A Structural Model for Arbitrating, Disputes under the Oil and Gas Lease

Loretta W. Moore

David E. Pierce

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A Structural Model for Arbitrating Disputes Under the Oil and Gas Lease

ABSTRACT

Nearly all oil and gas in the United States is developed under some form of oil and gas lease. The resulting lessor/lessee relationship is frequently put under stress by conflicts that are inherent to the relationship. For almost a century the oil and gas lease has been the source of extensive litigation to address conflicts that appear to be an inseparable part of the lease relationship. The primary dispute resolution techniques currently employed to resolve lease disputes are informal negotiation and litigation. The oil and gas lease relationship can be improved by incorporating into the lease document a pre-dispute arbitration clause which requires the exhaustion of formal negotiation and mediation processes prior to arbitration. Sample contract language and arbitration rules are provided as drafting prototypes to assist in evaluating the arbitration alternative for addressing oil and gas lease disputes. The development of an arbitration alternative also demonstrates the need for the creation of an organization that specializes in administering dispute resolution processes for the oil and gas industry.

I. INTRODUCTION

Perhaps it is time to quit trying to draft the optimum oil and gas lease.⁠¹ Instead, it may be more beneficial to focus our drafting efforts on

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¹ Several articles have addressed ways to improve upon the express terms of the oil and gas lease. See, e.g., Owen L. Anderson, David v. Goliath: Negotiating the “Lessor’s 88” and Representing Lessors and Surface Owners in Oil and Gas Lease Plays, 27 Rocky Mt. Min. Min. L. Inst. 1029 (1982); Edwin M. Cage, The Modern Oil and Gas Lease—A Facelift for Old 88, 31 Inst. Min. L. & Tax’n 177 (1980); James N. Castleberry, Jr., Protecting the Oil and Gas Lessor, 30 Rocky Mt. Min. L. Rev. 441 (1958); Hinton, Negotiating Oil and Gas Leases for the Lessor, 1 Nat. Resources & Env’t 7 (1985); John S. Lowe, Negotiating Oil and Gas Leases for the Lessee, 1 Nat. Resources & Env’t 6 (1985); John S. Lowe, Representing the Landowner in Oil and Gas Leasing Transactions, 31 Okla. L. Rev. 257 (1978); Thomas W. Lynch, The “Perfect” Oil and Gas Lease (An Oxymoron), 40 Rocky Mt. Min. Min. L. Inst. 3-1 (1994); Maurice H. Merrill, The Oil and Gas Lease—Major Problems, 41 Neb. L. Rev. 488 (1962); Ronald D. Nickum, Negotiating and Drafting a Modern Oil and Gas Lease on Behalf of Lessor, 13 Tex. Tech. L. Rev. 1401 (1982); Bernard E.
efficient dispute resolution techniques\(^2\) to manage the discord that appears to be an inseparable part of the lease relationship.\(^3\) If disputes between parties to the lease are inevitable,\(^4\) an internal dispute resolution mechanism may improve the relationship more than another round of royalty clause tinkering.

After evaluating the various types of dispute resolution techniques, this article explores the role arbitration can play in resolving oil and gas lease disputes.\(^5\) In an effort to define the possible contours of a structural

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Nordling, Landowner's Viewpoints in Pipeline Right-of-Way and Oil and Gas Lease Negotiations, 52 J. KAN. B.A. 35 (1983); David E. Pierce, Incorporating a Century of Oil and Gas Jurisprudence Into the "Modern" Oil and Gas Lease, 33 WASHBURN L.J. 786 (1994).

2. The authors view the "ADR" process as a search for the Appropriate Dispute Resolution technique, not necessarily an Alternative technique. See generally Ann L. MacNaughton, 11 NAT. RESOURCES & ENV'T 3 (1996) (discussing the process of developing "appropriate" dispute resolution strategies).

3. See David E. Pierce, Rethinking the Oil and Gas Lease, 22 TULSA L.J. 445 (1987)(identifying the inherent conflicts associated with the "standard" oil and gas lease relationship).

4. As Professor Merrill noted in 1958:
   In contrast [to coal leases], the oil and gas lease seems to have been in a state of constant change throughout the history of the industry. Its evolution and its interpretation have been and continue to be subjects of discussion in law review articles and at legal institutes. Modifications of old clauses, and new provisions, designed to deal with thorny issues or currently developing problems, appear in abundance. In the West Publishing Company's Sixth Decennial Digest, fourteen pages are occupied by the paragraphs giving access to cases involving the construction and operation of mining leases dealing with all sorts of minerals except oil and gas. In contrast, the construction and operation of oil and gas leases require seventy-three pages. This difference is significant of the greater diversity of the problems arising in this one field.

MAURICE H. MERRILL, THE PUBLIC'S CONCERN WITH THE FUEL MINERALS 21-22 (1960) (footnotes omitted). See also Pierce, supra note 3, at 456 n.54. In addition to the substantial degree of variance in lease language, Professor Pierce has observed that: "[T]he nature of the relationship, and the large amounts of money often at stake, guarantee that disputes will arise even under the most artfully crafted documents. Under the current form of oil and gas lease either party can seek their pound of flesh in court." Pierce, supra note 1, at 787 n.3.

5. For an excellent analysis of the role mediation can play in resolving oil and gas lease disputes, see Joseph Shade, The Oil & Gas Lease and ADR: A Marriage Made in Heaven Waiting to Happen, 30 TULSA L.J. 599 (1995). Professor Shade offers the following suggested form of compulsory mediation clause:
   Prior to instituting litigation, the parties will attempt in good faith to resolve any controversy or claim arising out of, in connection with or relating to this lease by mediation. Such mediation will be conducted by a mediator chosen by agreement of the parties or duly appointed by the American Arbitration Association in accordance with the Commercial Mediation Rules of such association then in effect. The cost of mediation shall be shared equally by the lessor and lessee. If the matter has not been
model for arbitrating oil and gas disputes, sample contract language and arbitration rules have been prepared. The goal is to address the relevant issues by providing readers with tangible drafting prototypes that will assist future discourse on this subject.

II. DISPUTE RESOLUTION TECHNIQUES

It is difficult to compile an accurate list of dispute resolution techniques. Recognizing that the law is, to a large extent, merely a conflict resolution process, clients and their counsel are fashioning, on a daily basis, new ways to resolve conflict. However, it is useful to analyze dispute resolution techniques by first determining whether they are designed to take the final decision-making process out of the control of the parties. If they do, they are often referred to as "decisional" techniques. An example of a decisional dispute resolution technique is arbitration. Once the process is triggered, a decision will be rendered by the arbitrator. If the ultimate decision-making process remains under the control of the parties, the dispute resolution technique is "non-decisional" with the goal of "facilitating" a resolution of the dispute by the parties.

resolved pursuant to the aforesaid mediation procedure within sixty days of the commencement of such procedure (which period may be extended by mutual agreement), either party may initiate litigation.

Shade, supra at 645.

6. See infra Appendix A (contract language) and Appendix B (arbitration rules).
7. Professor Dauer has observed: The catalogue of dispute resolution procedures is far from closed. . . . A major hallmark of ADR is its flexibility. Unlike the more established forms that prevail in litigation, almost every aspect of almost every kind of ADR can be varied to almost any degree to suit the special needs of the individual case. . . . The needs of the parties and the characteristics of the problem should describe the contours of the process, not anything that comes from strict adherence to a conventional form.

1 EDWARD A. DAUER, MANUAL OF DISPUTE RESOLUTION 5-1, 5-2 to 5-3 (1995) (footnote omitted).
8. Id. at 5-3. Decisional techniques are also referred to as "adjudicative" techniques.

CENTER FOR PUBLIC RESOURCES, MODEL ADR PROCEDURES IN TECHNOLOGY DISPUTES 7 (1993).
9. Litigation is also a decisional technique.
10. This assumes, as is the case with litigation, the parties are unable to voluntarily settle their dispute prior to a final ruling.
11. The primary "decision" will be whether to pursue a judicial remedy.
12. 1 DAUER, supra note 7, at 5-3. Non-decisional techniques are also referred to as "consensual" or "non-adjudicatory" techniques. CENTER FOR PUBLIC RESOURCES, supra note 8, at 2.
The two general categories of techniques can be combined, and frequently are, by requiring a formalized exhaustion of various non-decisional techniques before the dispute becomes ripe for application of a decisional technique. For example, although the focus of this article is on the use of a decisional technique, arbitration, the sample rules offered for discussion require the parties to exhaust two non-decisional techniques before they can pursue the arbitration remedy. The sample rules require the parties, once the "arbitration" process is triggered, to first exhaust a structured negotiation process and, failing agreement after negotiation, pursue mediation. Under the sample rules these techniques are triggered as part of the "arbitration" process to effectively develop the essential

13. See, e.g., Joseph W. Morris, The Viability of Alternative Dispute Resolution in the Oil and Gas Industry, 39 ROCKY MTN. MIN. L. INST. 14-1, 14-24 (1993) (discussing a two step dispute resolution clause recommended by the Center for Public Resources/CPR Legal Program employing optional mediation/arbitration, mediation/litigation, minitrial/arbitration, or minitrial/litigation approaches). However, this does not refer to the process of "Med-Arb" when the same neutral acts as a mediator and then, if the matter is not resolved, functions as the arbitrator. See Karen L. Henry, Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes, 3 OHIO ST. J. ON DISP. RESOL. 385, 389 (1988).

14. Rule 4 of the sample rules provides, in part:

4. Party Discussions and Mediation. Upon receipt of the Reply, each party will identify someone in their organization that has the decision-making authority to grant the remedy sought by the other party(ies) . . . . Each party will notify the Institute of their selected decision-maker on or before the tenth day following receipt of all party Replies . . . . The Institute will then coordinate a meeting in which the selected decision-makers will confer face-to-face with one another in an effort to resolve their differences. The meeting shall take place on or before the thirtieth day following each party's selection of a decision-maker. The meeting will be at a date, time, and location agreed to by the parties; if the parties are unable to agree, the date, time, and location of the meeting will be designated by the Institute. If the parties are able to resolve some or all of their differences, they will enter into a Joint Stipulation that identifies the dispute they have resolved, and whether any dispute remains that requires further arbitration. The Joint Stipulation will be filed with the Institute. If matters remain unresolved following the meeting, the Institute will give the parties a ten-day period in which to agree upon the selection of a mediator to work with the parties in an effort to resolve their remaining differences. If the parties are unable to agree upon a mediator within the ten-day period, the Institute will appoint the mediator. Upon identification of the mediator, the Institute will forward to the mediator a copy of the Arbitration Notice, the Arbitration Notice Reply(ies), and any Joint Stipulations. The mediation will be commenced on or before the forty-fifth day following the meeting of decision-makers. If the parties are able to resolve some or all of their differences, they will enter into a Joint Stipulation that identifies the dispute(s) they have resolved, and whether any dispute remains that requires further arbitration. The Joint Stipulation will be filed with the Institute.

See infra Appendix B, Rule 4.
written information, at the negotiation/mediation phase of the process, to facilitate voluntary resolution of the dispute. Since the same written information will be used in the arbitration process if the non-decisional techniques fail, the parties have a built-in incentive to properly characterize the dispute at the negotiation/mediation phase.

Once the decisional/non-decisional categories are established, it is often helpful to further classify possible dispute resolution alternatives by associating them with one of the following generally recognized types of dispute resolution techniques: negotiation, mediation, minitrial, and arbitration. However, as noted previously, these classifications are more for historical and descriptive reference as opposed to defining what is possible. This is truly an area where the only real limitations are those imposed by the level of dispute resolution knowledge and creativity of the parties.

A. Negotiation

Lawyers routinely negotiate some or all aspects of their clients' disputes. The major downside of negotiation, compared to other non-decisional techniques, is its adversarial nature. Part of the negotiation process inevitably includes posturing and positioning in the event the dispute is not resolved. Negotiations may break down, particularly where they are approached in a competitive, as opposed to a cooperative, mode. Although over 90 percent of all lawsuits filed are settled through negotiation, it is safe to assume that 100 percent of the lawsuits that actually go to trial represent failed attempts to negotiate a dispute.

15. Another general category would be the "court-annexed" dispute resolution techniques that are imposed by a court to try and facilitate settlement. Although the precise processes are dictated by statute, court rule, or court order, they will typically employ some form of non-decisional dispute resolution technique. See also Bruce S. Marks, Commercial Conflict Management and Alternative Dispute Resolution in the Oil and Gas Industry, 41 INST. OIL & GAS L. & TAX'N 9-1, 9-63 TO 9-68 (1990). See generally 1 DAUER, supra note 7, at 5-11 to 5-19.

16. The Preamble to the Model Rules of Professional Conduct identifies several roles played by lawyers: advisor, advocate, intermediary, evaluator, and "negotiator." The Preamble states, in part: "As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others." MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

17. In many instances the "successful" negotiation does not take place until the eve of trial when many of the benefits of an early resolution of the dispute have been lost. Jay F. Lapin & Roger J. Patterson, Alternative Dispute Resolution: New Strategies for Litigation and Settlement of Legal Claims, 40 INST. ON OIL & GAS L. & TAX'N 6-1, 6-4 (1989).

18. Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 28 (1983) (study by the Civil Litigation Research Project indicated about 88% of the civil cases in the ten courts studied were settled while only 9% went to trial). More recent studies indicate that only 5% of all cases filed go to trial. 1 DAUER, supra note 7, at 4-20.
When a dispute arises the lawyer often becomes the key actor in the negotiation process with their client at the periphery. The tendency is often to "turn it over to the lawyers" once it is apparent the matter cannot be resolved through ordinary business channels. The lawyers then attempt to hammer out a settlement within the general confines of their clients' authority.

However, the resulting settlement may not maximally serve the interests of all the parties. Client dissatisfaction with the settlement may result in attempts to circumvent the settlement through self-serving interpretation or outright refusal to perform. If the settlement results in a perceived "winner" and "loser," the losing party will have an incentive to avoid the settlement terms whenever possible.

Negotiation will often require access to information which the other side is unwilling to provide. Unless the parties can effectively negotiate a resolution of these information issues, litigation will be triggered to obtain the discovery a party deems necessary before meaningful negotiation can take place. Therefore, negotiators must navigate around numerous discovery issues that can become litigation triggers.\textsuperscript{19}

Although negotiation has inherent flaws, it should, and will, be pursued in about every sort of dispute. The sample arbitration rules offered by the authors are designed to ensure a controlled form of negotiation is pursued in every dispute that has been noticed for arbitration.\textsuperscript{20} The "Arbitration Notice" and "Arbitration Notice Reply" will set out in writing the relevant facts, law, positions, and demands of each party. For example, Rule 2 provides, in part:

The Arbitration Notice will contain the following information:

a. A description of the dispute(s) giving rise to the arbitration proceedings;
b. A statement indicating why the matter is subject to arbitration under the lease arbitration clause;
c. A statement of the relevant facts necessary to resolve the dispute;
d. A statement of the relevant law necessary to resolve the dispute;
e. A statement of the relief sought by the party (if seeking a sum of money, the specific amount alleged to be due and the details of the calculation must be included); and

\textsuperscript{19} Each party's quest for information to make their case, and to improve their bargaining position, also explains why successful negotiations often take place late in the dispute resolution process. See supra note 17 and accompanying text.

\textsuperscript{20} See infra Appendix B, Rule 4.
f. An appendix containing copies of all relevant documents, cases, statutes, and other written material relevant to the decision of the dispute.\(^\text{21}\)

Since these documents will serve as significant decisional documents for the arbitrator, there is an incentive for each party to be frank, fair, and accurate in their assertions. Therefore, for these same reasons, the information required by the Arbitration Notice and Reply will also be useful during the negotiation phase of the arbitration.

The negotiation process contained in the sample rules is structured to try and insulate the process, to the extent possible, from any pre-existing hostilities between the parties. Another goal is to try and eliminate the "ego" factor from the negotiations.\(^\text{22}\) In this regard, the sample rules provide:

Whenever possible: (1) the decision-maker who is identified should have no prior contact with the dispute triggering the arbitration; and (2) they should be from outside the particular department or business unit that has responsibility for the particular lease involved.\(^\text{23}\)

In the lessor/lessee context, this means the lessor will typically be acting on their own behalf with the lessee being represented by a decision-maker from another business unit that has had no prior contact with the dispute.\(^\text{24}\) To ensure all parties come to the negotiating table armed with authority to settle, the sample rules provide:

Where a party is an organization, the decision-maker's authority to act should be stated in a properly executed power of attorney designating the decision-maker as the organization's attorney-in-fact with actual authority to agree to the remedy sought by the other party.\(^\text{25}\)

\(^{21}\) See infra Appendix B, Rule 2 (Arbitration Notice), Rule 3 (Arbitration Notice Reply).

\(^{22}\) The design is to place the parties in a position to engage in "collaborative" negotiation with the mutual goal of solving the problems giving rise to the dispute. See generally 1 DAUER, supra note 7, § 4.06.

\(^{23}\) See infra Appendix B, Rule 4.

\(^{24}\) This could also aid the informal negotiation process since the manager of the business unit giving rise to the "problem" may be reluctant to have the matter reviewed by someone else in the company. Too often the personnel directly involved with the dispute are also the people who argue for litigation to vindicate their personal position, or ego, without considering what is best for the organization. After all, if the organization is going to pay for it, why not insist upon unlimited litigation? Often the personnel directly involved with the dispute are also the people who hire, and fire, the lawyers who will litigate the dispute. Attorneys in this situation should remember that under Rule 1.13 of the Model Rules of Professional Conduct "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (1983).

\(^{25}\) See infra Appendix B, Rule 4.
To ensure the parties approach the non-decisional processes of negotiation and mediation with the same commitment as the stand-by decisional process of arbitration, the sample rules provide:

If the arbitrator determines that any party failed, in good faith, to comply with the procedures outlined in § 4 of these Rules, the arbitrator shall assess Institute expenses, mediator costs, and party expenses (including travel expenses, lost work time, attorney fees, and any other loss that the party can demonstrate arose out of the other party's failure to participate) against the non-complying party. The parties recognize that a failure to pursue the informal proceedings provided for by these Rules can give rise to unnecessary expenses and loss of productivity that is difficult to value. Nevertheless, the arbitrator will endeavor to fully compensate the complying party to the maximum extent possible.26

The process is structured so that if a party fails to pursue negotiation and mediation in good faith, the dispute will ultimately be presented to the arbitrator. In addition to deciding the dispute, the arbitrator, under Rule 9, will also have the obligation to address any bad faith practiced by a party during the non-decisional phases of the process.27

B. Mediation

Mediation is perhaps the most popular form of non-decisional dispute resolution. The disputing parties are the active participants in mediation. Depending upon the selected process, the parties' lawyers may,

27. In the first portion of Rule 9 the arbitrator is given the "discretion to assess another party's attorney fees, and any other expense associated with the arbitration process, against any other party." The second portion of Rule 9 indicates the arbitrator "shall assess . . . expenses . . . against the non-complying party" when they fail, in good faith, to comply with negotiation and mediation procedures. Under the sample rules, the arbitrator could conceivably rule in favor of a party on the merits but assess attorney fees and expenses against the prevailing party because they failed to participate in the non-decisional processes that might have eliminated the need for the arbitration phase of the proceeding. See infra Appendix B, Rule 9. To limit the ability of a recalcitrant party to abuse the dispute resolution process, Rule 5 provides for the appointment of the arbitrator at any time the Executive Director of the Institute determines the situation warrants an arbitrator's direction. Rule 5 provides, in part:

The Executive Director of the Institute, during any phase of the dispute resolution procedures provided for by these Rules, may trigger selection of an arbitrator whenever it becomes apparent to the Executive Director an arbitrator is needed to manage the process.

See infra Appendix B, Rule 5.
or may not, be present during the mediation. The process employs a neutral party, the "mediator," who may be an attorney or some other specially trained or experienced person. Unlike arbitration, the mediator has no decision-making role and cannot impose a solution on the parties. Instead, the mediator serves as a facilitator for the parties, enabling them to conduct open communication regarding their interests, concerns, and options for resolving their dispute. The parties work out their own settlement agreement which they can make binding or non-binding.  

Party satisfaction in the mediation process can be quite high. The process allows the parties to vent their anger, feelings, hostilities, and fears in a "controlled" process. The parties are permitted to work through all aspects of their dispute which typically means any resulting settlement agreement will enjoy a high level of compliance. Parties typically find the mediation process more manageable because they can control the time and money that is spent pursuing mediation. The primary costs are the mediator’s hourly fee and the time required of the parties to prepare for and participate in the mediation. The process is private, and the parties can agree to whatever level of confidentiality they desire. The net effect tends to strengthen relationships that would otherwise be irretrievably damaged by the litigation process. When dealing with oil and gas lease disputes, where the underlying relationship can last for decades, promoting harmony that preserves a functioning long-term relationship should be a major consideration. 

Mediation, however, has its faults. First, the parties must be willing to mediate; they must approach the process in good faith. Either party

28. See generally 1 DAUER supra note 7, at § 11.11.
29. Id. at 11-32.
30. Shade, supra note 5, at 619.
31. 1 DAUER, supra note 7, at 11-32.
32. Shade, supra note 5, at 621.
33. The authors' sample arbitration rules allow the arbitrator to assess a wide range of costs against the party who fails to pursue mediation in good faith. See supra text accompanying note 26. See infra Appendix B, Rule 9. This is another reason why the informal non-decisional processes are pursued as part of the arbitration process: the parties will ultimately have an arbitrator that can determine disputes and impose appropriate sanctions when necessary. Rule 4 empowers the mediator to terminate the mediation and make a finding that a party is not pursuing the process in good faith, thereby triggering the appointment of an arbitrator. Rule 4 provides, in part:

If the mediator determines that a party is not participating in the mediation process in good faith, the mediator can terminate the mediation by delivering to the Institute the following document titled “Termination Statement”:

TERMINATION STATEMENT
This mediation is being terminated because the mediator does not believe that [name of party(s)] is (are) participating in the mediation process in
could easily attempt to use mediation as another discovery device or to verbally abuse or intimidate a weaker party. Either party might arbitrarily terminate the mediation. Even in cases where mediation is pursued in good faith, there is always the risk that the parties’ efforts will result in an impasse. In these situations the parties will have added another layer of time and expense to the process of resolving their dispute. However, even a failed mediation effort can be of value by better defining the true nature of the dispute between the parties.

Another disadvantage to mediation is that most mediated agreements are not self-enforcing. Unless the mediated dispute is already the subject of pending litigation, there is no procedural mechanism by which the agreement can become an enforceable court order. If a party defaults on the mediated agreement, the non-defaulting party must initiate a court proceeding to establish the existence of the contractual obligation, the party’s breach, and the appropriate remedy. The defaulting party may raise typical contract defenses such as duress, fraud, and unconscionability.

The availability of the mediator as a witness in such proceedings is questionable. Some jurisdictions exclude mediators and their records from the subpoena process. Statutes and court rules establishing mediator privilege and confidentiality may be available that prevent the mediator from testifying about communications and information received during the mediation process. Therefore, neither party may be able to rely on the mediator for support in enforcement proceedings.

The sample rules prepared by the authors attempt to address the enforcement problem by making the negotiation and mediation processes part of the arbitration process. Arbitration proceedings are commenced by serving

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[Signed by Mediator]

Upon receipt of the mediator’s Termination Statement, the Institute will proceed with selection of an arbitrator pursuant to section 5. The Institute will provide the arbitrator with a copy of the mediator’s Termination Statement which, for purposes of section 9, will be conclusive on the issue of the party’s lack of good faith during the mediation process. Under no circumstances will the mediator be called by the parties, or the arbitrator, to be a witness, or otherwise provide information or testimony in any form, regarding the mediation. The only evidence the parties can present, or the arbitrator request, concerning the terminated mediation process, is evidence that will assist the arbitrator in calculating the amount necessary to fully compensate the complying party as required by section 9.

34. Lapin & Patterson, supra note 17, at 6-32 to 6-33.
35. 2 Edward A. Dauer, Manual of Dispute Resolution § 22.07 (1995). Professor Dauer discusses the trend of states enacting ADR privilege statutes, but cautions that each statute must be carefully reviewed to ensure the activity comes within its protection. Id. at 22-27 to 22-28. See generally Loretta W. Moore, Lawyer Mediators: Meeting the Ethical Challenges, 30 Fam. L.Q. 679, 700-09 (1996) (discussing state law restrictions on mediator disclosure).
an Arbitration Notice on all other parties.\textsuperscript{36} The negotiation and mediation processes must take place once each party has served their Arbitration Notice Reply.\textsuperscript{37} If negotiation or mediation is successful, a Joint Stipulation will be entered into by the parties and filed with the administering organization. If all disputes are resolved between the parties, the Joint Stipulation will state that the current "Executive Director of the Oil & Gas Dispute Resolution Institute" is selected as the parties' designated arbitrator for the sole purpose of entering an award in accordance with the terms of the Joint Stipulation.\textsuperscript{38} The goal is to clothe the negotiated or mediated settlement agreement with the enforceability of an arbitration award.\textsuperscript{39}

C. Minitrial

The minitrial involves the presentation of an abbreviated version of each party's case to a panel consisting of a senior executive officer for each disputant and a neutral advisor.\textsuperscript{40} The goal is to provide the executives with an opportunity to hear the best case each side has to offer while

\begin{itemize}
\item \textsuperscript{36} See infra Appendix B, Rule 2 which provides, in part:
\begin{enumerate}
\item Commencement of Arbitration Proceedings. A party commences arbitration proceedings by serving an Arbitration Notice on all other parties to the lease, serving an Arbitration Notice on the Institute (3 copies), and paying the Institute the filing fee required by § 11 of these Rules.
\end{enumerate}
\textsuperscript{37} See infra Appendix B, Rule 4.
\textsuperscript{38} The Oil & Gas Dispute Resolution Institute is a fictitious organization, at this time. One goal of this article is to demonstrate how formation of such an organization could assist the resolution of oil and gas industry disputes. See infra notes 112-16 and accompanying text. Rule 4 provides, in part:
\begin{quote}
Any Joint Stipulation that resolves all disputes between the parties will name the current Executive Director of the Institute as the parties' selected arbitrator for the sole purpose of issuing an award that incorporates the terms of the Joint Stipulation. Upon issuing the award incorporating the Joint Stipulation, the arbitration will terminate.
\end{quote}
See infra Appendix B, Rule 4.
\textsuperscript{39} Section 9 of the Federal Arbitration Act provides, in part:
\begin{quote}
If the parties in their agreement have agreed that a judgment of the court shall be entered upon an award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in section 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. . . .
\end{quote}
\textsuperscript{40} See generally Morris, supra note 13, at 14-15 to 14-16 (describing the origin and attributes of the minitrial).
providing the information, and the environment, to try and negotiate a resolution of the dispute. It is a non-decisional technique which is best suited to situations where there are complex issues of law and fact and the parties on each side of the dispute are sophisticated industry equals. It is a private process which requires the active participation of the senior executive officers of each business entity.

Prior to the date of the mini-trial, each party’s lawyer will establish the date and site of the minitrial. They will agree upon a schedule for completion of discovery and exchange of information; they will agree on the procedural rules that will be followed during the minitrial and they will select a third party neutral. The senior executive officers for each party must be present throughout the minitrial so they can personally hear each party’s case. The third party neutral will also be present throughout the proceedings. The neutral is often a lawyer but in all cases will be someone who possesses expertise in the subject matter of the dispute. The parties will typically agree to share the fees and expenses of the advisor. The minitrial may take from one to five days.

Lawyers representing each party will provide a summary of their party’s “best case” on the disputed issues. They may present documentary exhibits and affidavits but no sworn testimony is taken. The rules of evidence are relaxed. After all sides have given their summary presentation, the executives meet in a separate conference room to engage in negotiations to try and settle the dispute. If they are unable to resolve the dispute, they may receive a written non-binding opinion from the third party neutral regarding the neutral’s assessment of the case and likely outcome at trial. With that additional information, the executives may meet again in an attempt to negotiate a settlement. In some cases where the executives are unable to initially resolve the dispute they may, at that time, agree to allow the third party neutral advisor to issue a binding decision. Regardless of the

41. Id.
42. In the corporate setting, many disputes can be resolved, or avoided, if upper level executives are brought into the process at the appropriate time; which in almost all cases will be “sooner” rather than “later.” The key is for lower level employees, and the legal counsel that represent the company, to know when in the dispute process to seek upper level executive input. Often times a dispute gets solved merely because the dispute resolution process requires the involvement of upper level personnel. Too often, however, the dispute has already languished for months or years before an external force, such as a court order or a structured dispute resolution process, forces the detached big-picture decision makers to get involved. A major improvement in internal corporate management would be to establish a system to actively involve upper level executives in resolving disputes at a much earlier stage of the process when a telephone call to an equally senior executive on the other side of the dispute may be all that is required.
43. See generally Morris, supra note 13, at 14-5 to 14-7.
44. Id. at 14-6 to 14-7.
precise process followed, settlement of disputes by minitrial often occurs because the parties with decision-making authority are actively involved in the process.45

D. Arbitration

Arbitration is a decisional dispute resolution technique in which both the parties and their lawyers play an active role.46 Unless the parties are able to voluntarily resolve their dispute, it will be resolved by the arbitrator.47 The arbitration technique can be selected at the time the contract or relationship is created.48 This is accomplished through a pre-dispute arbitration clause that is included in the contract, or by a separate agreement between the parties prior to the existence of a dispute.49

The parties typically play a major role in selecting the arbitrator who will serve as the neutral decision-maker. This allows the parties to select people who possess knowledge and experience regarding the subject matter of the dispute. The parties also have the flexibility to define the procedures that will be followed, such as discovery and the presentation of evidence. The dispute resolution process can be tailored by the parties to address the specific needs of their business relationship. Arbitration, compared to litigation, is generally faster, less expensive, confidential, and enables the decision-maker to focus on the details of the dispute while taking into account the customs and practices of the industry.50

However, many of the advantages of arbitration can also be cited as disadvantages. For example, limitations on discovery, perceptions concerning the qualifications and disposition of the arbitrator, and limited judicial review can all be viewed from varying perspectives.51 Typically these are viewed as advantages when talking about disputes in the abstract; they become disadvantages only in specific cases when one party feels they might have fared better in court.52 There are also what have been termed "illusory advantages" where arbitration becomes as complex, cumbersome,
and costly as litigation with the additional risk of intermediate trips to court to litigate whether a particular matter is subject to arbitration. Fortunately, these disadvantages can be managed or avoided by the parties, if they so choose, in their arbitration agreement. One disadvantage of arbitration the parties cannot change is its inherently adversarial nature. Although the process can be made more humane than litigation, it is still a process where each party is trying to convince a decision-maker about the correctness of their position. The authors, in an attempt to obtain the benefits of negotiation and mediation while ensuring a final decision will be made out-of-court if conciliatory efforts fail, have provided for a three phase dispute resolution procedure employing structured negotiation, mediation, and arbitration.

Of all the various dispute resolution techniques, arbitration has the strongest "legal" foundation with the validating force of the Federal Arbitration Act, state statutes, and a host of United States Supreme Court cases lauding and promoting arbitration agreements. Under the Federal Arbitration Act, the only limits on the parties' ability to engage in the private ordering of their dispute resolution affairs are the traditional limits

53. Id.
54. For example, the authors have sought to avoid the arbitrability issue by making virtually any characterization of a lease dispute issue a matter for arbitration. See infra text accompanying notes 89-95.
55. See supra note 14 and accompanying text.
56. Section 2 of the Federal Arbitration Act provides, in part:
   A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
57. For example, New Mexico statutes provides, in part:
   A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. . . .
N.M. STAT. ANN. § 44-7-1 (Michie 1996)
59. E.g., Allied-Bruce Terminix Companies, Inc. v. Dobson, 115 S. Ct. 834, 839 (interpreting the Federal Arbitration Act broadly to cover any contract "affecting commerce").
imposed on all contractual arrangements and the ability to effectively express their intent in writing.

III. THE OIL AND GAS LEASE RELATIONSHIP

To fashion the appropriate dispute resolution process for a business relationship, counsel, and their clients, must consider: the parties involved, their business goals, the disputes they commonly encounter, the traditional mode of dealing with disputes, and their goals in seeking a more appropriate way for dealing with disputes. Each of these considerations play a role in defining the dispute resolution techniques that should be

60. Section 2 of the Federal Arbitration Act requires enforcement of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994). In Doctor's Assoc., Inc. v. Casarotto the Supreme Court noted that "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." Doctor's Assoc., Inc. v. Casarotto, 116 S. Ct. 1652, 1656 (1996).


62. If the client does not raise the alternative dispute resolution issue, the lawyer, as part of her counseling process, should. Rule 1.4 of the Model Rules of Professional Conduct requires: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1983). The comment to Rule 1.4 states: "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 cmt. (1983). Today when a dispute arises the lawyer's communication role under Rule 1.4 would seem to include exploring alternative dispute resolution techniques with the client. How else could the client, ignorant about possible alternatives to litigation, make "informed decisions" concerning their representation in a disputed matter? A more difficult question is defining the lawyer's role in suggesting possible dispute resolution techniques at the pre-dispute drafting stage of representation. Certainly we are at that stage of development from a "business" point of view, even though it may not yet be an ethical obligation. The Colorado Supreme Court has addressed the issue under Rule 2.1 Advisor by adding the following language to Rule 2.1:

In a matter involving, or expected to involve litigation, a lawyer shall advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute, or to reach the legal objective sought.

employed and the procedural details that will govern the parties' dispute resolution rights and obligations.  

A. The Parties

The oil and gas lease relationship presents a unique dispute resolution challenge because the parties to the relationship can be so varied. However, in most leasing situations there will be one party, the lessor, who will often lack sophistication concerning oil and gas contracts and the oil and gas development process. Typically lessors are individuals that also own the land being leased, or they own only the mineral interest in the land. On the other side of the transaction is the lessee which usually has much more information and expertise concerning the subject matter of the leasing transaction. Although the term "lessee" is typically associated with an "oil company," it may also be a single individual, such as a geologist, attempting to lease an area so it can be packaged, sold, and assigned to an oil company. However, the lease will typically end up in the possession of an oil company which has expertise in oil and gas development. Therefore, the prototype lease relationship is an individual lessor with a more sophisticated oil and gas business organization as lessee.

B. Business Goals of the Parties

1. Lessor

The lessor's main business goal under the oil and gas lease is to obtain the risk-free development of the mineral potential of their property.

63. Several commentators have provided detailed guidance on how to diagnose relationships to define the dispute resolution techniques that might be appropriate for the parties to the relationship. E.g., 1 DAUER supra note 7, at § 6.01; Lapin & Patterson supra note 17, at 6-28 to 6-30; Shade supra note 5, at 620-28.

64. This is not always the case. Many lessors in areas that have been extensively developed for oil and gas are very sophisticated and, perhaps more importantly, lessors have ready access to oil and gas lawyers and support staff that can equal the playing field considerably.

65. However, the mineral owner in many cases could be an oil company that has acquired the minerals or a large institutional land owner such as a railroad or a governmental entity.

66. Lessees that are packaging leases for sale to a third party will be reluctant to include any provision in the lease that is not typically found in existing lease forms. Since they rely upon the secondary lease-trading market to sell their leases, they must be careful to ensure that any lease they take is, in effect, "negotiable." Pierce, supra note 3, at 457. The most common transaction affecting title to leased minerals is the assignment of rights in an oil and gas lease. Oil and gas leases are the negotiable instruments of the oil and gas business; assignments are the documents used to transfer lease rights. David E. Pierce, An Analytical Approach to Drafting Assignments, 44 SW. L.J. 943 (1990).
The lessor is a passive participant; she does not invest anything into the venture other than the mineral interest she is leasing. The lessor typically wants maximum development of the leased property since the lessor does not bear any of the costs of development. Maximum development will ordinarily result in maximization of the lessor's royalty income.67

2. **Lessee**

At one level, the lessee's business goals are the same as the lessor's: to maximize production from the leased property.68 However, since the lessee must carry all the risk, financial and otherwise, associated with development, one more unit of production to the lessee will not necessarily result in one more unit of wealth to the lessee.69 Among the lessee's business goals is the freedom to make development decisions about the leased property.70 For example, lessees typically maintain an inventory of leases that exceed the number of wells for which they currently have funds to drill. Therefore, the lessee will consider several factors to determine which leases will be developed with available drilling funds. The primary term of the lease, adjacent development, prospects for success, and lessor demands will be among the variables the lessee will consider in allocating their drilling budget. Once the lessee decides to spend her money on a drilling project, she will want control over where and how the well is drilled, tested, completed, and operated.

The lessee may also pursue economic opportunities beyond the extraction of the oil and gas associated with the lease relationship. For example, the lessee may want to try and package the production with other production and move it to locations where it can be processed into other products, sold, exchanged, or otherwise enhanced with new entrepreneurial capital in hopes of generating new profit. Many times one of the lessee's business goals under the oil and gas lease is to acquire production which she can use in her other enterprises, such as downstream marketing, processing, refining, or retail distribution.71

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67. If she owns the surface overlying the minerals, the lessor also contributes to the venture the right to use the surface to the extent necessary to develop the minerals. However, as with the granting of the lease, the lessor is typically compensated upfront for the lease (bonus and delay rental) and for the surface easement (statutory or contracted-for surface damage payment). See generally Eugène O. Kuntz et al., Cases and Materials on Oil and Gas Law 248 (2d ed. 1993).

68. Id.

69. Since the lessor has a risk-free share of production, one more unit of production should result in one more unit of wealth to the lessor. Pierce, supra note 3, at 459.

70. Kuntz et al., supra note 67, at 139.

71. Frequently lessors and lessees are involved in disputes concerning where the oil and gas lease relationship ends and the lessee's separate business enterprises begin. David E. Pierce, Developments in Nonregulatory Oil and Gas Law: The Continuing Search for Analytical
C. Common Disputes

The common types of oil and gas lease disputes can be placed into the following six categories:72

1. Granting Clause Issues. These issues concern the rights granted to the lessee and those retained by the lessor. Frequent problems concern surface and subsurface use issues, the mineral substances encompassed by the lease, the ability to use leased substances for operations, and accommodation doctrine issues.73

2. Title Issues. Although these issues may encompass some of the granting clause disputes, they generally relate to what the lessor actually owns instead of what she has purported to lease. Warranty, proportionate reduction, subrogation, and subordination issues would come under this heading. Also, subsequent transfers by the lessor can give rise to title issues such as apportionment of royalty and the allocation of pre-existing burdens on production.74

3. Lease Terminating Events. This category includes any event that can give rise to the automatic termination of the oil and gas lease. Included in this category would be delay rental, commencement, production, shut-in royalty, cessation of production, dry hole, paying quantities, and force majeure issues. It also includes any specialized lease clauses which provide for automatic termination in the event the lessee fails to perform as specified.75

4. Pooling and Unitization Issues. The granting, habendum, and royalty clauses of the oil and gas lease are each typically modified to some extent by lessee pooling or unitization. The most frequent issues concern pooling under a lease pooling clause or a separate pooling agreement. The scope of the authority to pool, the lessee’s good faith exercise of the pooling power, and the impact of the pooling on the revenue and operational aspects of the lease are all areas of potential disagreement.76

5. Revenue Calculation Issues. This category concerns the

72. Professor Shade, in his prior study of this issue, arrived at very similar groupings for disputes under the oil and gas lease. Shade, supra note 5, at 636.

73. Pierce, supra note 1, at 788-800.

74. Id. at 800-01.

75. Id. at 801-14.

76. Pierce, supra note 71, at 1-29.
calculation of what the lessor should be receiving as compensation under the oil and gas lease. Access to production and marketing information is often an issue. The basis for calculating the gross royalty due, the deduction of costs, interest, and accounting, all create opportunities for dispute. Division order disputes can be placed under this category since they often give rise to issues that can potentially impact revenue calculation.

6. Development Issues. Implied covenant obligations would generally fall under this category. This would include issues concerning the lessee's obligations to protect against drainage, conduct further development, conduct further exploration, and to efficiently operate the property.

Once these six categories are identified, they can be further classified using the following three analytical tests:

1. Issues of Law or Fact. Does the precise issue involve an issue of law or fact? If the facts are not in dispute, can the issue be resolved by an application of legal principles? For dispute resolution purposes, if one or more of the issues are solely one of law, some sort of summary procedure, similar to summary judgment in the litigation setting, should be available to resolve purely legal issues. If there are issues of fact that need to be resolved, the second analytical test should be applied.

2. Technical or Non-Technical Issues of Fact. If the dispute concerns non-technical issues of fact there may be no need for expert testimony concerning whether, for example, the lessee told the lessor that significant drainage of the leased property was occurring. Such veracity issues may be best resolved by having each party testify about what they said or were told by the other party. However, if the issue is whether, in fact, significant drainage is occurring, or whether a prudent operator would take action to drill a well to protect against drainage, these issues present technical issues of fact. Typically these issues are resolved with the benefit of expert testimony. These are also situations where veracity of the expert is typically not the issue; instead the focus will be on the method by which the expert arrived at their conclusion. These situations may be better suited for a written report.

77. Pierce, supra note 1, at 815-28.
79. Kuntz et al., supra note 67, at 313.
80. For example, the authors have provided for a "Summary Procedure" in their sample arbitration rules. See infra Appendix B, Rule 10.
instead of oral testimony.

3. Low-Dollar or High-Dollar Issues. The financial impact of the dispute will often be the determinative factor that defines the appropriate dispute resolution technique. It is difficult to justify $100,000 worth of "process" to resolve a $10,000 dispute. Therefore, an effort must be made to value disputes so they can be dealt with in a procedurally efficient manner.

D. Traditional Dispute Resolution Techniques

Informal negotiation and litigation comprise the traditional dispute resolution techniques employed by parties to the oil and gas lease. As with most business disputes, informal negotiation will take place when a problem arises and the matter will often be resolved. However, the dynamics of the process will often be impacted by the economic realities of the dispute. For example, a lessor may discover that compression costs are being deducted from their royalty payment. They contact their lessee and object to the deduction. The lessee may reply that under their lease, or the circumstances, the deduction is proper. The lessor then must decide whether she wants to invest time and money into the dispute to obtain her own legal evaluation of the lessee's position. If she does, she may discover the lessee's interpretation was correct, incorrect, or the propriety of the deduction is not clear under the facts or law, or both. If each party believes they are correct in their position, and are unwilling to compromise, the situation will stalemate with new animosity being injected into the relationship each month royalties are paid—and compression costs deducted.

Due to the amount involved, and the risk involved, neither party may be willing to invest the time and money required to resolve the dispute. These costs and risks are typically measured against what it will cost to file suit and litigate the issue in court. The inherent costs associated with litigation may mean the issue will continue to fester and manifest itself at every opportunity within the relationship. The situation will either

81. See generally Shade, supra note 5, at 601, 620-21.
82. However, even if the compression cost issue is finally decided in court, or by some other means such as arbitration, there will always be the problem of the "sore loser" who will continue to disrupt the relationship even though a disinterested third party has determined their concerns were unfounded. A major benefit of mediation is it tends to avoid the "sore loser" syndrome. As noted by Professor Shade:

Mediation does not address who is right and who is wrong. It avoids a clear winner and loser. It 'speaks only of who will do what,' when it will be done, and how the problem will be resolved. The 'absence of fault-finding plus the experience of working cooperatively' toward a mutually agreeable
result in continuing conflict or other collateral issues will be found within the relationship that shift the litigation cost/benefit analysis to favor litigation. For example, although the economics of the compression cost issue may not, by itself, justify the cost of litigation, other issues may be identified under the deteriorating relationship to change the litigation equation. For example, a disgruntled lessor may be willing to top lease their property to a third party that will raise lease terminating issues and at the same time provide the lessor with a litigation forum to resolve the compression cost issue.

E. Party Dispute Resolution Goals

1. Lessor

The lessor’s primary dispute resolution goal will typically be the creation of a cost-effective procedure through which they can air their complaints and obtain an attentive audience with their lessee. If the parties are unable to negotiate or mediate a solution to their differences, the lessor’s next goal would be to have a neutral, knowledgeable, third party review the situation and resolve the dispute. Throughout the process the lessor’s primary concern will typically be the cost, in time and money, to pursue the matter. Therefore, the lessor will want a procedure that captures the lessee’s attention while preventing the process from becoming a spending contest to see who can out-litigate the other.

Since most of the information concerning oil and gas disputes will be under the lessee’s control, the lessor will want access to information, available to the lessee, that is relevant to the dispute. For example, the lessee may be reluctant to provide their lessor with gas contracts that the lessor believes adversely impact the calculation of royalty. However, to resolve the

solution can help preserve a relationship, which adjudication might destroy.

Shade, supra note 5, at 622 (footnotes omitted).

83. The lessor may focus on shut-in royalty, cessation of production, pooling, paying quantities, and similar issues that could result in termination of the lease. See generally Pierce, supra note 1, at 804 (discussing the impact of “the fee simple determinable model” on lessor litigation).

84. The top lease situation can also provide the lessor with a cost-free advocate when the top lessee agrees to prosecute the litigation while agreeing to hold the lessor harmless for any costs associated with the litigation.

85. Perhaps the most efficient “dispute repression” mechanism is litigation. The costs associated with litigation, coupled with the inability for any one party to effectively contain costs once the process is triggered, serves as a major deterrent to litigation. However, this often means the dispute never gets resolved; it just gets repressed awaiting other opportunities to manifest itself in the relationship.
dispute,\textsuperscript{86} it may be necessary to make this information available for no other reason than to assuage a lessor's perhaps understandable, but nevertheless unfounded, suspicions.

2. \textit{Lessee}

To a large extent, lessee dispute resolution goals coincide with those of the lessor. However, the existing oil and gas lease negotiation/litigation approach to dispute resolution tends to favor lessees. Since the lessee is typically the source of information,\textsuperscript{87} and the party that is more likely to view litigation as a cost of doing business, the lessee enjoys a distinct advantage in the negotiation/litigation context; she knows the economics of the dispute, and the unfamiliar litigation environment, will tend to dissuade the lessor from pursuing their litigation option. This is perhaps the lessee's strongest negotiating tool: the lessor often has no real practical option to accepting stalemate on the issue. In the meantime, the statute of limitations is, by default, resolving the "old" elements of a continuing dispute.

Most lessees, however, seek to avoid litigation with as much vigor as their lessor counterparts to the relationship. Lessor discord can consume a considerable amount of time and effort, even in the non-litigation context. Unresolved disputes place the lessor/lessee relationship under stress and invite otherwise uncharacteristic opportunistic behavior by the lessor in an effort to obtain an attentive audience with their lessee, or a third party decision-maker. Few lessees would deny that a healthy lessor/lessee relationship is a desirable and valuable asset that should be pursued and nurtured whenever practicable. There is such a thing as lessee "goodwill" among lessors that is established through fair dealings between the parties and the ability to address disputes in a manner that strengthens, instead of weakens, the relationship.

Once lessees look beyond whatever subjective "edge" the current negotiation/litigation mode provides them, their goals become very similar to the lessor's goals: the creation of a cost-effective procedure by which each party's concerns can be aired and resolved in an efficient manner. Most lessees will also have other goals that are a product of the unique opportunities provided by the ability to engage in their own private ordering. These goals are often the product of past experiences—usually bad experiences. The lessee will view any dispute resolution technique as an opportunity to try and accomplish the following collateral, but

\begin{itemize}
\item Even though the gas contract in fact does not impact the calculation of the lessor's royalty.
\item This includes factual information, such as production sales agreements and accounting data, and technical information, such as well logs and field studies.
\end{itemize}
nevertheless very important, goals: (1) elimination of punitive damage risks in the relationship; (2) elimination of risks associated with an impassioned or unsophisticated jury; and (3) elimination of risks associated with an often overworked, non-specialist, judge.\textsuperscript{88}

IV. ARBITRATION OF LEASE DISPUTES

A. Structural Requirements: The Arbitration Clause

Once the parties have decided the arbitration alternative to litigation is desired, the task will be to draft a contractual provision that will effectively eliminate all permutations of the litigation option.\textsuperscript{89} To accomplish this goal the oil and gas lease must contain a broad pre-dispute arbitration clause. In an effort to create the broadest pre-dispute arbitration clause possible, the authors have chosen the following language:

The parties to this oil and gas lease agree to resolve by arbitration all disputes between them which arise out of, or which in any way relate to:

\textsuperscript{88} Bishop, \textit{supra} note 50, at 5-2.

\textsuperscript{89} One or both parties may prefer to leave certain issues for resolution by a court, or provide for judicial review in defined situations. \textit{See generally}, Bishop, \textit{supra} note 50, at 5-30 to 5-31 ("[P]arties can increase the scope of judicial review by providing that 'errors of law shall be subject to appeal.' In the absence of such a provision, errors of law by the arbitrators will not usually constitute a basis for a vacatur of the award in the United States unless they amount to a manifest disregard of law, which is a very stringent standard."). However, the authors' sample clause assumes the parties have decided that all disputes arising between them regarding the lease relationship will be determined in one final arbitration proceeding. The goal is to limit, to the maximum extent possible, the litigation option and the opportunity for judicial review of the arbitrator's award. Limited judicial review would still be available under §9 of the Federal Arbitration Act which provides, in part:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration
(1) Where the award was procured by corruption, fraud, or undue means.
(2) Where there was evident partiality or corruption in the arbitrators, or either of them.
(3) 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.
(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made....

(1) The express or implied terms of the oil and gas lease;
(2) The resulting lease relationship; or
(3) Any pooling agreement, unitization agreement, division order, or other title, development, or marketing document associated with the lease terms or the lease relationship.\(^9\)

This language, coupled with language discussed in the sections that follow, should avoid unnecessary diversions into court concerning whether a matter is encompassed by the obligation to arbitrate.

1. Scope of Arbitrable Issues

The authors' sample arbitration clause is designed to encompass the complete realm of disputes that may arise between an oil and gas lessor and lessee. The clause addresses all disputes associated with the lease relationship regardless of how they may be classified in a legal context. Therefore, the clause includes not only "contractual" disputes but also those that may be characterized as a tort or under some other common law or statutory law label.\(^9\) The sample clause provides:

> With the intent of maximizing the scope of arbitrable matters in any way related to this oil and gas lease: any dispute between the parties, whether classified as contract, property, tort, or otherwise, associated with oil and gas exploration, development, production, marketing, accounting, or post-production activities, shall be resolved by arbitration; this includes any right or obligation created by statute, regulation, resolution, ordinance, or other enactment or order by a governmental entity; it also includes issues relating to fraud, illegality, repudiation, or other theories that attack the existence or validity of this oil and gas lease.\(^9\)

Similarly, the clause addresses disputes that may technically arise under a document besides the oil and gas lease, but which has an impact on the parties' lease relationship. This would include documents such as a declaration of pooling, a separate pooling agreement, unitization agreement, division order, and production sales contracts. It would also include rights under a pooling or unitization order.\(^9\)

To protect the arbitration process from any undesired detours into court to address the scope of the arbitration clause, the sample clause

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90. See infra Appendix A.
91. See, e.g., Beeson v. Erickson, 917 P.2d 901, 905 (Kan. App. 1996) (party attempting to avoid arbitration unsuccessfully argued their cause of action sounded in tort and therefore was not subject to arbitration).
92. See infra Appendix A.
93. See supra text accompanying note 90.
provides: "If a party asserts a dispute is not subject to arbitration under the
arbitration provisions contained in this oil and gas lease, such arbitrability
issues will be resolved through arbitration." Absent this provision, these
arbitrability issues would be addressed by the court.


To ensure arbitration is not encumbered by limiting state law
provisions, the sample arbitration clause provides: "This is a contract
evidencing a transaction involving interstate commerce and all matters
relating to arbitration pursuant to this oil and gas lease will be governed
applies to: "A written provision in any maritime transaction or a contract
evidencing a transaction involving commerce . . . ."

Section 1 of the Act defines "commerce" as "commerce among the several States or with foreign
nations . . . ." This language has been interpreted by the United States
Supreme Court to cover any contract "affecting commerce" which signals
an intent "to exercise Congress's commerce power to the full." Furthermore, the Act has been interpreted as a federal law that imposes substantive
limitations on state law when the parties express an intent to invoke the
benefits of the Federal Arbitration Act. For example, a state law
prohibiting pre-dispute agreements to arbitrate issues sounding in tort

94. See infra Appendix A.
95. The United States Supreme Court, in First Options of Chicago, Inc. v. Kaplan,
recognized that parties could agree that arbitrability issues would be determined by the
arbitrator instead of a court. However, if the contract providing for arbitration is not clear
on the matter, the arbitrability issue must be determined by the court. First Options of
96. See infra Appendix A.
98. Id. at § 1.
Arbitration Act preempted Montana statute that required, as a condition to enforcement of
an arbitration clause, '[n]otice that [the] contract is subject to arbitration . . . typed in
underlined capital letters on the first page of the contract.');
101. The Kansas non-uniform version of the Uniform Arbitration Act provides, in part:
(b) Except as provided in subsection (c), a provision in a written contract to
submit to arbitration any controversy thereafter arising between the parties
is valid, enforceable and irrevocable except upon such grounds as exist at
law or in equity for the revocation of any contract.
(c) The provisions of subsection (b) shall not apply to: . . . (3) any provision
of a contract providing for arbitration of a claim in tort.

would be preempted by the Federal Arbitration Act,\textsuperscript{102} assuming the parties otherwise agreed to arbitrate their tort-based disputes.\textsuperscript{103}

The sample clause expressly selects the Federal Arbitration Act as the governing law "relating to arbitration." This is designed to avoid possible ambiguity created by a general choice of law provision that might be included in the lease, other contracts, or the arbitration rules. The goal is to make it clear that selecting, for example, New Mexico law to govern substantive oil and gas law issues is not intended as a selection of New Mexico law to govern issues regarding arbitration.\textsuperscript{104}

3. Federal Court Authority to Enter Judgment Upon the Arbitrator's Award

Due to the pro-arbitration attributes of federal law, the authors have provided for federal enforcement of the arbitrator's award. In the sample clause the authors provide: "Any award made pursuant to proceedings authorized by this arbitration clause will be entered as a judgment of the federal district court for the federal district where any portion of the leased land affected by the arbitration is located." This clause is designed to trigger the benefits of § 9 of the Federal Arbitration Act which provides, in part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an

\begin{itemize}
\item \textsuperscript{102} In Beeson v. Erickson the Kansas Court of Appeals noted:
Under both the Uniform Arbitration Act and the Federal Arbitration Act, a contractual provision to arbitrate applies regardless of whether the action sounds in tort or in contract. R.J. Palmer Constr. Co. v. Wichita Band Instrument Co., 7 Kan.App.2d 363, 365, 642 P.2d 127 (1982). Indeed, it appears to us that under R.J. Palmer, this action may have been one where 'commerce' was involved. If that is true, then the Federal Act would have preempted the Kansas Act and would have applied, and the tort exception would not exist. Beeson v. Erickson, 917 P.2d 901, 904 (1996).

\item \textsuperscript{103} The parties' contract will define the scope of their obligation to arbitrate. If they choose not to arbitrate tort disputes, their contract will govern. See generally Edward Brunet & Walter E. Stern, \textit{Drafting the Effective ADR Clause for Natural Resources and Energy Contracts}, 11 NAT. RESOURCES & ENV'T 7, 7-8 (1996) (discussing party preference for arbitration clauses that cover either a broad or narrow scope of issues).

\item \textsuperscript{104} See generally Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1218 (1995) (interpreting scope of choice-of-law provision and whether it limited arbitrator's ability to award punitive damages). The \textit{best way to deal} with the \textit{punitive damages issue} is to expressly address the availability of punitive damages either in the arbitration clause or the arbitration rules. The authors have elected to address punitive damages and other remedy-limiting provisions in their arbitration rules. See \textit{infra} Appendix B, Rule 9.

\item \textsuperscript{105} See \textit{infra} Appendix A.
\end{itemize}
order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.106

Section 9 of the Federal Arbitration Act permits the parties to specify the court where enforcement can take place. The authors have selected the federal district court where “any portion of the leased land” is located since all disputes between the lessor and lessee will concern a lease which describes land in one or more areas. Either party could change this to select a specific federal district court by name, such as “the federal district court for the district of Kansas sitting in Wichita, Kansas.” If the parties fail to provide a formula to identify a specific court, § 9 provides: “If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.”107

4. The Arbitration Details

Although the arbitration clause in the contract establishes the right to have disputes arbitrated, the clause will generally incorporate a set of rules that establish the details for how the arbitration will be conducted. For example, the American Arbitration Association (“AAA”) recommends the following clause for use in commercial contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.108

The only detail the Federal Arbitration Act supplies, in the event the parties fail to address the matter, is the appointment of the arbitrator.109

107. Id.
108. COULSON, supra note 46, at 17.
109. Section 5 provides:
If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had
The assumption is that the details will be established by the arbitrator once they are identified.\(^{110}\)

When dealing with a specific class of disputes, such as those encountered between lessors and lessees in an oil and gas lease relationship, the parties should establish the details that will govern the administration of their disputes.\(^{111}\) The rules can be designed to permit the parties to administer the process or to authorize a third party to administer the process. The sample arbitration rules provided by the authors anticipate that a separate organization, the "Oil and Gas Dispute Resolution Institute," will exist to assist the parties in administering their arbitration.\(^{112}\) To date, such an organization specifically designed to administer domestic oil and gas disputes has not been formed.\(^{113}\)

\(^{110}\) See generally Morris, supra note 13, at 14-21 ("If the arbitration clause is terse and makes no provision about what rules will govern, then it will become necessary for the panel, after soliciting the views of counsel, to determine the manner in which the arbitration will be conducted.").

\(^{111}\) Otherwise, a substantial portion of the time and expense associated with the arbitration of a dispute will be determining the rules that will be followed in administering the dispute. Also, many of the time- and money-saving "procedural" devices may not be as safely pursued when they are being imposed by the arbitrator instead of having them imposed by agreement of the parties. Bishop, supra note 50, at 5-29. For example, the parties may agree to a summary procedure which limits the evidence that can be considered in addressing a dispute. Such a party-imposed limitation would not provide a ground for attacking the arbitrator's award for "refusing to hear evidence pertinent and material to the controversy" because the arbitrator would not be "guilty of misconduct" as that ground is defined in § 10(a)(3) of the Federal Arbitration Act. 9 U.S.C. § 10(a)(3) (1994).

\(^{112}\) Although this is a fictitious organization, many industries have tailored a dispute resolution process, and supporting organizations, to meet their unique needs. Several industry programs have been established through the American Arbitration Association. See COULSON, supra note 46, at 57 (construction industry), 81 (textile and apparel industries), 99 (insurance claims). Other industries have established dispute resolution procedures and rules through self-regulatory organizations, such as the National Association of Securities Dealers, Inc.'s arbitration process. The CPR Institute for Dispute Resolution publishes the CPR MAPP (Model ADR Procedures and Practices) Series which contain model dispute resolution procedures with suggested guidelines concerning their use. The CPR MAPP on Oil and Gas Industry ADR contains the CPR's 1991 report on dispute resolution options and discusses how they might be employed to address certain types of disputes. CENTER FOR PUBLIC RESOURCES, INC., ADR FOR OIL AND GAS INDUSTRY BUSINESS DISPUTES (1991). (For further information on the CPR Institute for Dispute Resolution's publications, call (212) 949-6490.).

\(^{113}\) One commentator has observed: Various industry trade associations, such as the National Association of Securities Dealers and the Grain and Feed Trade Association, have developed specialized arbitration forums and rules for the principled
Under the authors' proposed rules the administering organization plays a more active role than is traditionally the case with other organizations, such as the AAA. For example, if the dispute is resolved by stipulation after the arbitration process is initiated, but before the individual arbitrator is identified, the Executive Director of the administering organization is deemed to be the arbitrator for the purpose of issuing an award in accordance with the stipulation so it can be enforced as a judgment under section 9 of the Federal Arbitration Act. Also, the Institute serves as a sort of policing agency during the non-decisional phases of the arbitration process. If a party is abusing the process, the arbitrator selection process can be triggered by the Institute so the arbitrator can take charge, impose sanctions if appropriate, and direct the parties to properly exhaust their non-decisional remedies. However, these same types of administrative mechanisms could be established by the parties through self-administered rules.

B. Structural Requirements: Arbitration Rules

The arbitration rules are typically where the dispute resolution goals of the parties will be reflected. One of the major underlying goals of lessors and lessees is to create a cost-effective procedure through which resolution of disputes affecting their industry members. The oil and gas industry has not followed this pattern. None of the trade associations involved in the oil and gas industry have developed any arbitration forums or arbitration rules. Moreover, many standard form contracts such as the AAPL Model Form Operating Agreement do not contain arbitration clauses.

In the international sphere, arbitration of energy disputes has become commonplace. On the other hand, none of the domestic efforts to organize forums or arbitrators for energy disputes have been dramatically successful to date.

Bishop, supra note 50, at 5-2, 5-3.

114. See supra note 38 and accompanying text.

115. See infra Appendix B, Rules 4 & 5. Rule 5 provides, in part: "If the parties are unable to resolve their differences pursuant to section 4, the Institute will initiate the arbitrator selection process . . . ."

116. However, the dispute resolution process may be more acceptable to lessors and lessees if they know it will be administered by a disinterested but knowledgeable organization. One group, working with Tulane University Law School and the U.S. Maritime Law Association, is developing a forum for the arbitration of offshore energy disputes that will be administered by Tulane University. Bishop, supra note 50, at 5-3. One could easily envision associations, such as the National Association of Royalty Owners and various state oil and gas industry associations, joining forces to create the organization, arbitration clause, and rules necessary to offer lessors and lessees viable dispute resolution alternatives to litigation.
they can efficiently resolve their disputes. The rules that follow attempt to achieve this goal by: (1) defining the matters in dispute; (2) establishing efficient mechanisms to identify the relevant facts regarding the matters in dispute; (3) identifying issues of law and fact that must be decided; and (4) creating an efficient decision-making process by which factual and legal issues can be finally resolved either by the parties or, if they fail, by the arbitrator.

Although detailed rules have been prepared by the authors, they are intended as "default" rules in the event the parties are unable to agree upon a better approach at the time a dispute materializes, or at the time the dispute resolution process is unfolding. Therefore, Rule 1 provides, in part: "At any time prior to issuance of the arbitrator's award in a proceeding, the parties may agree, in writing, to supplement or amend these Rules or other rules of procedure they have previously established."

1. Defining the Dispute

The sample rules force the party desiring to initiate the arbitration process to carefully consider all aspects of their dispute and carefully evaluate the factual and legal basis of their claims. To commence the arbitration proceeding the complaining party must prepare an "Arbitration Notice" which includes the following:

a. A description of the dispute(s) giving rise to the arbitration proceedings;

b. A statement indicating why the matter is subject to arbitration under the lease arbitration clause;

c. A statement of the relevant facts necessary to resolve the dispute;

d. A statement of the relevant law necessary to resolve the dispute;

e. A statement of the relief sought by the party (if seeking a sum of money, the specific amount alleged to be due and the details of the calculation will be included); and

f. An appendix containing copies of all relevant documents, cases, statutes, and other written material relevant to the decision of the dispute.

This is more than the pleading analog to a complaint. Instead, the document will resemble a motion for summary judgment with a supporting

117. See supra text accompanying notes 85-88.
118. See infra Appendix B, Rule 1.
119. See infra Appendix B, Rule 2.
The responding party’s Arbitration Notice Reply will respond to the Notice with a similar level of detail.

To ensure the parties fully prepare their respective cases at this early stage of the proceedings, the Rules provide: “The parties authorize the arbitrator, when the arbitrator deems the matter ripe for summary disposition, to decide the dispute based solely upon the information contained in the Arbitration Notice and the Arbitration Notice Reply.” The goal in forcing the parties to think through and put together their cases at the earliest stage of the dispute is to provide them with information they will need to effectively engage in the structured negotiation and mediation phases of the arbitration process. It also ensures that the mediator will have high quality information in the event the parties are unable to negotiate a solution. Front-loaded preparation also enables the arbitrator to dispose of the dispute at the


121. See infra Appendix B, Rule 10. The Rule is designed to permit the arbitrator to resolve the dispute, based upon the initial submissions of the parties, without running afoul of the Federal Arbitration Act. The Rule provides further:

The parties agree that for purposes of § 10 of the Federal Arbitration Act they will be deemed to have had a complete opportunity to present evidence pertinent and material to the controversy by the process of filing either an Arbitration Notice or an Arbitration Notice Reply as provided for in §§ 2 and 3 of these Rules. The decision to employ this summary procedure will be in the sole discretion of the arbitrator which the arbitrator will exercise after reviewing the content of the Arbitration Notice and Arbitration Notice Reply(ies).

122. See infra Appendix B, Rule 4.

123. A common criticism of mediation concerns the mediator’s inability to become thoroughly familiar with the dispute so they can properly mediate. Often this is due to unreasonable limitations placed on the mediator’s preparation. One commentator has observed:

The ability of a mediator to bring the parties together very often depends on his ability to convince both parties that each indeed has something to lose in the event a voluntary settlement cannot be achieved. To achieve this end, the mediator should be as fully informed as possible of both the facts and the legal issues before commencement of the process itself. This will avoid perhaps the most frequently voiced complaint regarding mediation: that the mediator makes observations and recommendations premised upon an incomplete knowledge of the facts and/or “from the hip” law. Unfortunately, in many instances the unwillingness of the parties to undertake the expense necessary to allow the mediator the preparation time to do an effective job dooms the effort to failure before it begins. If this one pitfall can be avoided, the probability of success of a mediation will increase dramatically.

earliest stage possible.\textsuperscript{124} The arbitrator is the key to ensuring the summary procedure provision works smoothly. An arbitrator knowledgeable with the subject matter, and trained in the law,\textsuperscript{125} should be able to readily determine when they have the information required to fairly resolve the dispute. In many instances, where the determinative issues are issues of law, the arbitrator should be able to render a decision relying upon the Notice, the Reply, and their own independent legal research. Perhaps more importantly, it lodges the discovery process with the arbitrator instead of the parties.\textsuperscript{126} After the initial Notice and Reply, even the pleading process comes under the control of the arbitrator.\textsuperscript{127} For example, a party may raise the equivalent of a counterclaim in her Reply. If the arbitrator believes it would be helpful to have a reply to the counterclaim, she can fashion the specific issues she wants the replying party to address.

2. Managing the Dispute Resolution Process

The sample rules rely heavily upon the selected arbitrator to accomplish the parties' dispute resolution goals. In this regard, Rule 7 provides, in part:

The parties direct the arbitrator to resolve the disputes between them in the most efficient manner possible considering the monetary value of the dispute, the relative complexity of the factual issues associated with the dispute, and the long-term impact the dispute could have on the parties' lease relationship. However, any selected course of action in pursuit of these goals will be at the arbitrator's sole discretion.\textsuperscript{128}

\textsuperscript{124} The summary procedure is under the complete control of the arbitrator. The Rule also provides:

In the event the arbitrator determines the matter is not ripe for summary disposition based upon the Notice and Reply, the arbitrator may receive additional information from the parties and, at any subsequent time, find that the matter is ripe for summary disposition. \textit{See infra} Appendix B, Rule 10.

\textsuperscript{125} The authors have specified that the arbitrator be selected from an Institute-generated list which will "include only persons who are lawyers knowledgeable in oil and gas law." \textit{See infra} Appendix B, Rule 5.

\textsuperscript{126} \textit{See infra} Appendix B, Rule 7, which provides, in part: "If the arbitrator determines that further information is necessary or desirable, the arbitrator will fashion the procedure which they believe will most efficiently produce the information in a manner consistent with the parties' dispute resolution goals."

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{See infra} Appendix B, Rule 7.
The arbitrator will be guided by this “efficiency standard” when determining the pleading, discovery, and hearing procedures that will be employed. With regard to these procedural matters, Rule 7 provides:

If the arbitrator determines that further information is necessary or desirable, the arbitrator will fashion the procedure which they believe will most efficiently produce the information in a manner consistent with the parties' dispute resolution goals. The procedure selected by the arbitrator may, or may not, include oral presentations or live testimony. In the event the arbitrator desires to have live in-person proceedings, they will be conducted at a date, time, and location designated by the arbitrator. Either before or after fashioning a proposed procedure to govern subsequent proceedings, the arbitrator may, if it is deemed efficient under the circumstances, obtain the input of the parties regarding the proposed procedure.129

If the procedures created by the arbitrator are unacceptable to the parties, under Rule 1 they can always “agree, in writing, to supplement or amend” the rules by designating the procedure they want the arbitrator to follow.130

3. Revealing the Arbitrator's Thought Process

Rule 8 employs a procedural innovation that provides the parties with an opportunity to comment upon the arbitrator's proposed award and draft opinion. Once the arbitrator has reached a decision, she is required to prepare a Draft Opinion which contains the arbitrator's “findings of fact, conclusions of law, analysis of the dispute, and proposed award.”131 The parties have the right to prepare briefs commenting on the Draft Opinion and “[u]pon receipt of the parties' briefs, the arbitrator may reopen the proceedings to obtain further information or proceed with issuance of an award and Final Opinion.”132 This procedure is designed to address a complaint associated with “neutral” arbitration: the arbitrator may simply misunderstand a party’s position.133 The value of this procedure is increased

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129. Id.
130. See infra Appendix B, Rule 1.
131. See infra, Appendix B, Rule 8.
132. Id.
133. In noting the benefits of “interest arbitration,” where there are two non-neutral party-selected arbitrators and one neutral arbitrator, Robert Pezold has stated: [P]articipation of the interest arbitrators in the decision-making process ensures that each party’s case, will be fully presented to the neutral decision-maker. For example, one of the functions of an interest arbitrator is to be certain that any confusion which the neutral arbitrator may have
by the requirement that the arbitrator reveal through findings of fact, conclusions of law, and analysis the basis for the draft and final opinions. This provides the parties with the opportunity to identify specific factual and legal findings, and legal analysis, they believe is flawed. The arbitrator can then decide whether the proceedings need to be reopened to focus on a factual issue or whether a legal issue needs to be researched, briefed, or argued further.

Although some commentators believe issuing a detailed opinion is an unnecessary invitation for challenge to the arbitrator's award, others feel it is a necessary part of the dispute resolution process. The authors believe that a detailed opinion should be issued, in the oil and gas lease

concerning a party's presentation is clarified during the presentation of evidence, or at any rate, during the deliberative process. This feature alone virtually eliminates the fears held by most lawyers presenting complicated cases to a single decision-maker—i.e., that the decision-maker might not understand or appreciate an essential part of their case, and that the attorney will not know of the decision maker's confusion until after a decision is rendered.

Pezold, supra note 123 at 20-10.

134. Coulson offers the following commentary:
Arbitrators are not required to write opinions explaining the reasons for their decisions. As a general rule, AAA commercial awards consist of a brief decision on a single sheet of paper. Written opinions can be dangerous because they identify targets for the losing party to attack. . . .

The AAA does not encourage such opinions. In some cases, both parties want an opinion. Then the AAA has no objection. Usually, however, the parties look to an arbitrator for a decision, not an explanation.

COULSON, supra note 46, at 30.

Robert Pezold also recommends that no explanation be given for the award:
'There is no obligation on the part of the arbitrators to explain or provide reasons underlying their award. In fact, doing so is, and should be, discouraged. Brevity and conciseness in an award will lessen both the likelihood of an objection to the award, and the possibility that such an objection would be sustained. Accordingly, unless the parties insist, the arbitration agreement itself should contain no specific requirement that arbitrators do anything other than render an award.

Pezold, supra note 123 at 20-34.

135. The Center for Public Resources offers the following view:
Most parties engaging in arbitration want to know the basis on which the arbitrator(s) reached their decision. Our Committee, moreover, considers it good discipline for arbitrators to require them to spell out their reasoning. Sometimes this process gives rise to second thoughts as to the soundness of the result. . . . In the Committee's view the risk that a reasoned award will be successfully challenged normally is small and is outweighed by the other considerations mentioned above.

CENTER FOR PUBLIC RESOURCES, INC., RULES AND COMMENTARY FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 13, cmt.
situation, for three reasons: first, it forces the arbitrator to carefully work through the relevant facts and law to arrive at a reasoned decision; second, it permits the parties to focus on specific misconceptions the arbitrator may have concerning the facts or law as part of the Draft Opinion review process; third, it brings a degree of closure to the dispute and will hopefully dissuade future disputes over the same or similar issues.

Written opinions should also serve a useful function regarding the preclusive effect of the arbitration proceeding. To the extent they are available for consideration in subsequent disputes between the same parties, it may eliminate the tendency to prospectively revisit issues that have been previously determined by an arbitrator. For example, suppose for the 1991 to 1996 time period the arbitrator determines that a lessee improperly deducted compression costs and awards the lessor $100,000 in damages. The arbitrator arrives at its decision based upon an interpretation of the express terms of the royalty clause. When the lessee continues to deduct compression costs in 1997 and beyond, and the lessor initiates arbitration to recover the deducted costs, must the second arbitrator again interpret the royalty clause? Can the arbitrator simply rely upon the interpretation made by the previous arbitrator and award a sum of money?

The authors' sample rules provide for a more efficient way to deal with the prospective effect of an arbitrator's findings. Under Rule 9 any party can request the arbitrator to grant declaratory relief that will define the parties' rights and obligations prospectively as part of the arbitrator's award. However, even without the benefit of declaratory relief, Rule 8 provides: "The arbitrator's Final Opinion will constitute binding precedent between the parties regarding matters addressed by the arbitrator and, to

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136. See supra text accompanying notes 130-32.

137. This third reason is the one most relevant to the oil and gas lease since the relationship, in most situations, will continue long after the arbitration is completed. See Brunet & Stern, supra note 103, at 69 ("Some parties may want written reasons or findings of fact explaining the arbitration award. These can help the parties to accept the award as rational and reasoned.").

138. See generally 2 Dauër, supra note 35, at § 24.02 (res judicata) & § 24.03 (collateral estoppel).

139. The confidentiality provisions of the arbitration clause and rules should contain a specific exception for the admission of the arbitrator's opinion in subsequent arbitration proceedings between the parties to the lease, or their successors or assigns. For example, Rule 13 provides, in part: "However, the Final Opinion in any arbitration proceeding can be used by a party in any subsequent arbitration proceeding concerning the same oil and gas lease." See infra Appendix B, Rule 13.

140. See generally, 1 Dauër supra note 7, at 7-39 to 7-42.

141. Rule 9 provides, in part: "The arbitrator is authorized to fashion any remedy they deem appropriate under the circumstances, including specific performance and declaratory relief that will govern the prospective rights and obligations of the parties under the oil and gas lease." See infra Appendix B, Rule 9.
the extent it is relevant, will be adhered to in subsequent proceedings governing the parties' rights and obligations under the oil and gas lease.\textsuperscript{142} Therefore, to the extent the prior arbitrator decided an interpretive issue relevant to a current dispute, the matter cannot be reargued in a subsequent arbitration proceeding. The only issue would be how much the lessee improperly deducted.

The authors have responded to the major argument against providing a written opinion by addressing the judicial review issue head-on. Rule 8 concludes by providing:

\begin{quote}
Although the parties, by this Rule, are requiring the arbitrator to issue a detailed Final Opinion, they do not intend to expand in any way judicial review of the arbitrator's findings, conclusions, analysis, or award. Instead, the parties intend that the arbitrator's award will be reviewable only on the limited grounds specified in the Federal Arbitration Act. 9 U.S.C. §§ 1-16.\textsuperscript{143}
\end{quote}

The confidentiality provisions of Rule 13 also promote limited review by prohibiting disclosure of the Final Opinion; only the Arbitrator's Award will be made public in the process of entering it as a judgment.\textsuperscript{144}

4. Selecting the Arbitrator

The Achilles heel of the authors' sample rules is the arbitrator. Rule 5 addresses the arbitrator selection process and contemplates that the Institute will play the major role in identifying competent candidates.\textsuperscript{145} The Oil & Gas Dispute Resolution Institute is a recommended solution to a problem several distinguished practitioners have noted regarding oil and gas arbitration: the need for an administering organization familiar with the oil and gas industry that can identify potential arbitrators with the required oil and gas expertise.\textsuperscript{146} The Washburn University School of Law is currently

\textsuperscript{142} See infra Appendix B, Rule 8. Rule 8 also makes the Final Opinion and Arbitrator's Award binding on the successors and assigns of the parties to the oil and gas lease.

\textsuperscript{143} See infra Appendix B, Rule 8.

\textsuperscript{144} See infra Appendix B, Rule 13.

\textsuperscript{145} See infra Appendix B, Rule 5.

\textsuperscript{146} James Brown and John Melick have noted that one of the areas of greatest need is "ensuring that disputes are resolved by persons sufficiently expert in the coal, oil, and gas fields." Brown & Melick, supra note 52, at 1-30. In commenting on the process for identifying the industry expert, it is noted that short of naming the arbitrator in advance in the agreement:

The second way that access to truly expert arbitrators can be provided for in an agreement is to designate a particular institution as that which will be relied upon to furnish the requisite expertise. Although AAA now does a commendable job in serving that function, its voluntary and generic
exploring a possible role it might play in this area through the joint efforts
of its established Alternative Dispute Resolution academic and clinical pro-
grams and its oil and gas law faculty. This article represents our initial
effort to explore dispute resolution alternatives under the oil and gas lease
relationship.

Rule 5 instructs the Institute to initiate the arbitrator selection
process “by providing the parties with identical lists containing the names
of five potential arbitrators.” The list can include only “persons who are
lawyers knowledgeable in oil and gas law.” Although the mediator does
not need to be trained in the law, the extensive procedural discretion given
to the arbitrator dictates that she be a lawyer. Only a lawyer can efficiently
and fairly make the numerous decisions required of her as the arbitrator
under the proposed rules. The arbitrator will determine whether there are
disputed issues of fact or law, she will tailor the discovery and other
procedural mechanisms to flesh out the dispute, she will render a final
opinion based upon her findings of fact, conclusions of law, and legal
analysis.

To assist the parties in conducting their due diligence of the five
persons named on the list of potential arbitrators, Rule 5 contemplates that

characteristics may not serve the interests of all potential disputants
adequately.

Id. Robert Pezold has noted:

Another relative disadvantage of neutral arbitration is that it is difficult to
find a single arbitrator upon whom both parties can agree. Indeed, the
search itself can consume a great deal of time. If the parties rely upon an
agency to select a neutral, such as the AAA or CPR, the parties may well
sacrifice all hope of obtaining specialized expertise, or in the worst
instance, even basic qualifications. If instead the parties rely on a court,
then even the basic levels of disclosure required of a neutral may be lost.
Finally, a neutral selected by an agency not associated with the parties has
no incentive to be responsive to the needs or desires of the parties in
respect of timing, venue, and hearing procedure.

Pezold, supra note 123, 20-13 to 20-14.
147. Directed by Professor Loretta W. Moore.
148. Directed by Professor David E. Pierce.
149. See infra Appendix B, Rule 5.
150. Id.
151. Rule 8 provides, in part:

In deciding any dispute the arbitrator will endeavor to apply the
appropriate law to the dispute, including, without limitation, any
applicable statute of limitation. However, the arbitrator will not be
required to follow formal rules of evidence and can, if they deem it
appropriate, consider applicable industry norms or other matters tending
to define the business context of the dispute.

See infra Appendix B, Rule 8.
152. See infra Appendix B, Rules 7-10.
the Institute will provide the parties with a completed "Arbitrator's Questionnaire." One of the Institute's roles would be to review the Arbitration Notice and then identify potential arbitrators with the expertise to administer the dispute. At this stage the Institute would attempt to screen out candidates that had obvious conflicts, or who were not interested in being considered, in an effort to create an initial list of five eligible candidates. The screening would include identifying any situation that would disqualify the arbitrator under, for example, the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes. Although the parties will be limited by the Institute's list, the selected arbitrator, in any event, "must be impartial."

The authors have elected to rely solely on neutral arbitration using a single arbitrator. Since one of the major goals is to contain the cost of the process, and one of the major costs will be the arbitrator's fee, a single arbitrator is being used. The authors also thought that the benefits of interest arbitration could be obtained, without the use of non-neutral arbitrators, by careful selection of potential arbitrators familiar with the issues in dispute and the provision for party review of the arbitrator's preliminary opinion and award.

5. Cost Concerns

Although the authors have attempted to streamline the dispute resolution process as much as possible, one of our major fears is that it will still prove to be too expensive in some situations. For example, suppose a lessor believes that the lessee's use of an injection well for disposal of off-lease produced water is beyond the scope of the lease granting clause. Can the lessor afford to go through the proposed dispute resolution process to resolve a dispute which may have minimal economic consequences for either party? On the other hand, the parties face the same problem with the litigation option. The major difference with the proposed dispute resolution process is there are several opportunities to resolve the dispute; in the litigation process there is usually one opportunity. For example, if the lessee's area manager knows the lessor can trigger a process that requires the area manager's supervisor to get involved, or that will involve company

153. See infra Appendix B, Rule 5.
154. Coulson, supra note 46, at 171-79.
155. Unless, of course, the parties are able to agree upon an alternative procedure they prefer. See infra Appendix B, Rule 1.
156. See infra Appendix B, Rule 5. One of the grounds for vacating an arbitrator's award under the Federal Arbitration Act is "evident partiality" of the arbitrator. 9 U.S.C. § 10(a)(2) (1994).
158. See supra note 133.
personnel from outside the area's business unit, they may be more accommodating in trying to resolve the lessor's complaints informally. Also, the process is phased so that the lessor can pursue the formal negotiation process for $500 and then make a decision whether they want to invest more into the process if it goes to mediation, or arbitration. ¹⁵⁹

From the lessee's view, there is a legitimate concern that by making the process too accessible they will be inviting frivolous abuse of the process to obtain periodic command audiences with the lessee's decision-makers. This is one reason the authors have provided for a non-refundable filing fee to initiate the process. Although we have selected $500, this amount is not calculated to compensate the Institute for its services, but rather to discourage abuse of the process.

The rules provide for the mediator and arbitrator to estimate the cost of their services; these estimates will be used to calculate a 110 percent deposit on fees that will be collected by the Institute prior to each phase of the process. ¹⁶⁰ The party initiating the process must provide the deposit for the mediator's estimate. The deposit for the arbitrator's estimate will be divided between the parties to the dispute. However, if the replying party fails to post her part of the deposit, the complaining party must do so, but she will be entitled to an amount equal to ten times the amount posted on the replying party's behalf—regardless of the outcome of the proceedings. ¹⁶¹ Failure to timely post a deposit will result in dismissal of the proceedings which can be refiled only upon payment of a new filing fee. ¹⁶² Therefore, since failure to pay a deposit is jurisdictional, the complaining party must be prepared to cover for the replying party's failure to post her share of the arbitration cost estimate. The rules also provide the mediator and arbitrator with certain contractual rights and protections regarding their fees and potential liability. ¹⁶³

¹⁵⁹. See infra Appendix B, Rule 11.
¹⁶⁰. Id.
¹⁶¹. Id.
¹⁶². Id.
¹⁶³. Rule 13 provides, in part:

The parties further agree to indemnify and hold harmless any mediator, arbitrator, the Institute, and members of the Institute, against any claim, loss, or damage, including attorney fees and litigation expenses, and including claims based upon the sole or concurrent negligence of any mediator, arbitrator, the Institute, or members of the Institute, arising out of or related to the dispute resolution proceedings contemplated by these Rules. For purposes of these Rules, the parties intend that any mediator, arbitrator, the Institute, and members of the Institute, are to be intended third party beneficiaries of the parties' obligations under these Rules.
6. **Confidentiality**

To achieve the goal of privacy in the dispute resolution process, Rule 13 provides, in part:

All information provided during the course of the arbitration proceedings, including the negotiation and mediation phases, and including the arbitrator's Draft Opinion and Final Opinion, will be kept confidential by all parties involved in the process. However, the Final Opinion in any arbitration proceeding can be used by a party in any subsequent arbitration proceeding concerning the same oil and gas lease. If a party is ordered by a court to reveal information covered by this section, they will inform the court of this confidentiality obligation and seek to have any required disclosure made in the most protective manner they can arrange under the circumstances.

The parties agree that they will not call any mediator, arbitrator, or member of the Institute to be a witness, or otherwise provide information or testimony in any form, regarding any matter in any way related to the dispute resolution proceedings contemplated by these Rules.164

Although the Final Opinion will be available in future arbitration proceedings concerning the lease, no other disclosure is authorized. Under no circumstances do the rules permit the parties to call a mediator, arbitrator, or Institute member as a witness or to provide "information or testimony" concerning dispute resolution proceedings.165

**V. CONCLUSION**

The authors have sought to achieve two goals with this article: First, to provide a tangible vehicle for evaluating the use of arbitration to address oil and gas lease disputes. Second, to demonstrate the potential value of an organization that specializes in administering dispute resolution processes for the oil and gas industry. Although we could have addressed these issues in the abstract, we chose to address them through prototype contract language and arbitration rules that make it easier to evaluate the dispute resolution models. It is hoped this approach will assist lessors and lessees

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164. *Id.* See generally Moore, *supra*, note 35, at 700-09 (addressing confidentiality concerns in mediation).
165. *Id.*
in designing better processes for resolving the inevitable disputes they will encounter under their oil and gas lease relationships.
Appendix A

A sample arbitration clause for the oil and gas lease could provide as follows:

Arbitration of Disputes. The parties to this oil and gas lease agree to resolve by arbitration all disputes between them which arise out of, or which in any way relate to:

(1) The express or implied terms of the oil and gas lease;
(2) The resulting lease relationship; or
(3) Any pooling agreement, unitization agreement, division order, or other title, development, or marketing document associated with the lease terms or the lease relationship.

With the intent of maximizing the scope of arbitrable matters in any way related to this oil and gas lease: any dispute between the parties, whether classified as contract, property, tort, or otherwise, associated with oil and gas exploration, development, production, marketing, accounting, or post-production activities, shall be resolved by arbitration; this includes any right or obligation created by statute, regulation, resolution, ordinance, or other enactment or order by a governmental entity; it also includes issues relating to fraud, illegality, repudiation, or other theories that attack the existence or validity of this oil and gas lease.

If a party asserts a dispute is not subject to arbitration under the arbitration provisions contained in this oil and gas lease, such arbitrability issues will be resolved through arbitration.

Arbitration of any matter under this oil and gas lease will be conducted pursuant to the “Oil & Gas Lease Dispute Arbitration Rules-1997 Edition” established by the Oil & Gas Dispute Resolution Institute, which rules are, by this reference, incorporated into and made a part of this oil and gas lease. This is a contract evidencing a transaction involving interstate commerce and all matters relating to arbitration pursuant to this oil and gas lease will be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Any award made pursuant to proceedings authorized by this arbitration clause will be entered as a judgment of the federal district court for the federal district where any portion of the leased land affected by the arbitration is located.
Appendix B

OIL & GAS LEASE DISPUTE
ARBITRATION RULES
1997 Edition

1. Selection of Rules. When the parties to an oil and gas lease ("lease") agree to arbitrate a dispute pursuant to the Oil & Gas Lease Dispute Arbitration Rules—1997 Edition ("Rules"), they will be deemed to have adopted by reference these Rules as established and administered by the Oil & Gas Dispute Resolution Institute ("Institute"). However, the parties to the lease may supplement or amend these Rules through language in the lease that expressly references how the Rules are being altered. At any time prior to issuance of the arbitrator's award in a proceeding, the parties may agree, in writing, to supplement or amend these Rules or other rules of procedure they have previously established.

2. Commencement of Arbitration Proceedings. A party commences arbitration proceedings by serving an Arbitration Notice on all other parties to the lease, serving an Arbitration Notice on the Institute (3 copies), and paying to the Institute the filing fee required by § 11 of these Rules. The Arbitration Notice will contain the following information:
   a. A description of the dispute(s) giving rise to the arbitration proceedings;
   b. A statement indicating why the matter is subject to arbitration under the lease arbitration clause;
   c. A statement of the relevant facts necessary to resolve the dispute;
   d. A statement of the relevant law necessary to resolve the dispute;
   e. A statement of the relief sought by the party (if seeking a sum of money, the specific amount alleged to be due and the details of the calculation must be included); and
   f. An appendix containing copies of all relevant documents, cases, statutes, and other written material relevant to the decision of the dispute.

   The Arbitration Notice cannot exceed twenty-five pages in length excluding the appendix provided for in subsection f.

3. Reply to Arbitration Notice. On or before the thirtieth day following the date the Arbitration Notice is received, each recipient will prepare and serve on the other parties to the lease, and on the Institute (3 copies), an Arbitration Notice Reply ("Reply") which contains the following information:
   a. A statement indicating whether the replying party believes the matter is subject to arbitration under the terms of the lease;
   b. A statement identifying the listed facts in the Arbitration Notice which are disputed and those that are not disputed;
c. A statement identifying any additional relevant facts which were not referenced in the Arbitration Notice;

d. A statement of the relevant law necessary to resolve the dispute;

e. A statement of the relief being sought by the replying party (if seeking a sum of money, the specific amount alleged to be due and the details of the calculation must be included); and

f. An appendix containing copies of all relevant documents, cases, statutes, and other written material relevant to the decision of the dispute that are not otherwise contained in the Arbitration Notice.

The Reply cannot exceed twenty-five pages in length excluding the appendix provided for in subsection f.

4. Party Discussions and Mediation. Upon receipt of the Reply, each party will identify someone in their organization that has the decision-making authority to grant the remedy sought by the other party(ies). Where a party is an organization, the decision-maker's authority to act should be stated in a properly executed power of attorney designating the decision-maker as the organization's attorney-in-fact with actual authority to agree to the remedy sought by the other party. Whenever possible: (1) the decision-maker who is identified should have no prior contact with the dispute triggering the arbitration; and (2) they should be from outside the particular department or business unit that has responsibility for the particular lease involved.

Each party will notify the Institute of their selected decision-maker on or before the tenth day following receipt of all party Replies; if the party is an organization, they will include with their notice a copy of the required power of attorney. The Institute will then coordinate a meeting in which the selected decision-makers will confer face-to-face with one another in an effort to resolve their differences. The meeting shall take place on or before the thirtieth day following each party's selection of a decision-maker. The meeting will be at a date, time, and location agreed to by the parties; if the parties are unable to agree, the date, time, and location of the meeting will be designated by the Institute.

If the parties are able to resolve some or all of their differences, they will enter into a Joint Stipulation that identifies the dispute they have resolved, and whether any dispute remains that requires further arbitration. The Joint Stipulation will be filed with the Institute.

If matters remain unresolved following the meeting, the Institute will give the parties a ten-day period in which to agree upon the selection of a mediator to work with the parties in an effort to resolve their remaining differences. If the parties are unable to agree upon a mediator within the ten-day period, the Institute will appoint the mediator. Any mediator appointed by the Institute will be a lawyer knowledgeable in oil and gas law. Upon identification of the mediator, the Institute will forward to the mediator a copy of the Arbitration Notice, the Arbitration Notice Reply(ies),
and any Joint Stipulations. The mediation will be commenced on or before the forty-fifth day following the meeting of decision-makers. If the parties are able to resolve some or all of their differences, they will enter into a Joint Stipulation that identifies the dispute(s) they have resolved, and whether any dispute remains that requires further arbitration. The Joint Stipulation will be filed with the Institute.

Any Joint Stipulation that resolves all disputes between the parties will name the current Executive Director of the Institute as the parties' selected arbitrator for the sole purpose of issuing an award that incorporates the terms of the Joint Stipulation. Upon issuing the award incorporating the Joint Stipulation, the arbitration will terminate.

If the mediator determines that a party is not participating in the mediation process in good faith, the mediator can terminate the mediation by delivering to the Institute the following document titled "Termination Statement":

**TERMINATION STATEMENT**

This mediation is being terminated because the mediator does not believe that [name of party(s)] is (are) participating in the mediation process in good faith.

[Signed by Mediator]

Upon receipt of the mediator's Termination Statement, the Institute will proceed with selection of an arbitrator pursuant to section 5. The Institute will provide the arbitrator with a copy of the mediator's Termination Statement which, for purposes of section 9, will be conclusive on the issue of the party's lack of good faith during the mediation process. Under no circumstances will the mediator be called by the parties, or the arbitrator, to be a witness, or otherwise provide information or testimony in any form, regarding the mediation. The only evidence the parties can present, or the arbitrator request, concerning the terminated mediation process, is evidence that will assist the arbitrator in calculating the amount necessary to fully compensate the complying party as required by section 9.

5. **Arbitrator Selection.** If the parties are unable to resolve their differences pursuant to section 4, the Institute will initiate the arbitrator selection process by providing the parties with identical lists containing the names of five potential arbitrators. The Institute’s list of arbitrators will include only persons who are lawyers knowledgeable in oil and gas law. Each list will be accompanied by an Arbitrator's Questionnaire completed by each potential arbitrator. Each party is given the option to strike up to two names from the list. Each party will then rank numerically (with number 1 being their first choice) each of the unstruck names on their list.
The parties must report their strikes and rankings to the Institute within ten days following receipt of the list.

If there are only two parties involved, the Institute will appoint the arbitrator from the list that coincides, as closely as possible, with the highest-ranked unstruck person on each party's list. When there are more than two parties, if the process does not yield an unstruck candidate after circulating two lists, the parties will have a period of three days to agree upon an arbitrator among one of the ten listed and, failing agreement, the Institute will randomly select a name from the ten candidates.

If at any stage of the selection process a party fails to timely or properly respond, all candidates on the list(s) will be deemed acceptable to the party.

The Executive Director of the Institute, during any phase of the dispute resolution procedures provided for by these Rules, may trigger selection of an arbitrator whenever it becomes apparent to the Executive Director an arbitrator is needed to manage the process.

The selected arbitrator must be impartial and will be governed by the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes.

6. One Arbitrator Unless Otherwise Agreed. Unless the parties agree otherwise at the time the arbitrator selection process begins, all disputes will be determined by a single arbitrator. In the event the parties agree to have more than one arbitrator, they must agree on an odd number of arbitrators and the Institute will, once the desired number of arbitrators is identified, design the lists and process that will be used to select the arbitrators. If the parties fail to agree upon the number of arbitrators, the Institute will proceed to have the dispute determined by a single arbitrator.

7. Arbitrator's Case Management Role. Upon identification of the arbitrator, the Institute will forward to the arbitrator a copy of the Arbitration Notice, the Arbitration Notice Reply(ies), and any Joint Stipulations. After reviewing the Arbitration Notice, Arbitration Notice Reply, and any Joint Stipulations, the arbitrator will decide whether the case is ripe for decision pursuant to § 10 of these Rules, or whether further information is necessary or desirable.

The parties direct the arbitrator to resolve the disputes between them in the most efficient manner possible considering the monetary value of the dispute, the relative complexity of the factual issues associated with the dispute, and the long-term impact the dispute could have on the parties' lease relationship. However, any selected course of action in pursuit of these goals will be at the arbitrator's sole discretion. If the arbitrator determines that further information is necessary or desirable, the arbitrator will fashion the procedure which they believe will most efficiently produce the information in a manner consistent with the parties' dispute resolution goals. The procedure selected by the arbitrator may, or may not, include oral presentations or live testimony. In the event the arbitrator desires to
have live in-person proceedings, they will be conducted at a date, time, and location designated by the arbitrator. Either before or after fashioning a proposed procedure to govern subsequent proceedings, the arbitrator may, if it is deemed efficient under the circumstances, obtain the input of the parties regarding the proposed procedure.

8. **Arbitrator's Award and Written Opinion.** After considering the evidence submitted by the parties pursuant to these Rules, the arbitrator will prepare a written Draft Opinion which contains the arbitrator's findings of fact, conclusions of law, analysis of the dispute, and proposed award. In deciding any dispute the arbitrator will endeavor to apply the appropriate law to the dispute, including, without limitation, any applicable statute of limitation. However, the arbitrator will not be required to follow formal rules of evidence and can, if they deem it appropriate, consider applicable industry norms or other matters tending to define the business context of the dispute.

The arbitrator will serve the Draft Opinion on the parties who will, on or before the thirtieth day following receipt of the Draft Opinion, review and prepare briefs commenting on the Draft Opinion. Briefs will not exceed twenty-five pages in length. Upon receipt of the parties' briefs, the arbitrator may reopen the proceedings to obtain further information or proceed with issuance of an award and Final Opinion. The award and the Final Opinion may vary from the Draft Opinion and proposed award. The Final Opinion will contain the arbitrator's findings of fact, conclusions of law, analysis of the dispute, and award. The award will also be reported in a document titled "Arbitrator's Award" which will state the relief granted and the assessment of any fees or costs authorized by these Rules.

The Final Opinion and the Arbitrator's Award will be delivered by the arbitrator to the Institute; the Institute will serve each party with a copy of the Final Opinion and the Arbitrator's Award. The arbitrator's Final Opinion will constitute binding precedent between the parties regarding matters addressed by the arbitrator and, to the extent it is relevant, will be adhered to in subsequent proceedings governing the parties' rights and obligations under the oil and gas lease. Any Final Opinion and Arbitrator's Awards will be binding upon the parties to the oil and gas lease and any successors or assigns that subsequently acquire an interest in the oil and gas lease.

Although the parties, by this Rule, are requiring the arbitrator to issue a detailed Final Opinion, they do not intend to expand in any way judicial review of the arbitrator's findings, conclusions, analysis, or award. Instead, the parties intend that the arbitrator's award will be reviewable only on the limited grounds specified in the Federal Arbitration Act. 9 U.S.C. §§ 1-16.

9. **Arbitrator Remedies.** The arbitrator is authorized to fashion any remedy they deem appropriate under the circumstances, including specific
performance and declaratory relief that will govern the prospective rights and obligations of the parties under the oil and gas lease. The arbitrator has the discretion to assess another party's attorney fees, and any other expense associated with the arbitration process, against any other party. However, the arbitrator does not have any authority to award exemplary or punitive damages.

If the arbitrator determines that any party failed, in good faith, to comply with the procedures outlined in § 4 of these Rules, the arbitrator shall assess Institute expenses, mediator costs, and party expenses (including travel expenses, lost work time, attorney fees, and any other loss that the party can demonstrate arose out of the other party's failure to participate) against the non-complying party. The parties recognize that a failure to pursue the informal proceedings provided for by these Rules can give rise to unnecessary expenses and loss of productivity that is difficult to value. Nevertheless, the arbitrator will endeavor to fully compensate the complying party to the maximum extent possible.

10. Summary Procedure. The parties authorize the arbitrator, when the arbitrator deems the matter ripe for summary disposition, to decide the dispute based solely upon the information contained in the Arbitration Notice and the Arbitration Notice Reply. The parties agree that for purposes of § 10 of the Federal Arbitration Act they will be deemed to have had a complete opportunity to present evidence pertinent and material to the controversy by the process of filing either an Arbitration Notice or an Arbitration Notice Reply as provided for in § 3 of these Rules. The decision to employ this summary procedure will be in the sole discretion of the arbitrator which the arbitrator will exercise after reviewing the content of the Arbitration Notice and Arbitration Notice Reply(ies). In the event the arbitrator determines the matter is not ripe for summary disposition based upon the Notice and Reply, the arbitrator may receive additional information from the parties and, at any subsequent time, find that the matter is ripe for summary disposition.

11. Fees and Deposits. Upon filing an Arbitration Notice the filing party will pay to the Institute a non-refundable filing fee of $500.

In the event the matter goes to mediation, the Institute will provide the party filing the Arbitration Notice with the mediator’s estimate of the time required to mediate the dispute, their hourly charge, and any expenses they anticipate. These amounts will be reflected in a Mediation Deposit Statement prepared by the Institute which requires a deposit equal to 110 percent of the mediator’s estimated total charges. The party filing the Arbitration Notice must, on or before the tenth day following receipt of the Mediation Deposit Statement, pay the required deposit to the Institute. In the event the actual mediation expenses exceed the deposit, the party filing the Arbitration Notice will be responsible for payment of the balance due to the mediator.
In the event the matter goes to arbitration, the Institute will provide each party to the dispute with the arbitrator's estimate of the time required to arbitrate the dispute, their hourly charge, and any expenses they anticipate. These amounts will be reflected in an Arbitration Deposit Statement prepared by the Institute which requires a deposit equal to 110 percent of the arbitrator's estimated total charges. Each party must, on or before the tenth day following receipt of the Arbitration Deposit Statement, remit 50 percent of the required total deposit to the Institute. In the event the actual arbitration expenses exceed the deposit, the parties will each be severally responsible for payment of 50 percent of the balance due to the arbitrator. In the event there are more than two parties, or two aligned groups of parties, then each separate party, or party group, will be responsible for contributing their proportionate share of the required deposit. The Institute will determine the number of party groups and party alignment for purposes of assessing the deposit required by this section.

If the party filing an Arbitration Notice fails to pay the Filing Fee, the arbitration proceeding will be deemed to have never been commenced. If the party filing the Arbitration Notice fails to timely pay the amount required by a Mediation Deposit Statement, or the amount required by an Arbitration Deposit Statement, the arbitration proceeding will be deemed dismissed and can be refilled only upon serving a new Arbitration Notice on the party(ies) and paying a new Filing Fee. If the party filing an Arbitration Notice Reply fails to timely pay their share of an Arbitration Deposit Statement, the party filing the Arbitration Notice will be required to pay the amount due and, regardless of who is ultimately the prevailing party in the arbitration, and regardless of any other allocation of expenses made by the arbitrator, will be entitled to an award of an amount equal to ten times the amount due under the defaulting party's Arbitration Deposit Statement. In the event the non-defaulting party fails to timely pay the amount due under the defaulting party's Arbitration Deposit Statement, the arbitration proceeding will be deemed dismissed.

Any unused amount held on deposit by the Institute will be returned to the party making the deposit with a written account of amounts received, amounts disbursed, and the balance remaining.

12. Service of Documents; Document Format. All documents required to be served upon another party, the Institute, or the arbitrator, will be deemed served when actually received by the addressee regardless of the means by which they were transmitted. All documents will be on white paper measuring 8.5 inches by 11 inches. Top, bottom, left, and right margins will be no less than 1 inch. Type will be no smaller than 10 point type set no more than an average of 12 characters per inch in black ink. All text will be double-spaced; footnotes will be single-spaced and will conform to the most recent edition of The Bluebook, A Uniform System of Citation.

13. Confidentiality; Indemnity for Institute, Mediator, and Arbitrator; Third
Party Beneficiary Status. All information provided during the course of the arbitration proceedings, including the negotiation and mediation phases, and including the arbitrator's Draft Opinion and Final Opinion, will be kept confidential by all parties involved in the process. However, the Final Opinion in any arbitration proceeding can be used by a party in any subsequent arbitration proceeding concerning the same oil and gas lease. If a party is ordered by a court to reveal information covered by this section, they will inform the court of this confidentiality obligation and seek to have any required disclosure made in the most protective manner they can arrange under the circumstances.

The parties agree that they will not call any mediator, arbitrator, or member of the Institute to be a witness, or otherwise provide information or testimony in any form, regarding any matter in any way related to the dispute resolution proceedings contemplated by these Rules. The parties further agree to indemnify and hold harmless any mediator, arbitrator, the Institute, and members of the Institute, against any claim, loss, or damage, including attorney fees and litigation expenses, and including claims based upon the sole or concurrent negligence of any mediator, arbitrator, the Institute, or members of the Institute, arising out of or related to the dispute resolution proceedings contemplated by these Rules. For purposes of these Rules, the parties intend that any mediator, arbitrator, the Institute, and members of the Institute, are to be intended third party beneficiaries of the parties' obligations under these Rules to include, without limitation, the obligation to pay fees under § 11 and the obligation to indemnify and hold harmless under this § 13.