

Effective Decorum During the Arbitration

By Daniel Baldwin

New and increasingly creative forms of Alternative Dispute Resolution seem endless in our modern society. However, in the world of commercial arbitration, certain practices remain constant no matter how much has changed in dispute resolution and hearings management. Managing the arbitration environment is crucial to successful outcomes for all parties involved. Maintaining effective decorum is not optional, it is required. For example, the Federal Code of Regulations contains a common definition of the basic obligations of arbitrators: “Arbitrators shall maintain order and decorum in the proceedings, be patient, dignified, and courteous to the parties, witnesses, and their representatives, and dispose promptly the business before them.”¹ Such basic tenets should be upheld not only by the arbitrators, but by all parties to an arbitration.

The arbitrator is expected to conduct the hearing with dignity and decorum and should set the tone for the proceeding. The arbitrator’s ability to control the conduct of the hearing has a great impact on how efficiently and effectively the dispute between the parties will be resolved. Arbitrators are the procedural regulators who should not be afraid to exercise their authority. While parties and their representatives typically conduct themselves properly during the hearings, there are times when tempers flare and the proceedings can become disorderly. Misconduct can take many forms, both minor and egregious, including witness or party harassment, uncalled for interruptions, vulgar language, name-calling, or rude gestures. It is up to the arbitrator to control the proceeding and discourage or penalize parties or counsel who demonstrate a lack of the expected dignity and decorum of the proceeding.²

Many arbitrators take full advantage of the “less than formal” approach common in arbitration hearings. However, subtle dangers arise when the arbitration process becomes too relaxed. Arbitrators should apply similar rules and practices found in courtrooms, but be careful to maintain the balance between the less formal arbitration process and the decorum of a courtroom. Understanding this balancing act helps to keep the hearing clear, succinct, and candid during oral communications with all parties.

Another important part of decorum is emotional self-control. The arbitrators may set the tone for the hearing, but it is up to counsel to balance zealous representation with calm and respectful behavior. Clearly, lawyers are trained to be advocates for their clients and will represent the interest of the client with vigor, dedication, and strong commitment. However, this zeal in representation should not translate into a chaotic hearing where loss of composure, abusive language, rudeness, or disrespect is the norm.

The arbitrator must maintain this delicate control and balance by clearly demonstrating “command and control” of the arbitration hearing. If the arbitrator does not immediately put an end to unnecessary outbursts or actions that lead to loss of control and decorum, such conduct will be detrimental to the parties’ interest and contrary to the administration of justice. Civility is key in arbitration hearings. Professional conduct shows respect not only for the process of arbitration, but also for the interest of all parties including the arbitrator.

Arbitral institutions also focus on arbitrator conduct in maintaining efficient and effective proceedings. The American Arbitration Association (AAA) Code of Ethics for Arbitrators in Commercial Disputes sets forth Canons for how arbitrators should conduct themselves:

CANON I: An arbitrator should uphold the integrity and fairness of the arbitration process.

An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself and must observe high standards of conduct so that the integrity and fairness of the process will be preserved.

By holding himself or herself to a high standard of conduct, the arbitrator also sets the tone for the arbitration and increases the likelihood that counsel will conduct themselves in kind.

CANON IV(A): An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

Canon IV makes it clear that fairness starts with exemplary arbitrator conduct by stating that arbitrators should treat all parties with fairness, impartiality, courtesy, and patience. Not only does Canon IV emphasize that arbitrator conduct impacts how smoothly the hearing is conducted, but also that the arbitrator has an obligation to encourage the parties, witnesses, and counsel to equally obey similar rules of decorum.³

After surveying the rules of engagement of some of the most prominent ADR programs in the United States, it is clear that effective decorum is essential to a successful hearing. According to the Merriam-Webster dictionary, decorum means: “correct or proper behavior that shows respect and good manners.” As arbitrators, we serve in a unique capacity that gives us the privilege to set the tone for disputing parties and to encourage them to address their differences in an environment where the conventions of polite behavior and propriety and good taste in conduct exist. This capacity to set the tone and control the process may be the best ADR tool to a successful resolution regardless of the underlying substance and complexity of the dispute.

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¹ 37 CFR 251.30.

² See *Instructions for Witnesses In Arbitration*, APWU (2015), available at: <http://www.apwu.org/ir-instructions-witnesses-arbitration>.

³ See *Neutral Corner*, FINRA (2002), available at: <https://www.finra.org/arbitration-and-mediation/neutral-corner-august-2002>.