FROM THE NEUTRAL'S PERSPECTIVE: WHAT ARBITRATORS WANT TO SEE FROM THE PROCESS

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I. INTRODUCTION

The vast majority of advocates treat the arbitration process exactly as they would a litigated matter. This is certainly not surprising as trial techniques are, generally, the only ones being taught to law students and lawyers alike. It is axiomatic to say that certain litigation techniques destroy the general purpose behind arbitration, that being to obtain a well reasoned conclusion to a dispute by arbiters who have subject matter familiarity in a timely and cost efficient manner. As a general rule, clients want contested matters done faster, cheaper, and of a less technical nature than "standard" courtroom practices allow. Arbitration is a way to give clients this service if the process is not treated as the proverbial "federal case." Remember that regardless of the preference of counsel as to the arbitration process, it is the process contracted for by the parties. Attempting to change the mechanics of arbitration into something counsel prefers (i.e. litigation) is not something the client desired when it entered into the agreement.

The following outline are thoughts, comments, and suggestions made to the participants in the process from the arbitrator's perspective. I have compiled these suggestions based not only on my own experience but in discussing arbitration procedure with other arbitrators. These suggested techniques are not cast in stone, but rather should provide a general guideline for use during the arbitration process, at least from the eyes of the arbiters.

II. CLAIMS AND ANSWERS

A. Claim Document

1. Do not use legalese in drafting the claim document. A claim submitted in "Original Petition" style will not capture the attention of the reader, and therefore will not be very persuasive.
2. Use good prose in your claim document. This is the first time the arbitrators will know what the case is about. Doesn't it make sense to begin the persuasion process as early as possible?
3. Do not use the standard preprinted form only for your claim document. Simply typing in "breach of contract, $500,000" under the heading Nature of Claim, in the standard preprinted form does not tell the panel what it needs to know and is not persuasive.
4. Do not submit revised or amended claims that are substantially different in form or substance. Significantly changing facts or causes of action in mid-stream does not inspire confidence in your claim. If the claim needs to be significantly revised, do it as early as possible in the process, and as early as possible prior to the actual hearing date. Arbitrators understand that cases (and damage amounts) change as the case matures. Wholesale changes should be avoided, however. Appearing to "lay behind the log" with a late claim is not the preferred way to influence arbitrators.

B. Answering Statement

Again, do not use standard litigation forms in making your answering statement. Think about the effect of a "general denial" when it is read by the ultimate decision maker. Instead use good prose to tell your story. Arbitrators actually read claims and answering statements. As a rule,

we would like to understand what the claim and the defenses are about in well-written English rather than stilted legalese. This is particularly critical if the arbitration panel contains a lay person. BE CONCISE.

III. PREHEARING CONFERENCE

1. Now is not the time to give jury argument. Arbitrators generally are not interested in a discussion of the issues of the case, unless it pertains to scheduling issues. Thinly veiled attempts at making jury argument at this point are generally not well received.

2. The purpose of the prehearing conference is only to determine the date of the hearing and any milestone requirements to get from here to there.

3. The attorney handling the hearing must have authority to schedule the case. Do not have an associate handle the hearing who does not have authorization to calendar a case for a partner.

4. Arbitrators expect the parties and counsel to understand and adopt the principal of expedient resolution. A statement by counsel to the effect that the hearing on the merits can not be scheduled any sooner than one year (or longer) is a poor reflection on both counsel and its represented party. Do what is necessary to schedule a prompt hearing. Anything less will be looked on with disfavor by the arbitration panel.

5. If appropriate, make full use of stipulations. This saves time, hones the issues, and shows the arbitrators the parties are cooperating in an effort to help the arbitrators.

A. Discovery

1. The trend in arbitration is toward reduced/limited discovery depending on the type of case. Arbitrators are now being more assertive in restricting discovery, such as prohibiting depositions or allowing only a limited number. Rule 22(d) of the latest AAA Construction Industry Rules states there shall be no other discovery (other than an exchange of documents) "except in extraordinary cases."

2. Arbitrators like discovery disputes less than judges.

3. Always attempt to agree to exchange written documentation and, if necessary, limited informational interrogatories. Most arbitrators think interrogatories and request for admissions are a waste of time and money.

4. If you know there are going to be discovery issues or a discovery dispute, get it on the table at the prehearing conference.

5. Ask for only what you need. Do not attempt a fishing expedition. This tends to offend arbitrators who truly desire to streamline the process.

6. Tender your documents. Do not hide anything if they are asked for, unless privileged.

7. Think twice (or more) about filing multiple motions to compel. In your zeal to show the other side is not playing fair, you and your client may come off as being "whiners". This is not meant to discourage necessary motions to obtain critical documents. However, you do not want to give the arbitrators a negative impression of you or your client. (e.g. "Is this how this party acted during the course of the job?")

B. Prehearing Briefs

Do not submit a prehearing brief unless it is agreed upon at the prehearing conference. If prehearing briefs are requested, make sure these get to the arbitrators before the hearing. A great deal of good work product is essentially ineffective because the prehearing briefs are given to the arbitrators at the beginning of the hearing, leaving little or no time for them to be read and digested.

C. Dispositive Motions

Motions for summary judgment and other dispositive motions put arbitrators in an automatic quandary. Arbitration law in most states allows for vacatur of an award if an arbitrator refuses to hear evidence relevant to the case. However, Rule 31(b) of the latest AAA Construction Industry Rules now allows arbitrators to entertain motions that dispose of all or a part of a case, for efficiency sake. While granting a dispositive motion may not automatically allow the award to be vacated, most arbitrators are cautious about disposing of the case prior to all the evidence being received. That being said, rulings granting these motions are on the rise. Consider the tactical advantage of filing a dispositive motion, even if the odds of success are not great. At least the arbitrators will be appraised of the issue early and will be alert to that issue during the course of the hearing.

IV. HEARING

As a rule, arbitrators do not like to be surprised with motions at the beginning of a hearing. If there is a necessity for ruling on motions, attempt to get these heard and ruled on prior to the start of the hearing.

A. Presentation of Evidence

1. Use 3-ring binders with a clear index of all exhibits. Put major pieces of evidence at the front of the binders so that arbitrators do not have to continually look back at Exhibit No. 57 to review pertinent contract language. Consider having important documents (e.g. the construction contract) indexed separately for handy reference.
2. Exhibit binders should be exchanged between parties prior to the hearing. Do not submit evidence binders to the arbitrators before the hearing unless they have indicated this preference. While some arbitrators desire to review evidence prior to the hearing, most prefer to hear and see evidence contemporaneously.
3. Try to get an initial ruling as to the admissibility of all evidence in the exhibit binders as the first order of business at the hearing. Objections as to individual documents can be made at the time of their use or introduction during the hearing.
4. Present a proposed damage model to the panel at the start of the evidence. This allows the arbitrators to keep track while the evidence is presented. Update your damage model, if need be, at the conclusion of the case.

B. Rules of Evidence

1. Generally, there are “none”unless the arbitration clause so stipulates.
2. One of the few ways for an arbitrator to have an award overturned is to refuse to allow relevant evidence to be presented. Therefore, arbitrators are loath to disallow any evidence. However, be very careful not to abuse this privilege. Going too far with evidence that may be remotely relevant can tend to have a negative effect on your overall case.

C. Testimony

1. Lawyers should not testify--leading questions should be used as little as possible. It is better to have the client/witness tell the story rather than having it told by the lawyer. 2.

Keep sight of the main/central issues of the case. Construction cases are notorious for having a multitude of small issues. Do not go down rabbit trails. Don't sweat the small stuff.

3. As a general rule, do not spend testimony time on more than 25 pictures. If the point can not be made using photographs in one (1) hour or less, consider a site visit. Spend time only on the critical photographs, and refer the arbitrators to the others for review at a later time.

4. Allow arbitrators more time to read documents (letter, clause, etc.) before testimony begins. Too often testimony is given while the arbitrators are trying to read the information. Do not have witnesses read letters or contract clauses verbatim. Presumably, the arbitration panel is literate.

5. To the extent possible, attempt to present evidence in a chronological fashion.

6. Focus on and prove the causes of action or defenses alleged in your claim. (breach of contract, promissory estoppel, waiver, etc.).

D. Cross Examination

KEEP IT SHORT. In general, do not conduct examination as if you were at a deposition. (an event seen all too often in arbitration hearings). Your goal is to discredit the witness. This will cast doubt on the witnesses' other testimony. Attempting to make the cross-witness sweat for 2 or 3 hours may give your client some pleasure but it usually does not help your case. Likewise, asking the same or similar questions until you get the answer you want is not persuasive cross-examination. Usually, a frown or similar facial expression showing you disagree with the answer is much more effective than brow-beating the witness for an extended time.

E. Use of Experts

Do not attempt to present the full case through experts. Use experts for "true, expert testimony" only. The arbitrators want to hear from the participants regarding the crux of the dispute.

F. General

Be credible. If you or your party does anything to lose credibility your whole case suffers. This rule applies from the initial prehearing conference through discovery (if any) and the hearing. A presentation that is both efficient and concise is persuasive.

V. POST HEARING

A. Briefs

Post hearing briefs should not be used to make a second closing argument. Only brief the issues that the arbitrators have expressed an interest in, or if there is a serious question of law at issue. Do not gratuitously send a post hearing brief if one has not been requested by the arbitrators. Also, do not get into a continuous cycle of responses and replies. Stick to the briefing schedule.

B. Awards

1. Arbitration awards traditionally have not had any explanation with them. Arbitrators like it this way, however the trend is toward reasoned awards. If you simply want a standard award, make sure the arbitrator(s) know this as some are now accustomed to giving a reasoned award as a matter of course.

2. If you request findings of fact and conclusions of law, be prepared to draft them and submit them to the arbitration panel yourself.

3. Don't allow your clients to call the arbitrators.

VI. SUMMARY

It is amazing how often arbitrators agree on issues during deliberation. This reveals that cases fall on their own merit, specifically, on the strength and credibility of witness testimony, on the law and to a much lesser extent, the skill of the lawyer in presenting the case. Studies have shown that the presumption that "Arbitrator's split the baby" is a myth. Treat the case as an arbitration, not the proverbial "Federal" case, and both you and your clients will see the benefits.