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Top 10 Rules for Arbitration Chairs

By Anthony Michael Sabino – January 26, 2022

Chairing an arbitration is a solemn responsibility. While most arbitral fora provide excellent training to aspiring chairs, there is no substitute for actual experience.

I was fortunate to have been mentored during my early years as a commercial arbitrator by some truly wonderful individuals who led by example and unhesitatingly shared their experience with the ADR process and all its intricacies.

Now as I approach some 20 years of service as a chair in commercial arbitrations, I thought one way to repay my teachers' generosity would be to share the lessons they imparted.

1. Due Process Emanates from Respect and Courtesy
Above all else, the most important responsibility of a chair is to see that due process is served. Obvious? Certainly. But what is not as readily apparent is that due process does not spring from legal axioms alone.

Its true font is the fundamental principle of respecting and being courteous to all who come before the arbitration panel. Due process is best served when you respect each and every party, attorney, and witness, their claims and defenses, their testimony, and their exhibits. Due process naturally flows from that respect and courteous treatment.

2. The Chair Takes Care of the Panel
Unquestionably, the chair is the "first among equals," as some of what follows here shall demonstrate (assuming the typical three-person panel). But the chair cannot be heedless of the other two panelists, who are not only your peers, but just like you, were selected by the parties pursuant to the rules and procedures of that particular arbitral forum.

After serving due process, my cardinal rule is "the chair takes care of the panel." To accomplish this, be aware of your fellow arbitrators' circumstances. How far and long did they travel to the hearing? Are they tied to train schedules, or do they have personal commitments later that day? Most importantly, be sensitive to signs of fatigue. The consideration you give your panel can only make them more focused on the matter at hand, and that alone advances due process a mighty step.

3. Maintain an Orderly Hearing.
A disorderly hearing is the enemy of due process. To be sure, respect and courtesy require that the chair allow each side a certain degree of latitude to make their case in their own fashion. But that precept does not grant either side unbridled discretion with regard to their conduct.

The chair should not hesitate to halt the interruption of speakers, caution counsel or witnesses not to talk over each other, curtail argument disguised as a question, and discourage evasiveness in

responding to proper examination. You do not diminish due process by maintaining order; to the contrary, by taking a firm and gentle hand, you enhance it.

4. Encourage Streamlining the Proceedings
Even in the non-judicial setting of arbitration, due process demands that certain proprieties be observed, such as the formal admission of exhibits, the qualifying of expert witnesses, and so forth. These steps, though often routine, can be time consuming and distracting.

As chair, encourage the parties to stipulate (either before or during the hearings) to the admission of exhibits. Nearly all arbitral fora have procedures in place regulating discovery and conflicts regarding same. Utilize those rules in order to confer with the parties prior to the actual hearing, and in that conference, in addition to resolving any differences then extant over the production of documents and things, take the opportunity to encourage the participants to agree, in advance and as much as possible, to the admission of material not in dispute.

Similarly, the credentials of experts and any reports they generate are well known to each side before the hearings. Therefore, qualifying an expert and the admission of the expert's report can usually be stipulated to.

Moreover, I have observed there is usually a tacit agreement from each side that "if you accept my expert, I will accept yours." Remember also that stipulating to the qualification of an expert and admitting the expert report into evidence does not detract one iota from an incisive cross-examination by the opposing party, not to mention that the arbitrators always have the last word as to the weight and credibility they shall afford the expert's testimony and any accompanying report.

In sum, stipulations such as these enhance due process, because they allow the arbitrators to hear the substantive evidence that much sooner in the hearing.

5. Overbook Hearing Dates
One of the most eminently practical lessons I was taught by my chairs was "better to schedule too many hearing dates than too few." It is a simple fact that parties often underestimate the time they will require to put on their case, let alone how long it will take the opposition to cross-examine. And it is even more beyond refute that scheduling additional hearings is far more difficult than cancelling dates you no longer need.

Not only is there no harm in reserving more days for hearings, but also due process is better served. Parties relieved of the burden of watching the hours go by may then proceed with confidence, knowing that they have enough time to put their best case forward. Indeed, the alternative is most unpleasant; parties that feel rushed are far more likely to believe they were denied due process. And they might be right. Avoid any such problem by scheduling one or two hearing days beyond what the parties request, in order to be safe.

In short, it is far easier to cancel dates you do not need than to seek out mutually acceptable dates for additional hearings.

6. Take Charge of Pre-Hearing Matters
The rules of nearly all ADR fora stipulate that the chair's responsibilities commence with presiding over a pre-arbitration conference (still telephonically in most cases, but increasingly via video link), and continue until a final award is issued. But, sometimes, there is plenty for the chair to do in between, even before the first hearing date. Typically, the rules of the forum invest the chair with sole authority over a number of pre-arbitration issues (for example, resolving discovery disputes and issuing subpoenas). Never shy away from those obligations; to the contrary, embrace them.

First of all, such rules typically imbue the chair with solitary authority over these matters for a reason; it's just plain more efficient. Second, your fellow panelists are counting on you. It is your duty to them to resolve these preliminary issues to the best of your ability. Third, you serve due process by firmly ruling with alacrity on what are typically straightforward disagreements.

7. Pay Attention to the Details
Here, I offer a *potpourri* of relatively small matters that nonetheless require the chair's attention, since they will impact whether due process is truly served. They include remembering to ask counsel if they wish to re-direct or re-cross examine the witness. When they have concluded with the witness, be sure to ask your panel if they have their own questions. In all likelihood, this is their only chance to make inquiry of that particular witness. As you approach the end of the case, ask each side if they wish to conform their pleadings to the evidence (a small but important step that some neglect).

Before hearing closing arguments, remind each side that the complaining party customarily has the last word, and ask if the complainant wishes to reserve time for rebuttal (inexperienced participants might overlook this, and due process suffers accordingly). Likewise, give a friendly reminder to the defending party that sur-replies are generally not permitted.

Depending upon the complexity of the proceeding, consider suggesting to the parties that they take no more than X minutes to close (confer with your panel, and decide what "X" equates to in your specific case). To be certain, this does not injure due process; it actually helps, because a fair timeframe compels the parties at closing to focus on what is really important to their case.

8. Be Decisive
The chair occupies the "center seat," so making decisions comes with the territory. You need not worry about harming due process; in fact, you serve it best when you act with gentle firmness.

Don't be afraid to be decisive when ruling on objections, admissibility of evidence, and other matters that fall within the chair's purview. On close questions or if you feel you need help, then by all means, go into executive session, and benefit from your peers' points of view. But the

ultimate responsibility is yours, so make a decision, bring the parties back into the room, and move forward. Everyone, parties and your fellow panelists alike, shall benefit from your forthrightness.

9. Let Your Panelists Speak First in Deliberations
While a chair should be decisive in making rulings both before and during the hearings, a more collaborative approach is advised for deliberations.

In deliberations, a good chair listens first, and speaks last. A chair never ventures an opinion until each panel member's full and frank viewpoint is heard. Sometimes a panel arbitrator is too deferential to the chair's perceived authority. Letting your fellows speak first helps solve that dilemma.

Each and every panel member arrived at the hearing via the same or a similar selection process, and therefore deserves to be listened to. For all these reasons, due process is best served when the chair listens first and speaks last in deliberations.

10. Lead the Way to Compromise
My closing point may be self-evident, but that does not obviate the need to state it outright.

Your title may be "arbitrator," but you don't need to be "arbitrary," especially in reaching a final determination. This is why my preceding recommendation is to listen to the panel first, and as chair, speak last. Air out all the possibilities for a resolution of the case with the panel (not the parties, to be certain). Whether novice or veteran, your peers bring their own particular skills and experience to the deliberations. Embrace that, and benefit from their diverse viewpoints.

The paramount objective is to accord due process to the parties, and collaboration in deliberations and compromise in the final award best serves that ideal.

And there you have it. Please bear in mind that each and every arbitration you participate in is, among other things, a unique opportunity to learn. Therefore, I hope you can make good use of my suggestions, and indeed, add to them. Together, we can all work toward ensuring that arbitration (not to mention all modalities of alternative dispute resolution) maintains the highest level of quality.

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