CONSTRUCTION LAW INSTITUTE

Presented by the
University of Kentucky College of Law
In Cooperation with the
Construction & Public Law Section of the KBA

What Arbitrators Prefer: Friendly Encouragements From an Arbitrator of Construction Disputes

By James Duffy O'Connor
Maslon Law Firm
90 South 7th Street
Suite 3300
Minneapolis, MN 55402
james.oconnor@maslon.com
www.maslon.com

March 1, 2013
University of Kentucky College of Law
Lexington, Kentucky

The price of admission to an arbitration hearing can be nominal. All that's required is a written agreement between the parties that compels disputes to be resolved by arbitration. Such an agreement is typically incorporated into the parties' construction contract, before commencement of work, and before a dispute arises. Often, the writing selects a forum, like the American Arbitration Association Construction Industry Forum, or JAMS, which has the consequence of insinuating some formal rules of procedure, though even these may be modified by the joint agreement of the parties. The most common arbitration forum today is the "Ad-Hoc" arbitration. There, parties who find themselves in a dispute jointly agree to resolve the matter through a binding arbitration, and design together the arbitration process. Some cobble together rules and procedures from other arbitration forums, and still others fashion procedures and rules that are tailor made for the particular dispute. The common denominator in all these situations is flexibility, and the by-product of that flexibility is cost-effective efficiencies in the resolution of disputes. Whichever forum is selected, and whatever rules and procedures may apply, most arbitrators of construction disputes will agree that there is a set of guidelines, call them Friendly Encouragements, that when adopted by the parties make the process more enjoyable for all. This article attempts to collect them in one place for your consideration and convenience.

I Before Selection of the Panel

1. Don't Lie in Wait on a Panel Member. We expect that you will vet the panel members, study their Forum bios and their Firm bios. Many of us have written articles, made decisional law (good and bad) in our practices, and have developed

practice emphases that may give rise to inferences (justified or not) of subject matter bias. Some lawyers categorize arbitrators as "a contractor's lawyer," or "an owner's lawyer," or "a sub's lawyer," and the like. You may also discover in your vetting process that a panel member has published articles on a subject matter that affects your dispute. Don't wait until after panel has been selected to raise this issue with the case administrator. Don't lie in wait; raise the concern immediately. The disclosure process is already too burdensome in some forums. Don't make it worse than it already is.

2. Don't Disclose the Phone Book. Parties should disclose the names of known and expected witnesses as soon as practically possible. This enables the arbitrators to investigate whether they or their firms have conflicts that need to be disclosed to the parties. Certainly the parties may not know each and every witness they may "wish to" call at the time of the hearing, but they should do a reasonable job of predicting whom to call. In doing so, don't go over board; don't list the phone book. If it occurs that you decide to engage an expert witness who has prior experience with the arbitrator, make the disclosure quickly and don't expect that all prior experiences are outcome determinative of an arbitrator's withdrawal.

II Pleading the Dispute

3. Write the Story Well. Don't pattern the claim on a pleading in a United States District Court or your local trial court. While notice pleading is certainly sufficient, it is not memorable. Tell a good (but true) story in the pleading. A story well told will capture the attention of the panel, and will prepare them to accept the evidence that hinges the claim to the framework of the law. The same goes with the

Answering Statement. Write the story well, including why the claim falls short of what is legally necessary to sustain it. Your defenses are more forceful when they are couched in compelling prose that contextualizes the facts of the case. It goes without saying that the story must be true. If the story you tell at the closing is not the story in your pleadings, your chances of success on the merits have taken a turn for the worse.

III The Prehearing Conference

4. Do a Dress Rehearsal With Opposing Counsel. Parties who don't take control of their case before the Prehearing Conference will abdicate control to the panel. Develop your own Case Management Order that addresses all the issues and deadlines that you know the panel members will raise. Present yours to opposing counsel and ask for theirs. Then do a dress rehearsal with opposing counsel. Meet and confer with opposing counsel and hammer out the deadlines. Address whether and how to conduct discovery, especially e-discovery and depositions of fact witnesses. Discuss whether the hearing on the merits should be bifurcated, and if so how. Agree on a hearing schedule that is quick, yet adequate in time to allow both parties to be properly prepared to present their cases to the panel. Don't pick hearing dates without input from your client and known/expected witnesses. Discuss the form of the Award and whether you need a stenographer. Don't take an unreasonable position with your opposing counsel during the dress rehearsal. You know that the panel will resolve disagreements, selecting what is most reasonable. Leave to the panel only those issues that you cannot compromise on. Then prepare to be compromised.

5. Tell Your Story Dramatically, but without Drama. The Prehearing Conference is your first chance to tell your story to the panel. The panel doesn't want to hear grandstanding, but it does want to hear what happened. Tell your story dramatically, but without drama. A claimant should know by now how to articulate his right to relief, based on the facts as he expects to prove them. Also, the claimant should know what he is looking for from the panel. Know how much money you expect to recover and graphically itemize your damages at the Prehearing Conference. Counsel who is unprepared to do so will leave the panel wondering if there is a case there at all. If the claimant's counsel is unable to articulate a basis for relief based on real facts, and if he can't "blackboard" the damages he expects the panel to award to him, the respondent's counsel should then seize on this to demonstrate that the claimant's presentation is lacking for a reason—there isn't any "there" there.

6. Share the Goodies. If you plan to use exhibits at the Prehearing Conference (as you should), then don't wait until the hearing to share the goodies with opposing counsel. Your exhibit will lose its intended effect if you end up having to justify its use before revealing it. If it is as dramatic as you'd like, then it will be just as dramatic after you've shared it with opposing counsel. If it's that good, revealing it before the Prehearing Conference won't remove the intended effect, and will likely eliminate the distraction of having to justify its use. If the opposing party has seen it already, you can be sure that the panel will not prohibit you from using it as you intended.

7. Know What You Want & Ask For It. Arbitrators are empowered to fashion Awards in many different ways. They can order specific performance. They can issue injunctive relief. And, of course, they can make monetary awards. They can even give a party relief that is not legally available from the trial courts. Know what you want and ask for it. The Prehearing Conference is the venue for alerting the panel to just what it is you want from them in the Award.

IV Discovery & Motion Practice

8. Embrace Full Disclosure and Live With Uncertainty. Don't think for one moment that you can hide the Project File. The fundamental structure underlying the arbitration process is that the facts are in each other's Project Files, and nowhere else. So embrace the idea of full disclosure of your Project Files, even those you deem irrelevant, and live with the inevitability of uncertainty. Civil litigators have been trained to "discover" cases with interrogatories and depositions. These, for the most part, are discouraged in the arbitration process. The AAA Rules expressly refuse discovery other than the exchange of documents except in extraordinary circumstances.[1] In complex cases, depositions are usually restricted to experts. So, it is inevitable that counsel will have to live with a level of uncertainty. Of course, counsel may jointly agree to additional discovery. Even so, counsel should evaluate whether that is really essential. If you can put in your case with your witnesses and the universe of documents is adequate to use to "cross" the opposing counsel's claims/defenses, you don't need to confirm that in a deposition.

[1] American Arbitration Association Construction Industry Rules R-24.

9. Most Motions are a Long Shot. Motions to compel production of documents shouldn't be necessary, considering that document exchange is the *sine qua non* of discovery in arbitration. You will need a VERY good reason for refusing to produce documents. The exception may be e-discovery, mostly because it has become so very expensive to produce and study every digital file generated in the course of a construction project. No doubt some may be essential to flush out essential facts and circumstances of a claim. That said, the panel would certainly prefer if the scope of the disclosure could be jointly determined before the Prehearing Conference. If that is not possible, then be prepared to spend more money than you had hoped to comply with an order to compel production of a "reasonable" amount of electronic discovery. Correspondence, photographs, schedules, Change Orders, Constructive Change Directives, Submittals and Addenda are all Project Documents, regardless whether they are physical or digital in nature. So, don't expect to keep these from opposing counsel. Dispositive motions are a long shot. The AAA Construction Industry Rules were modified recently to expressly allow for arbitrators to consider dispositive motions.[2] Indeed, based on recent criticisms relating to arbitrators' reticence to grant such motions, the AAA is training us to be more open to granting such motions. Nonetheless, most arbitrators are still very resistant to such motions. Why? We prefer to avoid deciding disputes on dispositive motions because it opens the Award to vacature on appeal—one of the few bases in the Federal Arbitration Act being the panel's refusal to hear testimony.[3] This may also "chill" relief based on

---

[2] *Id*. R-32(c).

[3] *See* 9 U.S.C. §10(a)(3); *see e.g., Congregation of Holy Family Church v. Mickey Construction Co.*, 500 So.2d 802 (La. Ct. App. 1st Cir. 1986); *Manchester Township Bd. Of Ed'n v. Thomas P.*

Daubert motions.[4] It isn't just that it's easier to hear the testimony. Entertaining the testimony protects the integrity of the Award. That, for most of us arbitrators, is sacrosanct.

V The Hearing on the Merits

10. Agree on Some Things. A common default strategy is for counsel to fail to agree on any form of factual stipulation, necessitating proof on matters that are truly not in dispute. Besides the time it wastes, it can be a strategic advantage to counsel to demonstrate that the issues that separate them (including defenses) are not that great, and thus focus attention on matters essential to counsel's success on the merits. So, try to agree on some things. For example, try to jointly produce a "chronology of events" for the panel. Agree on the timely exchange of current expert reports, and especially any new reports issued subsequent to expert depositions, if any. Agree, if possible on alternative forms of evidentiary presentation, that is, a form other than live testimony where the issue is tangential and the facts supporting it are for the most part undisputed. Agree also on the authenticity and admissibility of exhibits. You want to minimize the amount of hearing time lost as a consequence of evidentiary distractions.

11. Every Case Has a Blueprint. Counsel should design the presentation of proof to correspond with the legal elements necessary for success on the merits. If it's a negligence claim, the blueprint will include Duty, Breach, Causation and

---

Carney, Inc., 489 A.2d 682 (N.J. Super Ct. 1985); *see generally,* 6 Bruner & O'Connor §§ 20:118 -20:139 (Supp. 2012).

[4] Reported decisions on this issue tend not to second-guess the panel's rejection of evidence based on *Daubert*. *See, e.g.*, *MPJ, My Personal Jet, A.V.V v. Aero Sky, LLC*, 673 F. Supp.2d 475 (W.D. Tex. 2009); *Morrill v. G.A. Wright Marketing, Inc.*, 2006 WL 2038419 (D. Colo. 2006); *In re A.H. Robbins Co.*, 232 B.R. 855 (E.D. Va. 1999).

Damages. A contract claim will have to prove up the Contract (hopefully you've agreed upon those elements: offer, acceptance and consideration), Breach and Damages. A warranty claim will be based on the terms of the Express Warranty or Implied Warranty, Breach and Damages. Your witnesses and exhibits are really only necessary to prove the legal elements of proof. Every case has a blueprint, whether counsel has thought about it or not. The best presentations are those that follow a written blueprint.[5] Show up with the blueprint. Share it with the panel. Tell them what you are going to prove, and how (and through whom). Consider reproducing it as a large graphic demonstrative exhibit; and leave it up as you progress through it as your case unfolds. Refer to it regularly so that the arbitrators can contextualize the evidence they hear with your blueprint.

12. Emphasize the Important Recurring Exhibits in a Separate Binder.

Counsel often organize documents in ways that don't correspond to their use at the Hearing on the Merits. If you know that you will be referring to certain exhibits with dramatic recurrence, then don't hide them in multiple 4 inch thick Exhibit Books. Emphasize the important recurring exhibits in a separate binder,[6] and make sure the arbitrators use it, just as you do as your case unfolds. In this way, you won't lose time waiting for the arbitrators to flip through multiple binders to confirm your point.

---

[5] I like the term blueprint because it insinuates the pageantry of the construction industry into the structural underpinnings of the law. Judith Ittig prefers the term "road map." Ittig & Coleman, *The Top 20 Mistakes Attorneys Make in Arbitration and How to Avoid Them*, 65 Dispute Resolution Journal No. 2-3 (May-October 2010). The idea is the same. Come to the Evidentiary Hearing with a written presentation plan, and work the plan.

[6] Judith prefers a "red" binder for these. *Id*.

13. Organize Your Exhibits Thoughtfully. It happens too often that the exhibit books are organized by paralegals whose interests are to ensure that NO EXHIBITS ARE MISSED. That is well and good for the paralegal, but it does not usually assist in the orderly presentation of proof. If your blueprint is really good, it will identify those exhibits that will be used with each witness that is necessary to establish the legal elements of the parties' claim/defense. Where possible, organize your exhibits thoughtfully, with exhibit books assembled to correspond with the order of proof you foresee based on the blueprint. This may encourage counsel to organize exhibits to correspond to claims, rather than witnesses. There is no particular magic to the organization of the exhibit books other than the magic of speed during the presentation. However counsel chooses to organize the exhibits, it is essential that the exhibit books be clearly indexed. Ideally, the index will not just identify the exhibits, but also refer to their role in the presentation of the case (e.g., how they fit into the blueprint, and through whom).

14. Telegraph Your Witnesses' Testimony Graphically. Direct testimony, especially, is conducive to reproduction in outline form. Produce a graphic for the panel members that corresponds with the planned testimony of the witness. In this way, you can telegraph your witnesses' testimony graphically to the arbitrators, so that they can follow the progression of the testimony and confirm that your case presentation is unfolding as promised.

15. Got Live if You Want it but Not if You Don't. Trial lawyers have an understandable bias for live testimony. If you are presenting the witness, you like the dramatic presentation that is only possible with live testimony. Opposing

counsel fear the written version is too strong, and live cross-examination will wither its intended purpose. Still, there is a place for testimony by affidavit—especially involving undisputed testimony. Let opposing counsel know that you got live testimony if they want it, but not if you don't have to. The AAA Rules allow for several alternatives to "live-in-person" testimony (affidavits, internet communications, video conferencing and telephonic testimony). Think about using any and all of these alternatives to streamline the hearing process.

16. Turn the Experts Loose. A common trait of many trial lawyers is an overabundance of control. If they could, they'd script direct and cross and edit every exhibit to correspond to how they would like to see the evidence come in. At the heart of that trait is a fear that the finder of fact will misunderstand testimony or documentary evidence unless it is presented in "just the right words." The triers of fact in an arbitration, however, should be trusted to "get it right." The AAA Construction Panel has been vetted exhaustively, and you can rest assured that they are well-seasoned veterans of the process—virtually all of whom have been where you are so many times, they probably "recognize" your case when you are halfway through it. The national construction bar is relatively small, as is the pool of experts called upon to assist in the presentation of construction claims. Many experts are known to the arbitrators. They have retained them. They have cross-examined them. So, you should expect that there will be much give and take between them and the panel members. So, why not let the experts participate in cross-examination? The arbitrators can reign them in if they get a little off the mark or a little too

zealous. Often cases turn on a battle of experts. As an arbitrator, I like to see them mix it up between themselves during the hearing.

17. Don't Object. If the object of an objection is to prevent evidence from being heard by the panel, then don't object. It's coming in. Address the "weight" of the evidence in your post-hearing brief. Also, your panel will know hearsay when they hear it. They all know that it is expressly permitted in most arbitration forums. If the parties adopt the Federal Rules of Evidence, you may consider objecting on the basis that it is outside of the scope of the arbitration provision. Even so, hearing it isn't error, basing an Award on it would be. So, object quickly without argument and address the matter in your post-hearing brief—if even warranted.

18. Hang the Damage Calculation on the Wall. Don't wait until the case has been put in to figure out what your claimed damages are. You know what they are, presumably, because you have worked closely with your forensic accountant to develop a report and exhibits to assist in his testimony. You have to share that with the opposing counsel. So, put a big star on the summary exhibit that pulls all of your damages together and hang the damage calculation on the wall. Of course, keep it on your side of the room. And use it when you are putting in your damage case.

19. KISS me. It is just as true in arbitration as it is in presenting a case to a jury. Simplicity in the theory of recovery and presentation of the evidence is key. KISS (Keep It Simple Stupid) me, to be sure. All the clichés are true: don't lose the forest

for the trees; less is more; simplify and add lightness; simplicity is the ultimate sophistication.[7] So really, don't sweat the small stuff.

20. Watch the Clock. Don't let any one witness/issue drag on too long. This is especially true at the beginning of the presentation. Isn't it uncanny how fast you can go when you've run out of time? You can balance your time if you watch the clock. You know what you need to prove because you have written the blueprint. So, act like a scheduler and limit the presentation of the elements of proof by the clock. Know before you start how long you can take with a witness or an issue, and stick to it.

21. Don't Stop With the Pain. Good trial lawyers are born storytellers. Arbitrators like to hear them too. Construction jobs gone bad are filled with good "painful" stories. Of course, you should tell that story, but don't stop with the pain. You still have to prove all the elements of the tort, or all the elements of the contract breach, or all the elements of the statutory claim, and so on. See how important that blueprint is?

22. Keep it Moving But Make Sure They Are Moving With You. Arbitrators like nothing more than a day of testimony that "flies-by." They are not expecting a ton of evidence when a pound will suffice. They are very comfortable with summary charts and bullet lists in lieu of hours of testimony and reams of paper. Don't think you haven't proved enough when you find that you've put in your case on an issue in half the time you allotted to yourself. If you are that concerned that you need to prove more, ask the panel if they followed the presentation of evidence on the issue

[7] This seems a good spot to drop a few other acronyms. DRY = Don't Repeat Yourself. YAGNI = You Ain't Gonna Need It. DIE = Duplication Is Evil. OAOO = Once And Only Once.

and whether they think it is sufficient to make the point. And while you are busy keeping it moving, be sure that the panel is moving with you. Watch and listen to the panel. They will usually let you know if they are not tracking with you. And consider assigning to one of your team members the job of observing the panel to confirm, as best you can, that they are all following you.

23. Be Like a Burglar on Cross. Cross-examination is not the time to make your case. Identify just a few points you want to make with the witness. If you are not certain about what points to make, or whether you can make them with this witness, then pass on cross-examination. You will certainly be given ample time in your case, or in rebuttal, to make the points you wish through other witnesses whose testimony you can control. The best cross is so short that the witness doesn't know an admission has been made. Be like a burglar, slip in quickly and leave your mark. By definition, experts are professional witnesses. They are uniquely qualified to address a specialized area of expertise. It could be scheduling analysis, forensic accounting analysis, structural systems analysis. Experts on these issues are very likely smarter than you when it comes to addressing these issues. So, don't start a fight you can't win. Let them have their say and use your own experts to rip them apart when you get the chance.

24. Experts Aren't Fact Witnesses. The best witnesses are usually the quiet ones who are informed, courteous, observant, candid and disarming. These are not expert witnesses. These are the project people who lived through the pain of a claim unfolding. These are the witnesses through whom the "pain-story" is told. Experts aren't fact witnesses; so don't try to make them fact witnesses.

25. No Luddites Need Apply. Law firms today presume a level of familiarity with technology that was non-existent when I graduated law school in the late 1970's. When technology began to change the face of the legal profession, some old dogs refused to learn the new tricks. They are all in the bone yard today. You may fairly presume that the panel members will welcome the use of technology in the presentation of your case. The only thing you should worry about is whether the hearing room has the electronics you need to allow the use of new technologies. Make sure your software is compatible with available hardware and that all the participants can access it when it comes time to let them play with it. The arbitration forums have gone to lengths to improve the technological wherewithal of its members. No Luddites need apply to the AAA or JAMS, etc. You should feel free to challenge the panel to learn newer, faster, better technologies.

26. No Surprises. Arbitrators don't like to hear that an undisclosed witness is needed to provide testimony on an issue. Nor do they like to hear offered as evidence an exhibit that has not been previously disclosed. No surprises, please! Reconsider whether it is all that important to call the surprise witness or introduce the surprise exhibit. It will certainly introduce delay to the process and distraction to the presentation of your claim. It could also introduce the element of distrust. There is no certainty that the panel will allow it, and if it does, you can expect sanctions and perhaps a suspension of the hearing to allow opposing counsel to prepare to address the surprise. So, if you are going to do it, think though the consequences of that behavior.

27. Just Rebut the New Stuff. You don't need to be the last one to make a point you've already made. Using rebuttal to simply repeat what you presented in direct is not just a waste of time, it also introduces an element of confusion that can distract from what might have been a very good direct. The panel may be asking itself "Is this new?" "How is it different from his direct?" "Maybe I didn't understand what he was trying to do in direct?" "Maybe he doesn't know what he's doing?" Stick to the scope of the cross to just rebut the new stuff. The panel will reject cumulative evidence;[8] so don't make the arbitrators have to.

28. Close With Your Beginning. If you prepared your case properly, you will close by stating dramatically that you have proved exactly what you promised to at the opening of the Hearing on the Merits. If you don't close with your beginning, you better have an awfully good reason for it. The likely consequence is that you will leave the panel lacking in the credibility of your case. If you feel that some of your claim was left in shatters by opposing counsel's defensive case-in-chief, then you can bet that the panel feels the same way. Now is the time to explain why the rest of your claim is viable and compelling. Don't try to shore up your claim with a new theory or introduce a new cause of action that you would like the panel to shake out of the ruins of the failed claim.

29. Put the Award on the Wall. Don't wait for the post-hearing brief to show the panel the form of Award you expect from them. Just as you would teach a jury to fill out a Jury Verdict, put the Award on the wall; show the panel what their Award

[8] American Arbitration Association Construction Industry Rules R-33(b).

should look like. Specify in written form all the various types of relief you will be expecting from the panel in its formal Award.

VI The Post-Hearing Submission

30. The Plan Comes Together. Arbitrators look forward to finely crafted post-hearing briefs. They expect the submission to explain exactly how and where the chips fell as they may. Of course the submissions will disagree in their conclusions, but whether they are persuasive will depend entirely on how well they assess the evidence received in light of the promises made by the parties' counsel at the beginning of the arbitration. Did the claimant prove what it promised? Did the respondent demonstrate that essential elements of proof are lacking? This is where you explain how your plan came together in the hearing. Your blueprint should be readily apparent here, annotated by references to the most important and compelling testimony and exhibits received into the record. No new theories belong in here. No new causes of action or defenses belong in here. Just pull together in one place the pieces of the record that demonstrate that you proved what you said you would. Any citations to case law, statutory law, codes, etc. should be supplemented with copies of the same, organized in an appendix that corresponds to the citations in the post-hearing brief. Finally, reproduce the Award that you used in your closing here, to remind the panel just what it is you are asking them to give you.