CHAPTER 5

The Hearing
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5.4 What are effective ways of organizing the presentation of evidence and arguments? ................................. 232
Subject to the parties' agreement, arbitrators have broad authority to direct the order of proof. Arbitrators often have parties file pre-hearing memoranda and present opening and closing statements. Periodic summations of evidence and properly focused post-hearing briefs may also prove helpful. Arbitration also offers opportunities for shortcuts in the presentation of evidence.

5.5 How can developing technology be effectively employed in arbitration? ....................................................... 243
Arbitrators have much greater ability than judges to innovate with new technology to achieve the traditional goals of arbitration. New technology provides opportunities for improved document management and retrieval and visual displays of evidence.

5.6 When, if ever, may arbitrators sanction parties or counsel? .......................... 245
Where a party asserts a frivolous claim or defense, seeks to delay or disrupt hearings, or materially fails to cooperate in discovery, many arbitrators consider imposing sanctions. Commission members have mixed opinions regarding the use and nature of sanctions.
5.1 What roles can arbitrators play in assuring that hearings will be conducted fairly, efficiently, and civilly?

In arbitration, evidentiary hearings represent the “main event.” The presentation of the case before the arbitration tribunal is the central focus of participants’ energies and, for most, the primary determinant of their perspective of the arbitration experience.

As stated in Chapter 4, while substantial evidence suggests that most users perceive of arbitration as a relatively speedy and efficient path to justice, many parties still voice complaints about what they view as unnecessary delays. During hearings, as in the pre-hearing period, concerns about scheduling delays, disruptions, and procedural inefficiencies must be balanced against fairness concerns—which federal and state statutes guarantee.

The law governing arbitration provides only the most general parameters for the conduct of hearings. Even leading arbitration rules, while more specific than applicable statutes and their judicial interpretations, leave considerable discretion to arbitrators and, often, room for choice by participants.

1. Active management

*Effective arbitrators actively manage the hearing*

Just as the judge is the manager of proceedings in court, the arbitrator controls the arbitration hearing. In some respects, given the degree of discretion accorded them under arbitration law and leading institutional rules, arbitrators enjoy even greater authority than judges over hearings. Commission members agree that the experience of arbitrating parties’ satisfaction with the process directly depends upon the willingness of arbitrators to use their authority effectively.

A frequently cited article aimed at arbitrators in large, complex commercial cases advises that to achieve the goals of “expeditious, economical, and just determination of disputes, . . . arbitrators should not be passive, but rather should manage the conduct of proceedings with a firm hand.” Even in arbitra-

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3. See id.
tors schedule hearings for the presentation of evidence in the manner most conducive to efficiency as well as fairness. They establish the order of presentation and encourage the use of presentation formats (including those incorporating new technologies) that aid in the meaningful presentation of the case in the shortest possible time.

At the same time, effective arbitrators remain vigilant for and do their best to anticipate emerging problems. They also help arrange creative solutions that avoid unnecessary disruptions to the hearing schedule. For example, becoming aware that a witness may be unavailable for an afternoon session, an arbitrator may seek the parties' assistance in developing a contingency plan that involves taking a witness out of order or tending to other business. Other examples are provided in the following pages.

Effective arbitrators do not simply act as passive receptacles for the receipt of evidence, to avoid having to deal with evidentiary objections. Rather, they explain their guidelines for the admission of evidence—along with the rationale for those guidelines. Specific examples are discussed below.

Effective arbitrators also recognize that in the interest of gaining a complete understanding of the issues and the facts, it may be appropriate for the arbitrator to put questions to witnesses after the advocates have finished their questioning. Such actions can help arbitrators clarify points and alert the parties to their questions and concerns.10

Finally, most commercial parties and attorneys are aware that bad behavior during a hearing is counterproductive and most Commission members have had little difficulty maintaining civility in the hearing room. Nevertheless, arbitrators must take great care to deal decisively with disruptive or discourteous behavior and not to let things get out of control. This can happen fairly quickly: if it is perceived that one party "got away" with certain behavior, the other party may feel obliged to reciprocate, and will be sensitive to what is perceived as unequal treatment. Such behavior should be stopped immediately with a rule equally and emphatically enforced. ("There shall be no cross-talk; all remarks shall be directed to the tribunal.") In rare cases, the arbitrator may have to adjourn the hearing and call in counsel. (In one case, where the parties were putting pressure on the lawyers to "be tough," with consequent frequent disruptions in the hearing, an experienced arbitrator recalls summoning the lawyers and threatening to resign if they did not modify their behavior. They complied.) In extreme cases, a party's lack of cooperation may justify some form of sanction. Such options, which include cost-shifting, are discussed below.

**Arbitrators as role models**

As the foregoing discussion indicates, leadership flows from the arbitrator. In many cases, respect for the arbitrator goes a long way toward establishing standards for cooperation in the hearing room. In the case of a three-member panel,

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10. See Barrett, supra note 4, at 20.
room, and exhibiting civility toward other arbitrators and participants. (Such expectations are consistent with the Code of Ethics for Arbitrators in Commercial Disputes and prevailing arbitration law. 16)

2. Making expectations clear

From the earliest contact with the parties, as explained in Chapter 4, effective commercial arbitrators make deliberate efforts to communicate to the parties their mutual expectations of the arbitration process. Because most commercial arbitration procedures leave considerable room for arbitral judgment (informed in many cases by discussion among the participants), there is a need for clarification on various points of procedure, such as the handling of hearsay, burdens of proof, 17 the arbitrator's role in questioning, and other evidentiary matters.

3. Maintaining the focus

Although the pre-hearing process may help to simplify, clarify, and prioritize the issues in dispute, effective arbitrators keep the participants focused on the issues during evidentiary hearings:

The arbitrator must . . . direct the parties to the real issues and each party's position with respect to them. The arbitrator must ensure that the parties do not become sidetracked on minor or irrelevant issues which will not materially influence the outcome of the proceeding. 18

Arbitrators may keep the parties focused by utilizing techniques such as periodic summations, pointed questions to counsel or witnesses, and other techniques discussed in Section 5.4.

4. A subject for training

Commission members generally concur that issues related to controlling the hearing should be a regular part of the training of commercial arbitrators.

16. See id. § 28.4.5.
5.2

How can parties and advocates function most effectively in arbitration hearings?

1. Appreciating the realities of arbitration

Surveys of commercial arbitrators, lawyers, and business participants often reflect dissatisfaction with what they perceive to be inappropriate courtroom tactics in arbitration—tactics they see as a leading cause of delay or disruption. Skillful advocates and perceptive clients understand that effective representation in arbitration requires sensitivity to the following realities of out-of-court adjudication:

- (1) arbitration is not court trial, and assumptions and expectations brought from the courtroom may be misplaced in arbitration;
- (2) under applicable law and the rules governing the hearing, arbitrators have considerable flexibility in handling evidentiary objections and making other rulings; and
- (3) the tribunal often includes laymen, not necessarily attorneys, who may have pertinent expertise and bring with them particular perspectives on the issues in dispute.

2. Effective and ineffective arbitration techniques

Dean Thomson conducted a survey of arbitrators regarding their experiences and attitudes about advocacy that resulted in some useful guideposts for advocates in arbitration. The arbitrators were asked to describe the attributes of an effective advocate in arbitration, and then to describe those of an ineffective advocate. Table 5.A lists the characteristics they most often mentioned.

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22. See generally id.
The arbitrators were also asked to identify advocacy techniques which they viewed as particularly effective or ineffective. Their responses (shown in Table 5.B) echo their earlier answers.

As the foregoing suggests, the preparation, strategies, and demeanor of attorneys can have a major impact on the response of the arbitration tribunal. Further thoughts on effective case presentation, offered by Commission members, are detailed in the sections that follow.

**Being prepared**

In arbitration as in court, there is no substitute for effective preparation. Effective preparation means not only having a thorough understanding of all aspects of the case, factual and legal, but also considering how to make the clearest and most meaningful presentation to the arbitrators. The latter often includes a well-organized “arbitration notebook” which serves as the framework for presentation at the hearing—a subject which is discussed below.

On the other hand, some advocates make the mistake of believing that because arbitration is less formal than the courtroom, it is unnecessary to “sweat the details” in preparing for the arbitration hearing—that they can rely on seat-of-the-pants advocacy to prevail. This can lead to particularly embarrassing results, as reflected in the following anecdote:

The party presented a rather extensive claim for allegedly defective work and assured the arbitration panel that the claim would be amply supported by testimony from the president of the company performing corrective work. When the latter testified, however, his rather vague statements failed to provide detailed support for the claim. When, after cross-examination, he was pressed by the arbitration panel to give more information, he turned to counsel for the claimant and inquired, “Shall I tell the arbitrators about the letter I sent you that you told me not to tell them about?” He then proceeded to explain that he had informed counsel in writing that their client’s claim was dramatically overblown—testimony that was, of course, devastating to the claim.

In the days when pre-hearing discovery was relatively rare, one might understand an advocate’s expectation that case preparation would be completed as information spilled (or dribbled) out during the hearings. As arbitrators increasingly exercise their authority under current arbitration rules to direct pre-hearing exchanges of information, there is much less reason for such a state of affairs.

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23. See id. at 160–62.