilling to review the cession based on the non-privileged documents that are available. This seems to be an area where arbitrators need to draw on their vast claim experience and have the confidence to evaluate the claims and positions of the parties without drilling down into the privilege unnecessarily. I also disagree with the notion that privileged coverage opinions were ever routinely provided to reinsurers by all ceding companies. Cedants began requesting confidentiality agreements because the increase in disputes led to recognition that some older reinsurance contracts didn't have confidentiality clauses that applied to the non-privileged claim materials being reviewed during an audit, not because they thought it would protect them from waiver of privilege, which folks could never do via contract anyway. Now, all reinsurance contracts have confidentiality clauses and many even have access to records clauses that specifically state they do not entitle reinsurer access to privileged documents. And yet there are several reinsurers who take the position that they cannot evaluate a ceded claim because they haven't had access to the privileged communications or privileged coverage opinions between the ceding company and their counsel, even where they have had access to the entire non-privileged claims file and all of the pleadings. Imagine an insurer taking that stance on a claim from a policyholder. The insurer would be hit for bad faith in a millisecond – yet some arbitrators will support behavior like that in the reinsurance context.

MR. CHAFFETZ: Kathy, what's your view on this?

MS. BILLINGHAM: First, Jamie's point is also a good one - panels can review documents in camera, as this is a concept that courts understand, and sometimes maybe that's the best a panel can do to help protect the privilege while still considering the issue. In my experience there are some counsel that do tend to overuse the privilege. There are counsel that use it prudently. And I have been on panels where we have reviewed documents in camera. I think that's a great solution to the problem. I would also add that a lot of times it really depends on whether or not the documents are ancillary to the issue or they are directly related to the issue, too. And my experience is that panels tend to let more in than less. But if counsel clearly articulate the reasons for claiming privilege, such as you did, Peter, I think panels are sensitive to that as well. And I agree with Paul that a lot of times we don't hear that as well articulated as you did. And so if we were to hear that, I think it could well make a difference.

MR. CHAFFETZ: To me, this is a huge issue. In court, if a judge orders you to produce something that's privileged you can appeal. In arbitration, we don't have anything like that. If the arbitrators say you have to do it, you have to do it or you will be sanctioned. You can't appeal the arbitrators' decision as to whether something was privileged. And yet their erroneous decision could cause a waiver. I think that's the concern.

MR. SCRIMGEOUR: There is case law, actually, where an arbitration panel ordered privileged documents be disclosed and the company did not produce them. The company went on and completed the arbitration hearing with the adverse inference and still won.. But that's a risky maneuver for anybody to do.

MR. CHAFFETZ: Right. But if they lost the arbitration, would that award be reviewable, that is, subject to vacatur? It might be subject to vacation under the FAA. That's a really interesting question.

MR. SCRIMGEOUR: Yes, it does pose an interesting question. A skeptic might say that is why the Panel ruled in their favor . . .