Chapter 11

CONTROLLING THE ARBITRATION HEARING

I. Introduction

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When union and management advocates are asked what they look for in selecting an arbitrator, the ability to "control the hearing" is usually prominently included. For example, when a survey asked advocates the extent to which 11 different aspects of arbitrator performance influenced their selection of arbitrators, two of the three highest-rated factors were "the ability to control the hearing" and "the ability to move the hearing forward."[1] A union advocate, responsible for selecting 500 arbitrators a year for almost 20 years, said that he would not continue to select a particular arbitrator if attorneys from his firm reported that the arbitrator allowed adversaries to drag out a hearing or that the arbitrator lacked control of the hearing.[2]

Although advocates appear unanimously to desire arbitrators who "control the hearing," their expression of that desire may mask a divergence of underlying meaning. Arbitrator John J. Flagler surveyed and interviewed dozens of union and management advocates and concluded that "some advocates want a tightly controlled proceeding while others prefer a fairly unstructured hearing," and that "several advocates criticized the very same arbitrator practices that a similar number of advocates praised."[3] Cynics also

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[1]Bickner, *Arbitrator Acceptability: Arbitrators' and Advocates' Perspectives*, in Arbitration 2003: Arbitral Decision-Making: Confronting Current and Recurrent Issues, Proceedings of the 56th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA 2004), at 262. The third most highly rated performance factor was the "ability to write well-reasoned awards."

[2]Boone, *How Union Advocates Select Arbitrators*, in Arbitration 2003: Arbitral Decision-Making: Confronting Current and Recurrent Issues, Proceedings of the 56th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA 2004), at 269.

[3]Flagler, *Practices at the Hearing: A Few Modest Proposals for Improving Conduct of the Hearing*, in Arbitration 1990: New Perspectives on Old Issues, Proceedings of the 43rd Annual Meeting, National Academy of Arbitrators ed. Gruenberg (BNA Books 1991), at 54.

wonder whether, when advocates express a desire for arbitrators to control hearings, they really mean that they want the arbitrator to control their adversaries while leaving themselves unrestrained. The purpose of this session is to explore the question of whether the phrase "control of the hearing" has a core meaning upon which union advocates, management advocates, and arbitrators agree or whether it is an elusive and hopelessly subjective concept that can provide little guidance for arbitral best practices.

Uncertainty about the meaning of arbitral control might well be the source, rather than the result, of the disparate directives offered by the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.[4] Section 5.A.1. says: "An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument." Section 5.A.1.c. says: "An arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately." There is an inevitable tension between the first quoted section that imposes responsibility upon the arbitrator for the conduct of the hearing and the second section that seems to label at least some such control as "intrusion" into the party's right to present its case as it wishes.

The disparate advocate meanings resting under the broad umbrella of hearing control and the divergent directives from the Code of Professional Responsibility suggest the unlikelihood of finding a common core understanding of the degree of hearing control that arbitrators should exercise. The enterprise is made even more challenging by the necessarily contextual nature of any response to the question of appropriate arbitral control. It is unlikely that participants in labor arbitration would label any particular measure of arbitral control as appropriate or inappropriate apart from the context in which the issue arises. Are the advocates appearing before the arbitrator for the first time or have these advocates appeared before this arbitrator together for years? Are both advocates attorneys? Is the time for the hearing substantially constrained by travel schedules or the limited availability of witnesses? Do the parties have a well-established tradition of particularly formal or particularly informal proceedings?

In order to explore the issue of whether there is a common understanding of what it means for an arbitrator to "control the

[4]Available online at http://www.naarb.org/code.html.

hearing" and, if so, what it is, we have brought together three speakers and asked them to articulate generally what the concept means to them and then to respond to what they think an arbitrator should do in several hypothetical situations. We will hear from Case Western Reserve University School of Law Professor and labor arbitrator Calvin William Sharpe; Ellen C. Kearns, a Boston, Massachusetts, attorney representing management clients; and Sean T. McGee, an Ottawa, Ontario, attorney representing union clients.

II. Issues in Controlling the Arbitration Hearing

Calvin William Sharpe*

Introduction

I suppose one could legitimately wonder whether devoting a session on controlling the hearing for seasoned and highly acceptable arbitrators such as the members of this august body is a good use of our time. As I researched this topic I discovered that the subject of conducting the hearing has been a recurring theme in Academy discussions. Willard Wirtz wrote an article in the 11th volume of *The Proceedings* in 1958 titled *Due Process of Arbitration*, where he posited eight hypotheticals and reported on the results of a survey that he had conducted among 33 Academy luminaries.[1] Ben Aaron wrote a piece entitled *The Role of the Arbitrator in Ensuring a Fair Hearing* in the 1982 *Proceedings* examining the duty of fairness to the grievant, the parties, and the process.[2] Jack Dunsford addressed the issue in his presidential address of 1984 in a

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[1]Wirtz, *Due Process of Arbitration*, in The Arbitrator and the Parties, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1958), at 1, 2 (concluding that "due process [is] the exercise of any authority with a 'due' regard to the balancing of the two kind of interests, individual and group interests, that are involved in every situation arising in a complex society").

[2]Aaron, *The Role of the Arbitrator in Ensuring a Fair Hearing*, in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1983), at 30 (discussing the grievant's right to attend the hearing, the employer's right to call the grievant as a witness, the grievant's right to use her own counsel, and the proactivity of the arbitrator in developing the evidentiary record and preventing abuse of the process).

speech entitled *The Adversary System in Arbitration*, where he argued that arbitration is not purely adversarial and the arbitrator is not merely an umpire.[3] More recently Dick Mittenthal wrote an invited paper in 2003, entitled *The Heart of the Matter*,[4] where he advocates a pragmatism in conducting the hearing that strikes a balance between the two salient goals of the hearing: (1) "to make certain the parties are free to pursue their case in whatever way they see fit with a minimum of disruption," and (2) "to make certain we, as arbitrators, have sufficient evidence and argument before us to allow for an informed decision." In that paper Dick calls for striking a balance between the parties' freedom and "order in the interest of fairness and expedition" in the hearing.

So, in the words of Ben Aaron, this subject "recurs . . . as predictably, if not as frequently, as the swallows return to Capistrano." And in explaining this recurrence Ben cites Ralph Seward, who said 30 years before Ben's paper:

> [A]rbitration "is primarily important because of its nature as a process." It is, . . . "a method of settling disputes [that] . . . derives its importance and its lasting effects from its characteristics as a method." Arbitrators may make bad decisions without seriously damaging the process, but if arbitration hearings are widely perceived to be unfair, or to be lacking in due process, the system cannot endure. The periodic reexamination of the requirements of a fair hearing is necessary if only because it compels us to rethink our basic premises, to question the validity of established practices—in short, to strive to add depth and clarity to our notions of fair procedure in the arbitration of labor disputes.[5]

Although today's topic bears upon the conduct of the hearing, it is more narrowly focused on specific control issues rather than an overarching approach to the conduct of the hearing in general. However, I submit that remembering the purpose and func-

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[3]Dunsford, *The Presidential Address: The Adversary System in Arbitration*, in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 27th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1985), at 1 (making the point that arbitration is not a purely adversarial procedure, because it functions to preserve the parties' continuing relationship, which includes a long-term interest in parties to the arbitration being treated fairly and—in light of the importance of contractual clarity—in the ascertainment of truth rather than simply deciding which party's presentation is more persuasive).

[4]Mittenthal, *Invited Paper: The Heart of the Matter*, in Arbitration 2003: Arbitral Decision-Making: Confronting Current and Recurrent Issues, Proceedings of the 56th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA 2004), at 23(calling for the striking of a balance between the parties' freedom and "order in the interest of fairness and expedition" in the hearing).

[5]Aaron, *supra* n.2, at 30.

tion of arbitration is the key to handling the issues outlined in the six hypotheticals that follow.

Framework

As an alternative dispute resolution process, arbitration stands on a different footing from negotiation and mediation, primarily because the parties cede much greater control over the outcome of their dispute in arbitration than they retain in negotiation and mediation. Of course, in arbitration the parties do retain a measure of control that is missing in litigation, as they define jurisdiction and procedure and select the arbitrator. Rule 5 of the Code of Professional Responsibility (CPR) recognizes the control ceded to the arbitrator as well as the control retained by the parties by requiring the arbitrator to "provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument," while constraining the arbitrator "within the limits of this responsibility" to "conform to the various types of hearing procedures desired by the parties." Also, although permitting the arbitrator to play an active role in the hearing, the rule forbids the arbitrator from intruding "into the party's presentation so as to prevent that party from putting forward its case fairly and adequately."[6]

The parties have chosen arbitration over litigation, because like litigation it is a viable adjudicatory procedure. Viability essentially means, as the Court in *Gilmer* recognized, that arbitration as a procedure is competent to resolve disputes.[7] Indeed, arbitration is more viable than litigation in the labor-management setting, because it is relatively cost-effective, efficient, informal, final, and private with tailor-made expertise. Also, as Justice Douglas said famously in *Steelworkers v. American Manufacturing*,[8] the processing of claims (even frivolous ones) in arbitration has therapeutic

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[6] *See* CPR Rule 5A.

[7] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). Another aspect of viability is the catharsis noted by the Court in *Steelworkers v. American Manufacturing*, 363 U.S. 564, 568 (1960):

> The Courts, therefore, have no business weighing the merits of the grievance, considering whether there is any equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous clams may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.

[8] 363 U.S. 564 (1960).

or cathartic value that outweighs equitable concerns about processing such claims. Combined with the residual control that the parties retain over the arbitration procedure, these attributes can operate to preserve the parties' relationship.

Testing a Suggested Approach

Hence, the arbitrator might test the effectiveness of a particular solution to a control issue by asking whether it would further the purpose and function of arbitration. Specifically, does it enhance the viability, cost-effectiveness, efficiency, informality, finality, or party relationships of the arbitration? This analysis is similar to the one used by Ben Aaron to answer the question about the grievant's right to retain her own counsel. Aaron based his affirmative answer not on the grievant's rights, as he concluded that the union had a legal right to select the counsel and thus bar grievant's counsel. Rather, Aaron, motivated by the arbitrator's "duty to try to make the grievance and arbitration procedure work for the benefit of all those involved," would point out to the union that, under the circumstances, it could not represent the grievant fairly and would propose that the grievant be able to use her own counsel on a nonprecedential basis. In Aaron's view, this approach would satisfy the arbitrator's responsibility of trying to make the arbitration process work, even if the union rejected his proposal.[9]

In concluding these brief opening remarks, my suggestion is that we, as arbitrators, against the backdrop of Rule 5 of the CPR (calling for the balancing of party freedom and order), consider and justify our responses to the issues raised in the following hypotheticals by reference to the purpose and function of arbitration using this multi-factor test. It will be interesting to hear the perspectives of the parties on this approach.

The following series of hypotheticals provides an opportunity to apply this approach.

The industry is complex and the facts intricate. After hearing the testimony and cross-examination of the first several witnesses, the arbitrator becomes worried that the case is headed in a direction different than at least one of the parties, and perhaps both, are advocating and may yield an

[9]Aaron uses a similar approach to the question about calling the grievant as an adverse witness. The purpose of arbitration as it relates to that issue is "to come as close to the truth about the matter in dispute as is possible for fallible human beings to achieve in the circumstances." Aaron, *supra* note 2, at 36.

award that makes things worse. Although the parties likely are expecting the arbitrator to act in a formal adjudicative role, as before, the arbitrator wonders whether it would be appropriate to let the parties know where the arbitrator thinks the case is headed. What should the arbitrator do?

Rule 2f of the CPR permits the arbitrator to suggest mediation if "it can be discerned that both parties are likely to be receptive or both parties agree." On the other hand, after the commencement of the arbitration, Rule 2f2a gives either party the right to insist that the process be continued to decision. Where the parties are amenable, mediation would seem to be appropriate under the multi-factor approach. It is likely to save cost and preserve the parties' relationship by allowing them to craft a win-win solution. Although many parties may welcome this kind of arbitrator intervention, others may resent it.[10] The arbitrator's assessment of the parties' amenability to mediation will turn on his familiarity with the parties. And the timing of the arbitrator's suggestion, for example, after opening statements or at the close of the record, may be important to preserving the arbitration option in the event that mediation fails.

The union's attorney is presenting a grievance challenging management's decision to introduce a technological change that resulted in a smaller workforce and complete elimination of overtime work. The union attorney's opening statement and examination of company witnesses is sneering and implies that the decision was motivated by the greed of high-level managers and their malice toward employees. The company's attorney requests that the arbitrator prohibit the union attorney from so characterizing management's motives. How should the arbitrator respond?

This is a tricky issue that threatens the parties' relationship and the efficiency and cost-effectiveness of the hearing. On the other hand, some venting may further the therapeutic benefits of the hearing. The solution has to be one that improves these factors.

In a related situation—where both counsel were screaming at each other (their voices dripping with antipathy)—I have had to usher counsel to a separate room; make them aware of the very high reading on the emotional thermostat in their communications; and remind them of their professional responsibility to their clients, our respective roles in the arbitration, and the importance of not taking personally those matters involved in the dispute. This intervention worked quite well; the thermostat was reset to a

[10] *See* Aaron, *supra* note 2, at 46 (observing that the parties do not want the arbitrator to mediate in the great majority of ad hoc cases).

normal level, and during five months of hearings in this case this behavior did not recur.

In this case, a similar strategy would seem to be appropriate. Even though the heat is coming from only one direction, a joint conversation with the advocates should give the sneering advocate a chance to explain his posture and opposing counsel a chance to respond. The opportunity to vent would also give the arbitrator an occasion to explain the decorum that is expected in the hearing and the reasons, including: (1) the integrity of the record (not laden by irrelevant evidence); (2) a better chance at the party's understanding of the issues (requiring at least an openness to the company's explanation); and (3) efficiency (preventing the hearing from becoming bogged down).

In a 1979 article, Peter Seitz said:

> Arbitration hearings are not intended to be stages for gladiatorial combat nor forums in which to afford an opportunity for counsel, uninhibitedly, to shine in the admiring eyes of their clients. Rather, their purpose is to inform the arbitrator so that the dispute may be decided wisely and justly. Counsel, in presentation, are entitled to the broadest possible latitude consistent with (a) the need for the arbitrator fully to understand the case and, (b) the arbitral objectives of speed, economy, and fairness. When such arbitral needs are ignored and the attainment of the goals of arbitration is being jeopardized, arbitrators are derelict in the performance of their duties if they fail to take appropriate action.[11]

Similarly, John Kagel says: "Counsel, whether or not a member of the bar, is expected to act in a professionally dignified manner in dealing with opposing counsel."[12]

He also comments:

> [I]nappropriate treatment of opposing counsel (rudeness, disrespect, obstruction, and other incivilities), designed to impress counsel's own client rather than advance the presentation of the case in a professional manner, may ultimately be seriously detrimental to the client.[13]

Party A's representative is examining Party B's witness. Party B's representative objects to a particular question, and Party A's representative responds directly to Party B's representative rather than waiting for the arbitrator to invite a response from Party A's representative. A colloquy ensues between the two representatives. What should the arbitrator do?

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[11] Seitz, *Some Observations on the Role of an Arbitrator*, 34 Arb. J. 3 (1979), at 6.

[12] Kagel, *Practice and Procedure* Section 144, in The Common Law of the Workplace, 2d ed., ed. St. Antoine (BNA Books 2005), at 29.

[13] *Id.*

Bypassing the arbitrator in this fashion threatens to reintroduce into the hearing bilateral elements that proved counterproductive before the decision to arbitrate. To circumvent the degeneration of the hearing into a disorderly and ineffective process, it would seem to be wise for the arbitrator to interrupt Party A's representative and instruct her and her counterpart that all objections and responses are to be directed to the arbitrator.[14] Establishing this ground rule at the earliest opportunity would make for a more decorous hearing, and from decorum flows efficiency in the parties' presentations, with fewer ill-considered objections.

A party's representative is leading her own witness through important testimony on direct examination. The opponent is not objecting. Should the arbitrator intercede to admonish the examiner about the use of leading questions or permit the leading to continue in the absence of objection?

Rule 5A1.b. of the CPR requires the arbitrator to provide a fair and adequate hearing. It specifically permits the arbitrator "to obtain additional pertinent information." It also forbids the arbitrator from intruding into a party's presentation so as to prevent that party from putting forward its case fairly and adequately.

The problem with leading questions from the direct examiner on consequential matters is that they reduce the value of the elicited testimony, even in the absence of objection. The themes of fairness and accuracy seem to countenance the arbitrator's proactivity in informing the examining representative that leading a friendly witness through important parts of the testimony makes the arbitrator's job as factfinder harder and prejudices the examiner, as the weight of the elicited testimony will be discounted, creating less certainty in the outcome.

Generally, because the arbitration is the parties' proceeding, one can argue that the arbitrator should forgo his own preferences, where the party that is potentially harmed does not speak up. This is particularly true where both sides are represented by competent counsel. In the absence of a definitive "sustained," where the objection is finally lodged, biting the lip and "letting the chips fall where they may" may well be the best approach. It would advance party control, and the weakening of the party's case is no different than other strategic or tactical decisions that might have the same effect. A party's choice of witnesses and evidence to

[14]One attendee, former Academy President George Fleischli, shared his tactic for dealing with this situation: Saying to the initiator of this exchange, "Since you are directing your objection to him, he can rule on it."

present at the hearing are examples of control decisions that the arbitrator is not in a position to second-guess, notwithstanding the impact that they may have on the outcome.

On the other hand, Jack Dunsford points to the purpose of the hearing as developing all information that is necessary and relevant to an informed decision and argues that the arbitrator should be active enough "to inquire about whatever he thinks he needs to decide the case properly" and inform the parties about the "consequences of positions they assume." Jack cites the negative inference drawn from a grievant's failure to testify as an example.[15] This argument would support advising the direct examiner leading the witness through important testimony about the potential discounting of the testimony.

The union's representative is prepared to put on ten witnesses, five of whom are giving testimony that differs only slightly. Your suspicion as the arbitrator is that much of this evidence is cumulative, and you want to run an efficient hearing. Yet you do not want to prevent the parties from having their day in court. How do you balance these competing concerns?

In this situation it is important for the arbitrator to signal her interest in efficiency. For example, where the representative is having the witness read a document that speaks for itself, saying plainly: "I can read the document unless the witness has something to add to it." When the grievant begins the parade of witnesses, one approach might be to wait until the grievant puts on the case, and when the testimony begins to sound repetitive, go off the record and ask counsel whether the witness is adding anything to the evidence that is in the record.[16] Even if counsel says "yes," he is on notice about his expected responsibility to efficiently manage the case. Along with prompt arrival for hearing and closely adhering to break times, this air of efficiency seems to move the hearing along.

The parties' representatives are seasoned lawyers who raise objections based on the rules of evidence and care about the arbitrator's ruling on those objections. In light of the reality that the exclusion of evidence in arbitration is rare, how should the arbitrator handle those objections?

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[15]Dunsford, *The Presidential Address: The Adversary System in Arbitration*, in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 27th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1985).

[16]This might also be the place (off the record) to suggest a stipulation as contemplated by Rule 5A.1b.

Representatives who are conversant with the rules of evidence are likely to be reassured by an arbitrator's careful attention to evidentiary arguments.[17] As a leading evidence scholar points out, a number of evidentiary rules are likely to apply in arbitration.[18] Moreover, the underlying rationales of evidentiary rules of exclusion add precision in evaluating evidence, even though the rules do not ultimately bar admission of the evidence.[19]

Evidentiary objections in this context can be an excellent vehicle for controlling the hearing. The idea is to entertain arguments from counsel on the issue, make the ruling, and explain the rationale.[20] The evenhandedness and treatment of the parties displayed in ruling on evidentiary objections contribute to the legitimacy (fairness) of the process and the arbitrator's overall command of the hearing.[21]

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[17] *See generally* Sharpe, *Optimality Theory and Its Implications for Arbitral Practice,* in Arbitration 2004: New Issues and Innovations in Workplace Dispute Resolution, Proceedings of the 57th Annual Meeting, National Academy of Arbitrators, Coleman ed. (BNA 2005), at 30, 51–52 (noting the Lipsky and Seeber study finding reluctance among Fortune 1000 lawyers to use arbitration in part because of the absence of rules governing the admissibility of evidence).

[18] *See* Kirkpatrick, *Scholarly and Institutional Challenges to the Law of Evidence From Bentham to the ADR Movement*, 25 Loy. L.A. L. Rev. 837, 844–45 (1992) (noting the evidentiary rules that are commonly applicable in arbitration practice).

[19] *Id.* at 848.

[20] *See* Mittenthal, *Invited Paper: The Heart of the Matter*, in Arbitration 2003: Arbitral Decision-Making: Confronting Current and Recurrent Issues, Proceedings of the 56th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA 2004), at 24 (suggesting that "[r]ulings on the parties' objections should be explained where possible" in balancing the goals of party freedom and order "in the interest of fairness and expedition").

[21] Re-enforcing this point is a hearing that I conducted with a recalcitrant teacher appearing pro se (because he could not find a lawyer who wanted to represent him). I carefully explained the hearing procedures, their underlying rationale, and the comportment that I expected from him. He actually acquitted himself well at the hearing. And at the end of the hearing he expressed satisfaction that he had his day in court, saying that at least he "knew what was going on." Satisfying the seasoned lawyer's "need to know" may be at least equally important to the acceptability of the proceeding.