



## **BEST PRACTICES AND TIPS FOR ALLOCATION ASSIGNMENTS**

This guide is intended to provide guidance and best practice tips for neutrals considering an allocation assignment. It is intended to provide a starting point to lay the groundwork for an ethical and fair process.

### ***WHAT IS AN ALLOCATION?***

Typically, an allocation assignment involves division of a defined fund. When a dispute has settled and multiple claimants are entitled to some (yet to be determined) portion of the fund, usually tied to the proceeds of a settlement, the court and/or the parties may request the assistance of a neutral to assist in the allocation. Settlement allocation assignments may differ significantly one from another in scope, length, complexity, and process.

### ***PROCESS***

Generally, a neutral receives an allocation assignment in one of three ways.

- By court appointment
- By written stipulation/agreement of the parties
- At the request of Plaintiffs' counsel

Regardless of how a neutral receives the assignment, case managers are directed to send all allocation assignments to JAMS Legal for review.. (Note: this is the process for all atypical assignments.)

Legal review is in place to assist neutrals and case managers with administrative protocols early on in the process to help avoid potential problems later.

### ***DISCLOSURES***

Given the important and sensitive nature of settlement allocations, and given that the neutral will render a decision (whether binding or not), we generally advise the neutral to issue a disclosure statement to the parties. At a minimum, disclosure report(s) should be sent to the parties participating in the process. As the parties on these assignments vary, we should provide the participating parties disclosures based on the information available related to who may have been or will be involved in the matter, including the defense firm that was involved in the settlement. The participating parties should be comfortable with the process and the neutral selected for the assignment. Disclosures assist with this.

## **CONSIDERATIONS WHEN TAKING AN ALLOCATION ASSIGNMENT**

For any allocation assignment, your role should be clearly described in writing. Depending on the assignment this will be in the form of a court order, settlement agreement of the parties, or other written protocol provided by counsel. The document(s) should embody all aspects of the assignment. Following are items you should consider when discussing the assignment with the parties. This list is not meant to be exhaustive, but to provide guidance on the types of information you may need depending on the nature of the assignment.

- ✓ Nature of appointment (court and/or party agreement)
  - If the appointment is court ordered, ensure you receive a copy of the order and review in detail.
  - What is your role (i.e. arbitrator, mediator, special master)?
  - Who will be involved? Claimants and their attorneys only? Will defense counsel be involved, etc.?
  - Are your tasks and responsibilities clearly outlined in the Order and/or Stipulation? Are you comfortable with each and every assigned task? [Are you qualified to perform each task?]
  - If appointed by the court does the order contain all necessary information? (If not we should discuss with the clients and ensure a full and adequate order is obtained by the court.) Depending on the size and nature of the assignment are there any administrative components that can be incorporated to streamline and make the process more efficient?
  - Are there specific time considerations? Does the assignment have to be completed by a certain date and does your availability allow for that?
  - Is an appeal process contemplated and documented? Have you considered what percentage of the fund to hold back to account for potential appeals?
  - Are your decisions final or are they recommendations? Are the decisions confidential or are the claimants able to see how much other claimants are receiving? Will they be informed of exact amounts or ranges?
  - Is it clear that the allocator will be determining a proportionate share of settlement proceeds for a claimant and that the allocator will not determine the costs or fees applied against the settlement fund?
- ✓ Your fees for the assignment and how they will be paid. (Further information on fees below)
- ✓ What is your experience and comfort level with allocation assignments? Should you work with an additional neutral on the assignment?

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- ✓ Are you comfortable with all of the tasks being assigned?
- ✓ Are you and JAMS able to perform all of the tasks?
- ✓ If counsel assisted with developing the process and methodology for the assignment, have all counsel representing claimants had the opportunity to comment on the proposed protocol or provided confirmation that they waive that right by designating a liaison to speak for the group?
- ✓ May counsel provide argument or comments regarding the nature and extent of a particular claimant's damages, or comment on a proposed award, etc.?
  - Will you be making decisions by conducting in person hearings, by written submission, a combination of both? If in person are there location considerations (i.e. needing to hold hearings in multiple states to accommodate claimants)?
  - How will you organize hearings and handle timing on matters with a large number of claimants?
- ✓ Have the elements you will consider when rendering your decision been determined? Will the elements be traditional elements of damages and/or will there be other case specific elements included in your determination?
- ✓ Are *ex parte* communications addressed in the order/agreement? Are they allowed and under what specific circumstances?
- ✓ Consider revisiting and reviewing the Order and/or Stipulation throughout the life of the matter to ensure that as the assignment progresses there is not a change to your assigned duties and tasks. Consider whether the assignment has evolved and whether an updated order or writing is needed to reflect the changes.
- ✓ Any additional information you need to perform your duties.

### **SETTING CLIENT EXPECTATIONS – who is the client?**

When considering an allocation assignment and during your initial discussion with the clients one thing to consider is clearly setting client expectations. Be transparent throughout the process about your role – and specifically what you will and will not be doing. While we generally have extensive discussions with counsel – allocation cases are different and neutrals should be comfortable that counsel has adequately explained the process to their clients. If a neutral believes a claimant does not understand the process, or a neutral has received a complaint related to the process, they should reach out to counsel to discuss and document a resolution.

Best Practice Tip: Confirm, in writing, with counsel that all those involved have been properly apprised of the process and the extent and limitations of your role. JAMS and your Case Manager can assist if needed with such documentation. Consider whether a one-page description or FAQ about your role provided by counsel to their clients is appropriate.

If your assignment is based solely on written submissions consider confirming with counsel, in writing, that you will be relying only on what is being provided to you for purposes of your review.

### ***FEE CONSIDERATIONS***

Fees may be assessed on allocation assignments in a variety of ways and are influenced by a variety of factors. The neutral may charge hourly, a flat fee, a flat fee per claim, a combination of hourly and flat fees, etc. It is important to be upfront and clear on how the fees will be billed and collected.

If you are considering a flat fee arrangement, you (or JAMS) should provide to the parties an explanation and basis for the fee. This should be confirmed in writing—in a letter to the clients, in the clients' agreement, in an Engagement Agreement, etc. Transparency regarding fees is critical. Consider whether the agreement should allow for reconsideration of the flat fee amount should the work differ substantially from originally anticipated.

We encourage you to include your Case Manager and/or local Business Manager in the fee discussions you are having with the clients. JAMS Case Management Fees are also assessed on these assignments and it is important that these fees are discussed upfront.

### ***ADDITIONAL ADMINISTRATIVE SERVICES JAMS MAY PROVIDE***

Depending on the nature and size of the allocation assignment JAMS can provide more extensive administrative assistance. Formalized administrative procedures can improve efficiencies. Such additional administrative procedures can help maintain the integrity of the process and formalize and safeguard documentation of the process as well as prevent possible errors.

In addition to the regular administrative services JAMS provides, below are some examples of services and processes that JAMS has incorporated and utilized in previous matters. This list is not intended to be exhaustive, but to provide examples of different services JAMS is available to provide to support the allocation process.

- Multi-level reviews with various neutrals. [For example, primary reviewer level with summary and recommendation provided to secondary level; secondary level review is conducted as a group and then submitted as final proposal.]
- Establishing claims files for easy access to needed documents.
- Administrative quality checks/reviews of recommendations to ensure consistency.
- Hiring experts as needed—for example, an ethicist to assist with potential ethical issues or concerns that may be encountered during the course of an assignment. [This is to provide guidance to JAMS and the neutral[s] with regard to processes put in place by JAMS.]
- Setting up and using third-party resources (such as case administration websites, third-party platforms for document management and claims administration).

We are able to tailor and customize the process to the needs of the clients. Considering administrative options at the beginning of an assignment may increase efficiencies and safeguards.

## ***OTHER RESOURCES***

The JAMS Institute Library has several informative videos where neutrals experienced in allocations discuss the various cases they have handled and things to consider when working on these assignments. They can be accessed by clicking here: [Allocations](#)

The legal team is always available and happy to assist with any questions or concerns you may have regarding an allocation assignment. Our contact information is below, please feel free to reach out to any one of us at any time.

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