

EXPEDITED TRIALS
IAALS
Denver September 21, 2012
Stephen D. Susman

- I. There are two reasons that arbitration is replacing trial as the preferred way of adjudicating disputes in this country:
 - A. First, arbitration is deemed to be more cost efficient than any type of trial, either bench or jury.
 - B. Second, arbitration is deemed to be more predictable and fairer than a trial by jury which can only be avoided if it has been contracted away

- II. Before I proceed, I would note there is considerable evidence that the price differential has grown smaller because of both efforts of courts to curb discovery abuse and the tendency of arbitrators who were formerly judges to allow discovery. Unfortunately, as to the predictability concern, I see no trend to substitute jury and punitive

damage waiver clauses for arbitration clauses, probably because corporations value a closed proceeding more than the opportunity for appellate review.

III. In any event, trial lawyers and trial judges have done little to provide a competitive dispute adjudication service, one that is perceived to be as inexpensive and as safe as arbitration, and therefor JAMS and AAA are about to win the competition for corporate consumers

A. The expedited trial programs that have been introduced in a half dozen jurisdictions around the country may well reduce the cost of litigation if they are used, but they are almost all voluntary and I suspect infrequently used, mainly because they only come in one size and one size does not fit all

B. They also do nothing to assure the litigants that the resolution is more predictable or fairer, and in fact,

draconian restrictions on the time of trial and the amount of discovery make the parties and lawyers in a complex case with lots at stake, dubious of whether they will have time to get to the bottom of what really happened or to make the jury comprehend

- C. The problem with offering a solution that only attracts small claimants and only seems suited for simple cases, is that most of the effective criticism of the expense and uncertainty of jury trials comes from corporations who have had bad experiences with bet-the-company complex cases. I suspect that voluntary expedited jury trials will not attract many corporate customers, who will continue to insist that an arbitration clause, not an expedited trial procedure, be inserted into every contract.

IV. What will make a difference is not an expedited trial program that litigants have the option of opting into, but a rule that requires the Court, in all cases, to set, at the first pretrial, an early and firm trial date with an announced time limit to be shared by the parties.

A. This should be done at the first case management conference.

B. The Court should also require attendance by lead counsel and clients and should distribute a checklist of Pretrial and Trial Agreements and try to persuade counsel to agree to as many as possible.

1. Once the Court has set the date and amount of time for a trial, it should generally give the parties as much rope as they mutually agree they need to get prepared—everyone should be forced to submit to an expedited trial, but this doesn't

require that everyone should be limited to 15 hours of deposition testimony or 3 hours per deponent. So some of my suggested agreements, like limited depositions or no expert depositions, should be voluntary.

2. Some, however, the Court should order: e.g., entering an order to avoid waiver of the privilege; when a real live witness list is required and assure the parties that if anyone appears on the other side's list who has not been deposed, there will be a chance to do so on the eve of trial.
3. I can illustrate by pretending to be the judge and going over a few of the most important Pretrial and Trial Agreements.