Chapter 16

THE ROLE OF THE ARBITRATOR, IF ANY, PRIOR TO THE HEARING

How often have you spent the first half of a hearing—an entire morning—hashing out disagreements on the issues, information requests, subpoenas, etc.? How have arbitrators handled such issues? How should they? What tools might help? Join us in a session with a panel of advocates and arbitrators to look at the feasibility—including the possible pitfalls—of having the arbitrator assist in attending to these uncertainties *prior* to the hearing.

Moderator:	Sharon Henderson Ellis, Member, National Academy of Arbitrators, Brookline, Massachusetts
Arbitrators:	Jane H. Devlin, Member, National Academy of Arbitrators, Toronto, Ontario, Canada
	Elliott H. Goldstein, Member, National Academy of Arbitrators, Chicago, Illinois
Union Advocate:	W. Daniel Boone, Weinberg, Roger and Rosenfeld, Alameda, California
Management Advocate:	John M. Phelan, AT&T, Chicago, Illinois

Ellis: Good morning, everyone. We have for you a very diverse and experienced panel, both advocates and arbitrators, three from the states and one from Canada.

On my left is Dan Boone. He's a labor attorney and union advocate with Weinberg, Roger and Rosenfeld in Alameda, California. Dan is an advocate who is frequently asked by the Academy to speak at these meetings. He's advocated on behalf of unions in the public and private sector in approximately 2,500 arbitrations from what he calls the "quick and civil to the long and nasty."

To Dan's left is Jane Devlin, an arbitrator from Toronto with a private practice in mediation and arbitration since 1982. Although the focus of her work is labor, she also deals with sports disputes

as an arbitrator and mediator for the Sports Dispute Resolution Center of Canada.

Next to Jane is John Phelan. He's general counsel for AT&T located in Chicago. We have John to thank for providing this topic. He's responsible for legal support for arbitrations at AT&T's Midwest region, and at the moment he's involved in negotiations for two core contracts for AT&T involving 30,000 employees.

Many of you probably know Elliot Goldstein. He's an active arbitrator working primarily in the Chicago area and the Midwest, a frequent speaker at continuing education seminars, and he has written extensively on labor law issues. He's a member of the College of Labor and Employment Lawyers, a past chair of the Chicago Bar Association's Labor and Employment Committee, and a former member of the National Academy of Arbitrators' Board of Governors.

Finally, my name is Sharon Henderson Ellis. I've been an arbitrator since 1982 and I'm an adjunct professor at Boston College Law School and New England School of Law in Boston.

Phelan: Thank you Sharon. I really appreciate the invitation to be part of the panel today and the invitation of Marty Malin to be on the program committee. I'm here to present the management viewpoint. We have a common interest in reaching resolution of the issues voluntarily between us before we put them in front of the neutrals. Because when we get in front of a neutral, it's because of a failure of the parties to be able to understand how to proceed. We are exhibiting a great amount of trust in allowing our control of a dispute to be put in the hands of somebody whom we trust to bring to bear a great deal of patience in listening, to understanding the dispute. And I think that applies to pre-hearing issues, as well as the merits of the case itself. The disputes we put in front of arbitrators are the most difficult disputes to resolve. I'd say 99 percent of our cases at AT&T get resolved during informal discussion, during the course of the grievance procedure.

Ellis: Thank you, John. So now to our union advocate, Dan.

Boone: I approach this subject within a framework of understanding. We conceptualize two separate roles the arbitrator plays. First, the parties have hired the arbitrator to hear and decide the case. The arbitrator is working for the parties to hear the evidence, make a ruling, and ensure that it is implemented.

The arbitrator is also functioning in a related, yet broader, role, with greater powers than a trial judge. In the language of the *Steelworkers Trilogy*, the arbitrator is "the reader of the contract." The

arbitrator is authorized, in fact required, to maintain the integrity of the collective bargaining agreement, and as a general proposition to look out for the collective bargaining relationship.

As the advocate for the union, I want to have as much as possible happening in the presence of the union representative, the steward, the rank-and-file leadership, the grievant, and the participants on the side. I want the union side people to see what's going on. They have to understand the process. It's their livelihood. It's their organization. In order to more effectively represent members as rank-and-file leadership or to have their lives affected by this, I want them to be in the room to see what's going on. And my job, as the advocate, is to explain to them as best as possible what I'm doing, why I'm doing it.

Goldstein: I strongly agree with Dan because I rarely go out in the hall in a situation where it's an ad hoc case. With an ad hoc case, if I'm going to go out in the hall, I will come back and say, "Here's exactly what we did. And here is what I said and here's what they said." And I'll put it on the record.

But we want to have due process. We want to have fairness. But we want to have it expeditious, cheap, informal. And you want to have it open and understood by people coming off the work floor.

Devlin: It was with some trepidation that I accepted Sharon's invitation to be a member of this panel. The trepidation only increased when she suggested that we begin by discussing the problems we face spending time at the outset of the hearing dealing with process and procedural issues.

In Ontario, the Labor Relations Act provides that an arbitrator or the chair of a Board of Arbitration has the power to require any party to furnish particulars. Or during the hearing to require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing. And to make interim orders regarding procedural matters.

The extent to which one views time spent at the outset of the hearing dealing with procedural issues as a problem may be a matter of perspective. If the parties want to spend the morning discussing procedural issues, then I'm there to help them. If they don't want my help at a certain time, then I'm fine with that.

Ellis: Jane just talked about how in Canada, before most arbitrations, the advocates have already talked and worked out process issues, whether a witness can be examined by telephone, that sort of thing. Whereas Elliott and Dan both talked about the process being open and liking to have those differences worked out right

inside the hearing room rather than out in the hallway away from the client. I don't know what the best answer is. While I was preparing for this panel, I decided that it'd be really interesting to telephone several advocates around Boston and ask them whether they saw this as a problem and what they thought about it. Much to my surprise, I don't think any of them thought it was really a problem. They weren't bothered by the fact that 30 minutes or an hour often get spent at the beginning of the hearing trying to work out differences before you even make opening statements. I thought after that, "I'm going to relax a little bit and not worry about it, because no one else in the room was worried about it, just me, as the arbitrator."

Some of the advocates said to me that they thought it was preferable or sometimes necessary to bring up process issues and work through those issues right inside the hearing room, with the client in the room. So who'd like to elaborate on that a little bit?

Boone: The way I want the morning to start—and we'll put aside the question of soliciting an inquiry about settlement—is to have the morning housekeeping tasks be done as routinely as possible. If there is a timeliness issue raised (typically by the employer), then I would suggest that the arbitrator should ask if it has been raised before in the processing of the grievance. If it has not, then from the union's perspective the arbitrator should say "It is my ruling that a procedural arbitrability question that has not been raised before the day of the hearing is waived and therefore I don't need to hear any evidence about that."

If procedural arbitrability is put before you, because it's been raised before or because they insist on raising it, then the issue is whether or not the grievance is forfeited. The issue is not whether or not the grievance was timely filed. It may very well not have been timely filed. But the critical issue is whether or not that results in forfeiture. And that should be the issue that is articulated for you.

If the timeliness issue is raised, then the arbitrator should not bifurcate the hearing and have the arbitrability issue heard first. Almost always, the merits of the grievance and the arbitrability dispute are intertwined in the taking of evidence.

Ellis: I was also thinking of other kinds of things, an argument over not having provided all the documents, whether or not an advocate can testify, whether he can have a witness by telephone. There are so many things that come up I can't think of all of them. But every hearing I have a number of oddball things that come up.

Phelan: There are unusual pre-hearing requests. There are also routine matters that become unusual because of the history of how they've been brought up. I'll give an example. I work for a company that has 300,000 employees and 51 labor agreements. And just in my region, as Sharon pointed out, we have 30,000 people. So sometimes, when you come with a discovery dispute, a document production dispute, it can be more important to us where we have 30,000 people in the scope of the contract that's being covered by the request. There are circumstances where I agree with Dan in terms of "let's not spend a lot of time in advance on these issues." And I think there are circumstances where they are very important to the parties, to get them understood and ruled upon in advance.

Unidentified Speaker: I was a union advocate and now I'm an arbitrator. What I've tried to do to expedite the process is to encourage opposing counsel to review all the documents, to identify those that foundation can be waived prior to the commencement of the hearing, and then mark them for identification and receive them right at the outset.

Goldstein: I certainly agree with Dan to as much as possible try to deal with the client present. I attempt to prepare the client, also, for what's going to happen during that preliminary session.

Unidentified Speaker: I think Elliott's point is so right on in terms of having an ongoing relationship. I'm on the panel with AT&T and CWA in Atlanta covering nine states. I know when a hearing is scheduled that it's going to be at Marriott Courtyard. I know how the room is going to be set up. I know that both parties are going to have all the witnesses and all the observers they want for that case to be present in the room. I know who the counsel are going to be and I've worked with them before. I know that the first thing out of the box is going to be joint exhibits, and they're going to come right in.

But when there's an ad hoc situation, it's less clear what's going to happen. The contract explicitly called for management to secure a court reporter. Oops. They forgot. We were delayed four hours before we could secure a court reporter. The second day of the hearing, there was a disagreement over how documents were going to be marked. They couldn't reach agreement. They spent three hours the second day cross-referencing all the documents. And we had to refer to management's X, Y, Z that corresponds with union's X, Y, and Z. We wasted so much time. They were angry when I made them stay until 6:00 p.m. But, we got through

it. Those are the type of things if you know in advance and can get them done, it can really assist a great deal.

Unidentified Speaker: There are some procedural issues where the client wants to be there, to hear counsel make the argument. An issue about the scope of the grievance is not something that's going to probably lend itself to being dealt with by way of a conference call. You're actually going to have to do that at the hearing.

Ellis: I'm going to ask the panelists, starting with the advocates, what have you seen arbitrators do with these preliminary housekeeping issues that you found to be effective.

Phelan: In terms of how to handle some of these process issues, what I have probably the most difficult time with is when those signals that we're sending in response to those kinds of questions of how important the case is, or how important a particular prehearing issue is, are missed or ignored and a ruling comes up. It doesn't make sense for the situation. We had one case where we had a neutral say, "I always let in all of the documents and allow people to respond on either side," and really didn't hear our position at all, even though the advocates had flown to another city in order to give a pre-hearing oral argument on the scope of that request. We weren't expecting a written decision, but we were expecting an analytical decision as to why he decided one way or the other. So I do think the types of things that you've talked about, the pre-hearing checklist, the asking for the joint exhibits, the asking for the issues, the asking for the number of witnesses, have been very helpful.

Boone: I like an arbitrator, frankly, to encourage at least the moving party to mark up its exhibits, and then to ask the other side whether there are any objections to those documents. And two-thirds or three-quarters of them are going to get moved into evidence. If it's an authentic document, we know it's going to come into evidence if it's relevant to either side's theory of the case. So you mark them up and that saves time.

Devlin: I wouldn't normally get exhibits in advance of the hearing. I'm not saying I never have, but I certainly wouldn't routinely. And the difficulty is that most often I don't know what the issue is about, what the case is about. So just looking at documents without some kind of context, I don't think would be particularly helpful.

Goldstein: I think 80 percent of our cases that get scheduled get resolved prior to the hearing. I think they get resolved even earlier if the parties turn their attention to the case more than the night before the hearing, which often has to happen. A lot of

times it depends on the size of the case and value of the case. Is it something critically important to the business or critically important to the union's rights?

Knapp: Andrea Knapp, arbitrator in San Francisco. There's something that psychologists call the "curse of knowledge." And basically, the advocates come into the hearing having dealt with this case in whatever the situation was. I walk in, I have no ideas about the case. And so the advocates are poised, ready for me to start making decisions at the very get-go. It really is up to them to educate me with respect to the context within which I'm supposed to be making a decision. The best I can hope for as an arbitrator is to make sure that both sides leave the hearing feeling that they had a full, fair opportunity to make their best case. So things that come up very early when I don't know enough is, I think, the parties' obligation to inform the arbitrator. Make sure the arbitrator understands signals. If the arbitrator is not getting the signal, then that means you need to work harder to get that signal to the arbitrator.

Ellis: Thanks Andrea. I think that's such an important point. The arbitrator is walking into a discharge case or contract interpretation totally cold, and then all of a sudden, we have to start making rulings about what's relevant, what's not relevant. It's really hard at that point.

Let's move on. I'm going to read some language that John gave me out of one of his AT&T contracts. The language is pretty general. It says "The company and union shall attempt to agree upon and reduce such issue or issues to writing at or before the commencement of the hearing." That's very broad; John has said it doesn't add anything. Do you think it's a good idea to put more of this in the collective bargaining agreements, about advocates having to talk to each other prior to the arbitration? The kind of information they have to provide according to the contract? Is that really useful?

Phelan: To me, the language about at least making the attempt to come up with an issue in advance of the hearing has been somewhat helpful. At the very least, it gives the parties sort of a moral responsibility to make a good effort beforehand.

On the issue of bifurcation and whether it's always bad, I'd say it's not always bad because sometimes the parties have agreed to a grievance procedure that isn't just a formality. It really gives the parties the agreed-upon opportunity to resolve those 99 percent of the cases ahead of time and save that cost and expense. To

frame an issue in advance of the hearing, in advance of a resolution of a document production request and as early as possible in the grievance procedure, helps the parties to resolve even more disputes without having to go to the expense and the potential animosity that can result from having to litigate this before a neutral. So it's very valuable language. I think that language needs to be in force.

I've had the situation in the past where we've had a hearing before the hearing to determine whether a particular issue that the union never brought up in the grievance procedure and brought up for the first time sometimes on the eve of arbitration, sometimes halfway through the arbitration, should even be considered before the parties have to go back, regroup, gather more evidence, gather more witnesses to address the new issue. And that's why I think that, when the parties have gone through the trouble to put specific language in the contract, that language should be observed and I really appreciate when it is.

Ellis: Elliott, what have you observed when there's language in the contract intended to help the parties work out issues before the arbitration? Does that help?

Goldstein: It's critical to have these issues brought up; not have surprises, not to have new theories. Because otherwise, how do the parties evaluate a case? How do you have judgments as to what's really going on? I am very concerned when people come to a hearing and there are documents that have never before appeared, or there are issues that have never been presented, or, there's an entirely new theory; and it varies as to what I'll do. And I'm going to give you an opportunity to look at this case and to come back in and talk about it, because it's not arbitration by ambush.

Boone: Union advocates in the room, and many arbitrators, understand that there is often an imbalance of expertise, time available, arbitration experience, and education of those people who are participating in this process. Companies have human resources directors. They have people who are trained, and whose job it is to process grievances. On the union side, there are, for the most part, workers. Workers who are doing a full-time job, who may have inadequate education, a union rep who came out of the industry, whose facility with written expression in this area is not comparable. The reality is, frequently, I sit down with a file and I look at the contract or I look at the evidence and I realize that I have one or two winning theories that haven't been raised or clearly articulated in the processing of the grievance. My advocacy

is not out of bad faith or intent to ambush. I may meet with the people on the morning of the hearing at 8:30 a.m., and I'm going to meet the grievant for the first time. His or her livelihood is on the line. I may well ask probing questions of all the participants that elicit information not previously known. That's the reality of the practice, and the economics that go into labor arbitration from the union side. And I'll tell you, as an advocate, I may make an argument that the company has not heard before, and I expect that the arbitrator is going to hear that argument, understanding those realities. It is true that the grievance procedure in many places doesn't work very well. But in many workplaces, there are brand new stewards, there are inexperienced reps, there are education and language problems and those realities have to be dealt with.

Devlin: I think contract language can be helpful in cases, as long as it's language that's going to be respected, because it's easy to see that it could be honored in the breach. And there's one collective agreement that I work under where lawyers aren't allowed to present cases. The union reps and the management people who present these cases are very knowledgeable in the collective agreement. And it requires them to meet a week in advance and to exchange a copy of any document they intend to rely on at the hearing, including precedence and authorities. I've been at cases over the years where someone has asked to put in an award at the hearing that was not exchanged, and based on that provision, I have said no. Nobody's looked at me as if I have two heads. So I'm assuming that other arbitrators are doing the same. It really forces them to meet and look at that case ahead of time.

Ellis: I think if the grievance procedure worked, if it met all the steps and they really exchange information and really exchange arguments, then we'd have next to none of these squabbles before the hearing. So I'm curious about what's going on with people's grievance procedures.

Phelan: Some of the union representatives that we encounter are very skilled in labor relations, particularly the expert negotiators we deal with who go around the country negotiating large contracts and putting that language into the contracts. And some of the managers don't have much more in the way of understanding or expertise with regard to how to handle these situations than the union reps do because a manager might encounter it one time versus a union rep who deals with it more routinely. So is the balance of power something for an arbitrator to consider,

as to whether to enforce the grievance procedure language? And the vast amounts of disputes that do get resolved are a testament to how well labor relations in this country works. I think in our experience with my company, the grievance procedure is a very valuable tool that the parties, both the union and the company, take very seriously. I think it works very well.

Ellis: Good. Jane or Elliott, anything to add?

Devlin: I get the sense that in a lot of cases the parties do genuinely make an effort to settle the issue, but that if it's not settled, that's kind of the end of it. There isn't really a discussion of the facts or the positions. It's just going forward and maybe that's because it's going to be turned over to an attorney at some point and so they're not concerned about that. But that's one of the concerns that I've had about the grievance procedure and whether it really gets into exploring what the case is about, if it isn't resolved.

Ellis: Not infrequently, either in response to a nudge from the arbitrator or on the parties' own initiative, the parties engage in settlement discussions before anything at all gets started. The question here is, do you like to have a nudge or an inquiry from the arbitrator about whether you've had an opportunity to talk settlement? And if you would like such a nudge, what's the best timing of that? Out in the hallway before anything gets started? Or right after opening statements? Or at some other opportune time?

Unidentified Speaker: Yes, the first thing after the parties have been seated and poured their glass of water, I ask if settlement negotiations have either been initiated or exhausted. That prompts the two advocates to look across the table to each other and either there's been no talk or it hasn't taken place between those two advocates. And they then have an opportunity to do so. I want that to happen at the outset, before you do anything else.

I think that one is situational. It really depends on the circumstances. The Wisconsin arbitrators, by training and tradition, always do it. I'm not going to do it in the airline industry, where if they could have settled it, they would have settled it. I'm not going to waste their time unless they send me a signal. But in other industries, I will routinely do it.

Ellis: Okay. Thank you all so much.