



2025 FALL CONFERENCE

NOVEMBER 13-14

**MARRIOTT MARQUIS
NEW YORK CITY**

Suggested Best Practices for Handling Evidence In Arbitration

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Overview

**Setting
Reasonable
Expectations**

**Rules of
Evidence vs.
Custom &
Practice**

**Planning for
Evidentiary
Issues**

1. How important is it to a fair arbitration that the arbitrators apply the rules of evidence?

- a. Very important.**
- b. Rules of evidence are not important and do not need to be followed.**
- c. Arbitrators should use the rules of evidence more as guidelines than strict requirements for admission.**



Rules of Evidence: Which should apply?

- The Arbitration Agreement
- The Tribunal Rules
- Federal Statutes (F.A.A.)
- Federal Rules of Evidence
- Applicable State Statutes
- International Bar Association – IBA



2. *Is a discussion about motions in limine useful?*

- a. At the Organizational Meeting.
- b. At a later pre-evidentiary hearing/status conference.
- c. Never, just deal with the evidentiary issues at the hearing.



Pre-Hearing Evidentiary Considerations

- **The Value of Motions *in Limine***
 - Causes Early Focus on Evidentiary Issues
 - Raise at Organizational Meeting
 - Early evidence rulings can dramatically affect discovery
- **Stipulations of Fact – save time, money and effort.**
 - Stipulate to what you cannot realistically dispute
 - Stipulate to exhibits that are authentic and admissible

3. *How helpful is laying a foundation for testimony or to get an exhibit admitted?*

- a. It is a waste of time.
- b. Useful, because it provides credibility to the witness or exhibit being offered.
- c. I am not sure what laying a foundation means.



Getting Evidence Admitted

- Direct

- **Form of the question** – simple, one question at a time – give witness prompts to tell their story
- **Laying foundation for testimony** – how is witness competent to talk about elicited fact
- **Laying the foundation for exhibits:**
 1. authenticate how witness knows what exhibit is
 2. stipulation as to authentication vs. admissibility
 3. get advance ruling on objections to admissibility
- **Avoid hearsay objection** – by knowing the rule!

- Cross

- Control the witness with “Yes” or “No” questions

Types of Objections

- **Objections to form of the question:**
 - Vague, ambiguous, unintelligible
 - Compound
 - Leading
 - Asked and Answered
- **Substantive Objections:**
 - Lack of Relevance
 - Lack of Foundation – easiest objection to be sustained because it can be cured
 - Speculation
 - Assumes fact not in evidence
 - Hypothetical
 - Calls for Hearsay
 - Settlement Compromise Not Evidence of Liability--Rule 408
 - Improper Opinion
 - Argumentative
 - Attorney-Client Privilege/Work Product Doctrine

4. *Should arbitrators apply the hearsay rule in admitting or excluding evidence?*

- a. No. All hearsay evidence should be admitted and accorded its due weight.
- b. No. Hearsay is confusing and most people do not understand it anyway.
- c. Yes, because it is unfair to consider testimony or evidence of statements that cannot be cross-examined.



Knowing When Hearsay Is a Problem

- If a witness offers testimony of what someone else said outside of the hearing and offers it to prove the truth of that statement – **it is hearsay**. (FRE 801)
- **Why is hearsay inadmissible?** Because the witness cannot be cross-examined since he is not the one who made the statement (i.e., the perception, memory and credibility of the missing declarant cannot be challenged on cross-examination of the witness)
- **The following are not hearsay if the statement: (FRE 801)**
 1. is an admission of a party opponent or its manager or agent
 2. is the witness's prior statement under oath
 3. if the out-of-hearing statement is not offered for its truth
- **Exceptions:** (1) business record made in regular course of business (FRE 803 (6),(7)); (2) statement against one's interest (FRE 804 (b)(3))

Dealing with Objections

- **Arbitrators**

- A fair hearing is the ultimate objective.
- Rules of evidence are used to ensure fairness.
 - When in doubt let the evidence in.
 - Then, determine weight, if any, to be given evidence.
- Protect the record from an unfair exclusion of evidence (e.g., FAA Rule at 9 U.S.C. § 10(a)(3))

- **Litigants**

- Avoid unnecessary objections – substance over form!
- Listen to arbitrator and let ruling guide future questions.
- If issue on objection is important enough make a record.

Questions & Answers



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