VOLUME 13, NO.1 | DECEMBER 2010

The Newsletter of the ABA Forum on the Construction Industry

UNDER CONSTRUCTION

IN THIS ISSUE

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By Christopher W. Cheatham, Cheatham Consulting, LLC

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APPOINTMENT OF THE

LAW STUDENT

FORUM NOMINATING COMMITTEE

The following people have been appointed to serve on the Nominating Committee, and to select and submit to the membership the nominees for the positions of Chair-Elect and four Governing Committee Members: *Read more...*

WRITING COMPETITION

The ABA Forum on the Construction Industry announces a writing competition for law students currently attending ABA-accredited law schools. *Read more...*

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The GSA followed up its Report with a September 2010 notice in the Federal Register disclosing a pilot program to develop a GHG reporting program.[3] According to the notice, the GSA intends to conduct "focus groups with the top

200 Federal suppliers that voluntarily participated in the Carbon Disclosure Project's 2010 annual questions of GHG emissions measurement practices." The proposed greenhouse gas emissions reporting program mirrors the GSA's previous implementation of green building requirements that began nearly ten years ago. A few years after the United States Green Building Council (USGBC) launched the Leadership in Energy and Environmental Design (LEED) rating system, the GSA and other federal agencies adopted this third-party rating system to demonstrate the construction of green buildings. Similarly, the GSA report recognizes the need to rely on a third-party GHG emissions reporting system.

The Walmart Example

While the federal government is at the beginning of greenhouse gas emissions reporting, similar efforts in the private sector are already underway. With thousands of stores and a vast global supply chain, accounting for Walmart's GHG emissions would seem to require a herculean effort. But Walmart recently pledged to track and reduce the GHG emissions of its stores and its entire supply chain. Among its GHG emissions goals, Walmart has proposed to "eliminate 20 million metric tons of greenhouse gas emissions from Walmart's global supply chain by the end of 2015" by helping its "suppliers reduce the emissions associated with the manufacture, shipment, and use of their products.[4] Federal contractors that are also reliant on products and services from around the globe will be faced with a similar effort to track and reduce GHG emissions for federal procurement purposes.

With the slogan "Watch Our Falling Prices," it is unlikely Walmart would have proposed GHG emissions reductions if the initiative was expected to result in higher prices. Not surprisingly, Walmart expects the GHG reductions in its supply chain to result in cost savings for consumers. In February 2010, Walmart President and CEO Mike Duke made the case for simultaneously lowering emissions and prices: "Like everything we do at Walmart, this commitment ends up coming down to our customers and helping them save money so they can live better. Reducing carbon in the life cycle of our products will often mean reducing energy use. That will mean greater efficiency and, with the rising cost of energy, lower costs, making our business stronger and more competitive.[5]

Reporting as a Competitive Advantage?

Early reporting of greenhouse gas emissions may result in two particular competitive advantages for construction contractors bidding on federal projects. Over the long term, like Walmart, federal contractors can anticipate that reporting and reducing GHG emissions – particularly throughout the construction supply chain – will result in new efficiencies and lower costs. Federal contractors can then pass on these savings through lower bids.

In addition, in the short term, federal contractors tracking and reducing GHG emissions will improve their chances of winning federal contracts if competitors fail to report emissions. Contractors who were early adopters of green building techniques were able to win federal contracts that required experience with green construction and the LEED certification process. The same will be true of early adopters of GHG emissions reporting as the GSA and other agencies will begin factoring in GHG reporting and reductions into procurement decisions. While GHG

emissions accounting may be be burdensome, particularly for construction contractors that are dependent on hundreds of suppliers and subcontractors, early adoption may be the key to differentiating bids and winning contracts in an industry that has experienced increased competition and narrower profit margins. As the country's largest buyer of goods and services – $425 billion spent last year – the federal government can quickly force companies to incorporate GHG emissions accounting in every sector of the economy.

For federal contractors – and eventually state and local contractors – tracking, reporting, and reducing GHG emissions will become an important strategy for winning government contracts. What is your business plan for GHG accounting?

Christopher W. Cheatham is the managing partner of Cheatham Consulting, LLC. Chris works with the construction industry to identify new market trends – like green building and greenhouse gas emissions reporting – that can result in business opportunities. Please visit his blog, Green Building Law Update, to learn more about these and other topics or contact him at chris@cheathamconsulting.com.

Notes

1. Exec. Order No. 13,514, 74 Fed. Reg. 194 (Oct. 8, 2009).
2. Gen. Servs. Admin., Executive Order 13514 Section 13: Recommendations for Vendor and Contractor Emissions (April 2010).
3. Information Collection; Supplier Greenhouse Gas Emissions, 75 Fed. Reg. 57,275 (Sept. 20, 2010).
4. Walmartstores.com: Greenhouse Gas (last visited Dec. 5, 2010).
5. Walmartstores.com: Remarks as Prepared for Mike Duke, President and CEO of Walmart Greenhouse Gas Goal Announcement (last visited Dec. 5, 2010).

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Appointment of the Forum Nominating Committee

Committee Chair:
Jim Schenck

Committee Members:
Deborah Ballati, Frank Elmore, Joel Gerber, Kristine Kubes, Carina Ohara, and Carol Patterson.

Nominations for Chair-Elect and Governing Committee Members must be sent to the Committee Chair, Jim Schenck, by January 6, 2011. Nominations may be made by the candidates themselves or by third-persons on their behalf. All nominations or expressions of interest should include a resumé and a written submission that details the candidate's activities in the Forum, the ABA and the legal profession. In addition, the Committee would like to know if the candidates have any initiatives or practices they may be interested in proposing if elected to the position sought. Please note that in accordance with the Forum's Bylaws, any nominee for Chair Elect must have served at least two years on the Governing Committee.

The Nominating Committee will convene its first meeting in conjunction with the Midwinter program, which will occur on January 20, 2011. Any questions or concerns regarding the nominating process should be directed to the Committee Chair, Jim Schenck. Feel free to contact him directly (see Jim's contact info below). The election will be held during the business meeting at the Forum's Annual Meeting in April 2011.

The future of the Forum rests securely on the strength of its membership. We welcome those of you who wish to stand and serve by participating in this important process.

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MESSAGE FROM THE CHAIR-ELECT

Opportunity Knocks

By James S. Schenck, Conner Gwynn Schenck PLLC

Allow me to introduce you to Deborah Ballati, Frank Elmore, Joel Gerber, Kristine Kubes, Carina Ohara, and Carol Patterson. It is quite possible you already know them. They are all dedicated and long-serving volunteers and leaders of the Forum. Along with yours truly, they are also your Nominating Committee for 2010-2011.

By now, I hope you have seen the formal announcement that the Nominating Committee has been established, and you have a sense of its purpose and schedule. One of the notices is in this edition of Under Construction. The notice describes the Nominating Committee's responsibilities, and how those responsibilities are met. Please take a minute to review it, and contact me with any questions about it. Meanwhile, I want to share some personal thoughts with you about leadership succession in the Forum.

The Forum's leadership consists of five overlapping groups: the Officers and Governing Committee; the standing Committees; the Program Chairs, Coordinators and Speakers; the Division Steering Committees; and the editorial boards of The Construction Lawyer and Under Construction. Overall, it is a sizeable group. There are three Officers (Past Chair, Chair and Chair-Elect), and twelve Governing Committee members. There are ten formal Committees (Division Chairs Committee, Division Steering Selection Committee (more about this one below), Finance Committee, Marketing Committee, Membership Committee, Nominating Committee, Publications Committee, Special Programs and Education Committee (SPEC), Technology Committee, and Diversity Committee). There are about 115 members of these committees, not counting Division liaisons to the committees. In any given year there are eight Program Co-Chairs and dozens of Coordinators and Speakers. In the last edition of Under Construction, I carried on about the Divisions, all twelve of them, plus the Forum Young Lawyers Section. Given that

each Division has a Steering Committee Chair and five or six additional Steering Committee members, we add another eighty or so volunteers. The Editors and Assistant Editors of the periodicals add several more volunteers.

As noted, these groups do overlap. For instance, Jeff Cruz, who edits Under Construction, pitches in on the Publications Committee, reasonably enough, as do John Ralls and Stephen Hess of The Construction Lawyer. All of the Governing Committee members serve on at least two standing committees. Many of the Division leaders serve on committees or produce programs. So the volunteers who run the Forum are a tight-knit group of maybe 150 members. It is a large group, but it is a small subset of the entire Forum membership of nearly 6,000 people.

Turnover in the Forum's volunteer leadership tends to be fairly rapid. Governing Committee members serve for three years. Officers serve for three years (one year as Chair-Elect, one as Chair and one as Past Chair). Division Chairs typically serve two years. Division Steering Committee members typically serve no more than four or five years. Program Co-Chairs serve for one program. Speakers are limited to speaking once every three years. Editors serve a few years, but even those jobs turn over; they are hard work. We are fortunate to have a large, collegial and engaged membership. We need them.

Despite the rapid turnover in most Forum leadership positions, there is some continuity of leadership, simply because the same people often move from one position to another. Leaders in the Forum tend to funnel up the organization, starting in Divisions and programs, writing articles and books, serving on Standing Committees, and then in some cases taking on the work of the Governing Committee and becoming officers. The "Forum resumé" of a person seeking nomination to the Governing Committee or the office of Chair-Elect is likely to stretch back fifteen years or more. Indeed, a member is not eligible to serve as Chair-Elect unless that person has at some time served on the Governing Committee.

Another observation is that leaders in the Forum are to a certain extent self-selected; they are volunteers, after all. Newer Forum members often ask how to get involved. They are told to volunteer to write an article, attend a Division meeting, assist with a program, and on and on. The point is they need to be self-starters. It stays that way. Even candidates for Chair-Elect and Governing Committee tend to be self-nominated, or are nominated by a close colleague in the Forum. Frankly, the Forum and the Nominating Committee are not active recruiters. We do not have search firms under contract to find the best talent to fill positions; we do not approach members and entreat them to serve.

I am trying to get to a point with all of this background. The Nominating Committee has a straightforward and limited task. Each year it nominates one member to serve as the next Chair Elect of the Forum, and four members to serve as the next class of Governing Committee members. That is it. While the Committee's charge is narrow, it is no easy task. Typically there are more candidates than positions, so difficult choices must be made. The Forum, like many if not most volunteer professional associations, promotes people who have been hard-working and loyal volunteers in the past. That custom makes it difficult to select nominees, because

the Committee members and the candidates have often become friends, and some of them wind up disappointed.

The Forum is not likely to change its custom of elevating long-serving and dedicated Forum volunteers to the GC and to the Chair. The Bylaws require as much, providing that "In making nominations, the Nominating Committee shall consider each candidate's activities in the Forum, in the Association, and in the legal profession." This bias in favor of long-serving volunteers can frustrate another Bylaw mandate, however. The Bylaws go on to say that "The Nominating Committee also shall seek to improve the Forum's diversity through nominations that appropriately represent the various types of professional organizations, practice areas, geographical areas, minorities and women within the Forum." The pool of potential candidates that the Nominating Committee considers is very small. The Committee does not tend to recruit. To assure that it has a diverse leadership, ideally the Forum will focus on that goal long before the stage where the Nominating Committee is considering five appointments to Chair-Elect and Governing Committee.

The impulse to cultivate a diverse leadership, and a diverse membership, is undoubtedly about fairness, opportunity and inclusion. It is also about taking advantage of untapped potential in the organization. In our society, in our organization, we do not want to miss opportunities, and sometimes it takes a different perspective to see opportunities. In this regard, the Forum benefits from active turnover. The Forum benefits from the overlap of its leadership on committees, programs and publications. We learn from each other and we see a bigger picture. What we are asking ourselves more pointedly now, however, is whether we are cultivating the leadership that will provide enhanced opportunities to learn from each other, and to see an even bigger picture.

Once they are selected, the Chair-Elect and the new Governing Committee members can do much more than can the Nominating Committee to assure a vibrant and diverse future leadership for the Forum. These new members of the Governing Committee will be selecting the Co-Chairs for the programs to be offered in 2012-2013. They, along with their Co-Chairs and the Governing Committee, will be selecting speakers and program coordinators. That is a big opportunity to find great future leaders for the Forum

This winter, another important nominating committee will be working away. It is the Division Steering Selection Committee. Appointed by the Chair of the Forum, this Committee will be nominating Division Steering Committee Chairs and Division Steering Committee members for consideration by the Governing Committee. This year the Committee is chaired by Andy Ness. He will have the assistance of his committee members. He will also have the help of the Governing Committee liaisons to the Divisions. Finally, he will have input from the current Division Chairs.

The Division Steering Committee members are going to be the main source of future Program Co-Chairs, Program speakers, and Governing Committee members. I am sure Andy and his committee will be applying the same principles that will guide the Nominating Committee. Andy's committee, however, is going to be tapping far more leaders of the Forum than the Nominating Committee will be

tapping. His committee's task is ultimately more important to the long-term future of the Forum. Please help Andy, his committee and the Division Chairs identify those people who represent the best potential future leaders of the Forum. Let's not exclude anyone. Let's not miss opportunities. Let's tap our full potential. We look forward to hearing from you.

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The Forum Young Lawyers Section

By R. Carson Fisk, Ford Nassen & Baldwin, P.C.

For a young lawyer, getting involved in the Forum has historically been a somewhat daunting task. Given the absence of a formally recognized group within the Forum, young lawyers were generally left to find their own way, often without direction. This has changed within the past year with the creation of the Forum Young Lawyers Section ("FYLS").

As a group to serve young lawyers (a term that the ABA defines as someone under 36 years old or admitted to practice for five years or fewer), the mission statement of FYLS is as follows:

> The Forum Young Lawyers Section provides young lawyers and other qualifying members with: (a) a means through which they may discuss and exchange ideas and cooperate, encourage, and assist each other; (b) opportunities to enhance their professional competence, skills, and ethical development; and (c) opportunities to aid and promote their participation and advancement within the Forum.

FYLS has already provided its members opportunities to participate in editing Forum publications and planning social activities. In the near future, there will be more opportunities to assist in planning a community service event, which should become an annual event. As opportunities arise, they will be sent to FYLS membership via the FYLS listserv. If you have not received any emails from FYLS, please contact Toni Cosey-Williams (cosey-wt@staff.abanet.org) and Kelly Rodenberg (rodenbek@staff.abanet.org) and ask to be added to the listserv. This will ensure that you are kept current as to FYLS activities. Also, be sure to check the website on the Forum homepage, which should be operational in the near future.

But Forum involvement should not stop with FYLS (one is, after all, only a "young lawyer" for a relatively short period of time). One of the best ways to get involved in

the Forum is to join one of the other twelve divisions. The divisions allow someone to focus on a specific area of construction law or particular client base, or work with others with similar jobs (i.e., in-house counsel). They present unique opportunities that will be present long after one is no longer in FYLS. In part, FYLS encourages such involvement by trying to stagger dinner scheduling so that FYLS members are able to attend both the FYLS dinner and division dinners. This brings me to the real point of this article: How do I convince others to let me get involved with the Forum and FYLS?

A decision to become active in the Forum may be accompanied by the possibly tough sell of convincing bosses to allow one to attend. Forum meetings are generally out of town, making the costs of travel and a hotel—not to mention the meeting itself—a real consideration. As an associate, pitching that first meeting to the boss can be somewhat daunting. Questions such as "you want us to pay to send you to where?" and "what benefit will the firm get out of this?" are unfortunately not infrequent. But there are answers that may help get past this shortsighted perspective.

First, there is no getting around the fact that attending Forum meetings involves a commitment of both time and money. The meetings typically occur during weekdays, meaning workdays will likely be missed. But with laptops, Blackberrys, iPads, and iPhones, it is certainly possible to minimize the impact of missing a few days from the office. Flights, cars, hotels, and food obviously cost money. But even here, there are opportunities to save costs. As a member of the ABA, there are discounts available for travel-related expenses (www.abanet.org/travel) and discounts through Hertz are noted on the back of your membership card. Hotel costs can easily be reduced by sharing a room with someone. And often there are also other hotels near where a meeting is occurring that may provide less expensive rates. Basically, there is no reason why a trip to a Forum meeting has to significantly impact work or break the bank.

Second, there may be some resistance within the firm to pay for a conference held at a resort location. The Forum puts a lot of work into deciding where to host meetings. Given the national scope of the Forum, a variety of locations are generally sought. Not surprisingly, in order to attract attendees, the Forum tries to choose desirable locations. This fact does not mean the meetings have less value. In fact, the social aspects of the meeting (a real value discussed below) are amplified when the location has entertaining social activities available. Meetings are well attended and informative. The fact that a meeting may be in a desirable location is simply not a good reason for not allowing someone to attend.

Third, one of the challenges a young lawyer faces is how to develop his or her name—and by extension hopefully develop his or her legal practice. The Forum provides an excellent opportunity for this, and forward-thinking firms should recognize this benefit. Someone who is active in the Forum will have access to a host of opportunities, from speaking to publications, from administrative management to governance. There is no shortage of possibilities for developing a good name for both the young lawyer and the firm with which he or she is associated. Going to the Forum meetings is a key step to meeting in person the people one talks to on conference calls and communicates with by email. The

Forum even sets up various social events (i.e., architectural tours, boat cruises, regattas, and golf outings) to encourage camaraderie and help members get to know one another beyond just Forum-related roles. FYLS provides similar opportunities through its dinners. These relationships may very likely lead to your New York colleague referring his Illinois-based contractor client to your California law firm for guidance. It happens all the time, and I have heard one former Governing Committee member even state that "I use my Forum Member Directory every day."

These are only a few points that a young lawyer can raise in support of his or her interest in attending Forum meeting when facing a less than enthusiastic boss. I would encourage any young lawyer faced with such a difficulty to reach out to FYLS, or any of the Forum divisions, to get involved. It is perhaps easier to convince someone of the benefits of active Forum membership if there is a specific, focused event (i.e., Division 8 breakfast meeting, FYLS dinner, Division 2 steering committee meeting) to attend. Getting involved in FYLS and one or more of the other Forum divisions is a good first step to getting the full benefits of Forum membership.

Carson Fisk is an associate with Ford Nassen & Baldwin, P.C. in Austin, Texas, and serves as Chair of the Forum Young Lawyers Section.

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The Corporate Counsel Brief

By Deborah Bovarnick Mastin, Assistant County Attorney, Miami-Dade County, FL

Editor's Note: Under Construction will feature a regular column that offers the unique perspective of the Forum members who are also clients.

It is my honor to be the Chair of Division 11, Corporate Counsel, this year. Division 11, Corporate Counsel, is a diverse group, with members drawn from all facets of the construction industry. I represent a local government owner with an extensive capital development program. Other Division members work for professional design firms, large general contractors, small general contractors, specialty trade contractors, construction managers and service providers to the industry. However, because our clients are also our employers, we share a perspective in our dual roles as purveyors and consumers of the legal services required by our employers. The business of our employers/clients is not the law, but some aspect of construction. Many corporate counsel offices are staffed with only a handful of individuals. While all of us focus on construction law, many of us must handle whatever lands on our desk with an emergency transmittal – a lease to review, a copyright to register, a construction lien to foreclose, or an immigration matter to handle. Most of us rely on expert outside counsel when our internal resources are exceeded.

Budget constraints limit our travel opportunities, and it is rare when two individuals from the same office are authorized to attend the same event. Thus, we're mostly loners at Forum meetings; not that we're unfriendly, but we come to Forum events alone.

In order to address the particular needs of Corporate Counsel members, Division 11 frequently holds a breakfast meeting alone on the Thursday morning prior to the start of Forum's Annual, Fall, or Midwinter national conferences. These Thursday breakfast meetings allow Division members to introduce themselves to each other, so that those who don't attend every Forum event will have an opportunity to meet

some colleagues from the very beginning of the program. At these Thursday breakfasts we raise questions that are currently occurring in our practices, in order to learn from the experience of others who have faced similar issues. The Thursday time slot also allows Division 11 members to attend a breakfast event of another Division on Friday morning, so that participation in Corporate Counsel Division activities is not at the expense of other Forum Divisions. At many of our breakfasts, we invite speakers to address a topic of interest. In recent years, speakers have addressed litigation holds and electronically stored information, strategies for dispute avoidance, effective demonstrative evidence, and labor relations issues. At the Annual Meeting in Scottsdale in April 2011, we are planning to hold a networking breakfast event. Although no formal program will be presented, attendees will learn what resources are available to them within the Division membership.

On January 21, 2011 in New York City, however, we will partner with Division 9 Specialty Trade Contractors and Suppliers at the Midwinter Meeting, to create a Friday morning breakfast program that explores the tension between the prime contractor's duty to pass through its subcontractors' claims with its exposure to consequences from the owner for submission of potentially false or inflated claims. Three experienced panelists, Barbara Boxer of PDM Bridge, Inc., Leslie O'Neal Coble of Brassfield & Gorrie, Inc., and Sam Hadley of Cotton & Co., a forensic CPA, will consider with moderator Aaron Silberman of Rogers Joseph O'Donnell, various points of view on this sensitive topic, including the kind of supporting documentation a subcontractor should provide to support its claim, the degree of detail the prime contractor should review in order to satisfy its duty of due diligence, and the options available to a subcontractor when a prime simply refuses to submit a subcontractor's claim. These panelists face these issues in their practices on a regular basis. We are looking forward to a lively and practical discussion, and invite all attendees to join us.

If you are not an in-house counsel, I ask you to consider inviting your clients' in-house counsel to join you at Forum events. A better educated client can be an asset to your book of business.

If you are an in-house counsel, I encourage you to join in the monthly telephone conferences of our Steering Committee. The Steering Committee plans the future programs and activities of the Division. Especially if travel options are restricted, these monthly calls offer an excellent opportunity to exchange ideas with other in-house counsel, and to establish warm and valuable relationships. Your participation is enthusiastically welcomed.

If you have any questions about Division 11, Corporate Counsel, please don't hesitate to contact me. I can be reached at dmastin@miami-airport.com.

See you in New York.

Deborah Bovarnick Mastin is an Assistant County Attorney for Miami-Dade County, Florida, and the current Chair of Division 11, Corporate Counsel.

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The Top 20 Mistakes Attorneys Make in Arbitration and How to Avoid Them

By Judith B. Ittig and Harold Coleman, Jr.

Arbitration has three distinct phases: the pre-hearing stage; the evidentiary hearing; and the post-hearing period, which begins at the conclusion of the hearings until the arbitrator issues the award. As arbitrators who have heard hundreds of commercial and construction cases, we have come across numerous mistakes attorneys make—in cases large and small—mistakes that can negatively affect the time the arbitration takes, the cost of the process, and even more significant from the clients' point of view, the outcome.

To help attorneys recognize the mistakes they are making when representing parties in arbitration, we compiled a list of the ones we see most often and suggest ways to handle the particular issue or task in a manner that will be helpful to the arbitrator. These strategies could help attorneys improve the quality of their arbitration advocacy and obtain for their clients the benefits that arbitration was designed to produce.

Five Pre-Hearing Mistakes and How to Avoid Them

1. Postponing Itemization of Damages and Grounds for Recovery

Attorneys often file demands for arbitration and answering statements that do not specify the full nature of, and dollar amounts involved in, the clients' claims and counterclaims. Vague arbitral pleadings can be made because the arbitration rules of the American Arbitration Association (AAA) do not require much specificity at this point. General demands and answers are understandable if the claimant wants to get the arbitration underway as soon as possible; the claims and damages are not completely known; or the respondent is still considering its counterclaims and offsets, which it does not want to present until the claimant's claims are fully fleshed out.

But when attorneys choose to do only what is minimally required by the AAA rules, even when the legal theories and damage calculations are known, they are missing an early opportunity to highlight their cases for the arbitrator.

Recommended Solutions

The statement of claims does not need to follow the format of a complaint in a lawsuit, but it should set forth the factual grounds and legal theories for recovery, and all types of damages or other relief sought, both legal and equitable, as well as the amounts claimed.

The answering statement should do the same with respect to the defenses, counterclaims and offsets. In a recent arbitration involving allegations of malpractice by a real estate broker, after five days of evidentiary hearings, the arbitrator denied the claimant's request for damages because the demand asserted only a claim for breach of contract, even though a negligence claim could have been asserted as well. Possibly counsel assumed, wrongly, it turns out, that the arbitrator would award damages for negligence if the claimant proved that the broker's conduct fell below the requisite standard of care. However, the arbitrator determined that he was limited by the scope of the disputes presented for arbitration.

Indicating all the theories of recovery and relief sought, including the calculation of monetary damages, makes it possible for the arbitrator to determine whether the case will be complex or simple, and if it will be dominated by factual or legal issues. It will also help the arbitrator understand the case and recognize which pre-hearing procedures need to be scheduled.

2. Fear of Committing to a Schedule

Poor or delayed scheduling of the arbitration comes about because the parties' attorneys do not realize why they are required to participate in the preliminary hearing (called a "preliminary management hearing" in the AAA Construction Industry Arbitration Rules); therefore, they do not adequately prepare for it. They often regard this hearing as the responsibility of the arbitrator. They expect that the arbitrator will set the schedule for pre-hearing events, such as exchanges of witness lists and exhibits. As a consequence, the attorneys often end up requesting postponements after the schedule is established, and then accuse each other of delaying tactics.

Recommended Solutions

Attorneys should be prepared to answer the arbitrator's questions, or initiate discussion, about their needs for discovery, a site visit, and experts. There are a number of steps attorneys should take to prepare for the preliminary hearing. Since scheduling the proceeding is an important goal of the preliminary hearing, the attorneys should find out the dates on which their clients and witnesses (both fact and expert, if any) will be available. Before the preliminary hearing, the attorneys should meet and confer to discuss:

- The scope of document discovery.
- The dates for exchanging documents, exhibit lists and witness lists.

- The dates for exchanging their experts' reports.
- Whether either party plans to file any pre-hearing motions and if so, the dates for filing and replying to them.
- Whether a site visit is needed.
- How much time each side will need for direct and cross-examination (and perhaps rebuttal) at the evidentiary hearing. It is prudent to plan for rebuttal, even if the time allotted is not used.
- Available dates for the evidentiary hearing.

As a result of the meet and confer, the attorneys should have a jointly outlined schedule of all pre-hearing activities as well as possible dates for the hearing that accommodate both clients and their witnesses. The dates and amount of time reserved for the hearing on the merits should be realistic because arbitrators take seriously their duty to manage the arbitration efficiently and they are bound by law to postpone hearings only for good cause shown. Moreover, they are not required to grant a postponement request that lacks good cause, even if all other counsel were to agree to the request, unless the underlying arbitration agreement provides otherwise, which is not usually the case.

Unfortunately, litigators are notoriously inexpert at estimating how much time they need to present their case. The attorneys could suggest that the arbitrator set aside a day or two of additional hearing time in case it is needed. Blocking out more hearing time makes more sense than scheduling an inadequate amount of time and then trying to arrange additional days for the hearing at the last minute.

Because the schedule and hearing dates agreed to at the preliminary hearing will be incorporated into a case management order by the arbitrator and be considered final, the attorneys should notify their clients and fact and expert witnesses of the hearing dates as soon as possible after the preliminary hearing. They also should alert the arbitrator and opposing counsel as early as possible if any scheduling problems arise and propose a remedy that does not alter the overall schedule. Potential remedies include extending the hearing day, reducing the break and lunch periods, taking witnesses out of order, and supplanting in-person testimony with telephone testimony or with transcripts of the witness's deposition. In proper situations, the witness's affidavit can be an effective substitute.

Finally, we suggest that attorneys consider allowing their clients to participate in the preliminary hearing. It is good for clients to learn about how the arbitration will be conducted. Clients who learn this tend to have a more positive attitude toward, and respect for, the ultimate award.

3. Buried Exhibits and Not Having a "Red Book" of Core Documents

Too often, documents that will be used as exhibits in the evidentiary hearing are haphazardly assembled and too little thought is given to organizing them in a way that is useful to the arbitrator. It is a mistake to prepare exhibits without consulting with opposing counsel to avoid duplication.

Recommended Solutions

The arbitrator has to juggle books of exhibits submitted by both parties. It takes a

surprisingly long time for the arbitrator to locate the portions of exhibits referred to during the evidentiary hearing, especially when the exhibit is a multipage document.

Each exhibit should be numbered. In addition, the documents that make up each exhibit should have a unique consecutive identifying number (or combination of letter and number) on every page.

Exhibits that are not pre-marked and introduced at the hearing should be labeled for easy insertion with the pre-marked exhibits (e.g., Exhibit 10A). You don't want the arbitrator to have a mass of loose pages that can be misplaced or put aside.

To make it easier for the arbitrator to work with the parties' exhibit books, the attorneys should remove from each party's separate binders uncontested "core exhibits" (e.g., in a construction dispute, the construction contracts, plans and specifications, change orders, etc.) that will be referred to frequently and place them in a joint exhibit binder sometimes called a "Red Book." In addition, they should remove documents of the same type (e.g., invoices, time sheets and payroll records) that will rarely be referred to individually ("bulk documents") and place them in a separate bulk document binder.

Eliminating duplicate exhibits reduces the risk that the arbitrator's notes from the hearing will be scattered on different copies of the same exhibit. The attorneys should not want important notes to be overlooked when the arbitrator reviews the exhibits during deliberations. Keep bulk documents separate so that they do not interfere with the exhibit books on which most of the testimony will be based.

4. Not Disclosing Demonstrative or Summary Exhibits

Attorneys expect arbitrators to welcome demonstrative or summary exhibits and often fail to anticipate that the adversary might object to the use of such an exhibit. They may think, rightly or wrongly, that the source documents and testimony for a summary exhibit (such as a timeline or chart) have already been admitted into evidence, so there is no basis for any objection. For these reasons, attorneys often fail to disclose their intention to use such exhibits prior to the attempted introduction at the evidentiary hearing. Sometimes summary exhibits are not prepared until just before the hearing closes. Sometimes they are purposely not disclosed in order to catch the other party off guard.

Recommended Solutions

Counsel should pre-qualify summary and demonstrative exhibits in advance of their use. Doing so will save time during the hearing and avoid the objection that they are "surprise" exhibits. In one case, a scale model of a dam, made at great expense out of Plexiglas with working parts, was excluded from evidence because it would have been too time-consuming for the other party to check the model for accuracy and completeness.

In another case, a sample window and frame were not admitted into evidence because of objections as to whether the sample conformed to the window that was installed. The purpose for which the sample was offered might have been clarified in a pre-hearing setting and any objections could have been overcome. At the

hearing, it was too late.

Summary exhibits should only summarize and not add new information. The attorney risks losing the opportunity to use a helpful exhibit if it contains facts or opinions that were not elicited in testimony.

If admissibility is not addressed prior to the hearing or at least prior to the attempted introduction, and the adversary voices a strenuous objection, the arbitrator may get the impression that there is something incomplete or misleading about the exhibit, or that it contains information that was not properly placed in evidence. Even if the arbitrator allows it to be used, the exhibit may not be given the attention it should if its admission was surrounded by so much controversy. Worse yet, the arbitrator may feel compelled to postpone the hearings until the other party has reviewed the exhibit, thereby delaying the proceeding.

5. Not Requesting the Form of the Award

Attorneys err when they fail to tell the arbitrator the format of the award they want. This could result, on the one hand, in an award that does not address every claim and counterclaim submitted to arbitration, or it could be missing specific language that is useful, even necessary, for a party to initiate further proceedings. On the other hand, it could result in a more extensive, detailed and costly award than the parties think is required or wise.

For years, lump-sum awards stating which party prevailed, with no explanation of the result, were standard. Arbitrators may continue this practice under the AAA Commercial Arbitration Rules. Rule R-42 of these rules provides that arbitrators are not required to issue a reasoned award unless one is requested before their appointment. However, the arbitrator has discretion to grant a request for a reasoned award at a later time.

The default award under R-44 of the AAA construction rules calls for “a concise written financial breakdown of any monetary awards and, if there are non-monetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each non-monetary claim or counterclaim.” A recent amendment of that rule provides that the parties may request “a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact or conclusions of law.” There is a timing restriction on this request: it must be made before the conclusion of the first preliminary hearing. After the conclusion of that hearing, the parties may not change the form of the award without the arbitrator’s express consent.

Recommended Solutions

The attorneys should find out if their clients would prefer to know the reasons behind the arbitrator’s decision, and advise them that a reasoned award will cost considerably more than the standard commercial or construction award. The reason is that the arbitrator charges for “study time” and the time it takes to draft and finalize the award. It will also take longer to obtain.

If both parties decide a reasoned award is worth the extra cost and time involved, the attorneys should advise the arbitrator as early as possible so that he or she knows to take notes of the proceedings in sufficient detail.

6. Failing to Provide a Road Map of the Case

It is a mistake to limit the opening statement to a recitation of the events that led to the dispute. Attorneys should connect the facts with the claims and the supporting evidence to be presented, and cast doubt on the other party's position.

Recommended Solutions

The attorneys should present a road map in their opening statements that guides the arbitrator to the issues and the supporting evidence. Opening statements should do more than explain the "story" behind the dispute. They are more effective when they give the arbitrator a perspective from which to view the evidence.

This is a good time for the attorneys to use graphics or other visual material, for example, summary charts, tables, graphs, photographs, blowups of contract language, or other items that will be introduced as exhibits. As noted in Mistake Four, all such exhibits should be disclosed prior to use.

7. Not Correlating the Elements of Proof and the Order of Witnesses

There is great risk in thinking that disorder in the testimony can be cured by a closing statement that ties everything together. It is vital for counsel to plan the sequence of testimony. Without planning, the order in which the evidence is presented could simply confuse the arbitrator and lead to an adverse award.

Recommended Solutions

Each attorney's case should be made in a logical sequence, which does not always mean chronological. There are two distinct basic concepts to keep in mind: elements of proof and order of proof. For many cases, a chronological approach makes the most sense. But a different method might also work well: for example, a topical approach that deals with each item of claim in sequence. Or, with a construction case, for example, claims of specialty subcontractors could be dealt with separately.

The guiding principle should be to present the evidence in a manner that would be most helpful to the arbitrator. (See Rules R-30, R-31 and R-32 of the AAA commercial rules and Rules R-32, R-33 and R-34 of the AAA construction rules). Counsel is allowed to ask the arbitrator at different points during the hearing if he or she is following the evidence presentation, or whether a different approach would work better. Most arbitrators will respond to such inquiries. In our opinion, many attorneys fail to take this opportunity to ask the arbitrator if the case makes sense.

8. Repeating the Direct Examination on Cross

Two objectives of the cross-examiner are: (1) to catch the witness in a lie or mistake that challenges his or her credibility, and/or (2) to show that the witness has made an honest mistake or omission when the correction of that mistake helps your case. Without luck, these objectives could be achieved only if the cross-examiner thoroughly prepared the questions in advance. At a minimum, counsel

should prepare for cross by outlining the main headings for the cross-examination, concentrating on the elements of proof that are at issue.

Attorneys who ask questions on cross-examination that are similar to those asked during the direct examination appear to be unprepared. Perhaps they hope the witness will give a different answer the second time around, or will elaborate in the second answer, revealing an inconsistency or giving new ground to probe. It often just allows the witness to repeat testimony that is harmful to the questioner's case.

Recommended Solutions

The attorney who conducts a cross-examination is the real witness. Cross should be used to confirm the views of the cross-examiner. Repeating questions asked on direct and getting the same answers usually only reinforces the testimony in favor of the other side. The goal of the cross-examiner should be to delve into those areas where the witness must agree with your point of view, or be tied to a statement that can be contradicted.

It is helpful to the arbitrator if the questions on cross do not wander. One approach is to break the witness's testimony into topics so the arbitrator can understand how the witness's answers correlate to the disputed issues. Consider announcing each new topic to the witness before beginning the examination. For example, counsel could say: "Now, let's turn to the discussion you had with the lender on the day you received the notice of foreclosure." Both the arbitrator and the witness will benefit from this approach.

Lastly, it is vital to be respectful of witnesses during cross-examination. Arbitrators value civility and respect. It is distracting to the arbitrator to have to manage an attorney who behaves badly to a witness under cross-examination. Moreover, the witness's bad reactions could negatively affect the arbitrator's view of the cross-examiner's case.

9. Surprise Exhibits

We previously alluded to the problem of surprise exhibits submitted for the first time at the hearing on the merits, suggesting the importance of exchanging all exhibits before the evidentiary hearing. We raise it again here because this is where the consequences of the error will be felt.

The arbitrator's pre-hearing order commonly sets a date for the exchange of all exhibits that will be used at the hearing, with the normal exception of exhibits used in cross-examination or rebuttal.

Unless there is a very good reason why a new exhibit should be admitted, an objection to that evidence by opposing counsel is likely to be sustained. Even if the new exhibit is admitted, the arbitrator may postpone the hearing to allow the opposing party time to examine it and prepare a response. Arbitrators want to be fair to both parties. They are more likely to admit an exhibit under questionable circumstances if they know that any prejudice to the other party can be minimized or overcome.

The arbitrator may also assess costs and fees associated with responding to a new

exhibit. Introducing a surprise exhibit can hurt the credibility of the attorney who introduced it.

There are, of course, allowable surprises, for example, for newly discovered evidence. But that is rare. It is not often that pertinent evidence not available earlier is discovered.

Recommended Solutions

A good faith “meet and confer” with opposing counsel often works well to resolve any issues with late exhibits. Even if opposing counsel does not agree, the attempt to resolve the issue outside of the hearing could persuade the arbitrator to admit the exhibit if the basis for the adversary’s objection seems thin. Arbitrators appreciate when the attorneys have first tried to work things out themselves and they sometimes give credit for that effort when the objection can be minimized.

10. Not Providing a Clear, Concise Calculation of Damages

This mistake is probably the most common, and the most dangerous for the client. The attorneys who make this mistake probably fail to include sufficient information about damages in the demand or answering statement (see Mistake One) and do not file an amended damages calculation. These attorneys place all the emphasis on why the client is entitled to recover (the “story” of the case) and give little or no attention to quantum (i.e., the amount of damages being sought).

Recommended Solutions

Counsel should always calculate the damages claimed before the hearing commences, and create an exhibit that will show the arbitrator each item of claim and the related damages amount. This exhibit helps keep all claims and damages in plain sight of the arbitrator and helps prevent any of them from being inadvertently overlooked.

An attorney’s failure to make a claim or defense understandable may cause the arbitrator to conclude that the claimant or respondent failed to meet its burden of proof. Even where liability for one or more claims has been established, the arbitrator may decide not to award damages if they are not understood.

A question could arise whether a change only in the amount of a claim should be considered a new claim. Rule R-6 of the AAA commercial rules provides that new or different claims may not be added after the appointment of the arbitrator without his or her consent. The rule says nothing about increases or decreases in the amount of a claim. However, Rule R-6 of the AAA construction rules provides that increases or decreases in the amount of a claim do not give rise to a new or different claim. This rule allows changes in the amount of a claim at any time before the hearings are closed unless the arbitrator establishes a different date.

Possibly changes in the amount of a claim are acceptable under the commercial rules. But that cannot be assured. Counsel should avoid the possibility that the commercial rules might be interpreted differently by making clear damages claims at the outset.

If the damages increase for any claim, counsel should formally amend the demand

or answer accordingly. If damages decrease, however, it is not as important to amend the claim because counsel can offer to enter into a stipulation.

11. Not Specifying All Related Relief Requested

This is another mistake of omission. It usually happens when the attorney assumes that the relief is authorized by the parties' contract.

Making assumptions can get attorneys into trouble. For example, assuming that it is not necessary to request certain types of relief (for example, declaratory relief, specific performance, interest on the award) is a serious error. Arbitrators have been known to omit relief not specifically requested, even when they have contractual authority to award such relief. There have even been construction cases in which a party forgot to demand contract retention because the amount was undisputed.

Requests for attorney fees can be tricky because Rule R-43(d)(ii) of the commercial rules and Rule R-45(d)(ii) of the construction rules permit such an award only under three conditions: the parties' arbitration agreement provides for the recovery of attorney fees, such fees are authorized by law (i.e., there is a statutory basis for the recovery of attorney fees), or the parties have agreed that attorney fees may be awarded.

Attorneys have been known to put an attorney fee request in their demand for arbitration for the purpose of luring the opposing party into answering with its own request for fees. This is an important practice point because some arbitrators consider a reciprocal request for attorney fees to be a fee-shifting agreement.

Recommended Solutions

If there is no attorney fee clause in the parties' contract, counsel should think about whether it is prudent to request attorney fees for the prevailing party.

It is the responsibility of the attorneys to make certain there is no misunderstanding about the requested relief and how it is calculated. It is helpful to reference the basis for claims for attorney fees and various types of interest. For example, a claim for interest on the award could be based on the contract clause stating the interest rate, while a claim for pre-judgment interest could be supported by a statute.

Attorneys should present interest calculations as a per diem amount so the arbitrator can easily calculate the total up to the date of the award. It is also appropriate to request interest on the award itself until paid.

The date on which interest starts to run could vary. It could be the date of the invoice, or the date of completion, or the date of a lien filing, to name just a few of the options. Counsel should be clear about the date the arbitrator should use and explain why it is appropriate.

12. Not Listening or Reacting to the Arbitrator's Questions

Attorneys can become so focused on their own questioning, the pace of the arbitration, and the smoothness of their presentation, that they do not listen closely

to the questions asked by the arbitrator.

Recommended Solutions

Attorneys must be active listeners, especially when the arbitrator asks a question of either counsel or a party's witness. An active listener evaluates what the arbitrator is asking and analyzes why the question is being asked. Has the arbitrator missed an important point or misunderstood the testimony or document? Or, is the arbitrator opening a new line of inquiry or argument that counsel needs to address?

Attorneys should clearly answer any question asked by the arbitrator. A question by the arbitrator give the attorney an opening to ask that question of the current witness or another witness, if the answer would be to the client's advantage.

Counsel should never admonish the arbitrator for pursuing a topic or line of questioning. An arbitrator who believes that the answer to a question is necessary to a complete understanding of the dispute will resent any attempt by counsel to terminate that questioning. If the arbitrator is truly on the wrong path, then counsel should set him or her straight, but in a diplomatic way.

If the arbitrator's question was helpful, the attorney should remember it when preparing the closing argument. Referring to an arbitrator's question and emphasizing the correct answer can enhance the impact of that argument.

13. Failing to Notice that the Arbitrator Does Not Understand the Testimony

This error is a corollary to the last mistake. However, the cues lie not in the arbitrator's questions, but in his or her facial expressions. Attorneys miss them when they are not watching the arbitrator.

Recommended Solutions

An attorney should always be aware of the arbitrator's reactions during the evidentiary hearing. A colleague could be asked to assist counsel in making these observations. An arbitrator who appears to be confused or uneasy, or whispers to a colleague on the panel, might need a clearer explanation of some point made in the testimony.

It is not out of line for an attorney to ask the arbitrator if she or he would like to hear more testimony about a particular subject, or discuss previously given testimony that could reveal whether the arbitrator understood it. Finding out whether the arbitrator understands a claim is acceptable practice.

The informality of arbitration makes it possible to converse with the arbitrator at the hearing. That is a key advantage of arbitration. During a trial one cannot ask the jurors, or a judge in a bench trial, whether they have heard enough and understand the presentation. But that can be done in arbitration. Most arbitrators are receptive to counsel engaging them in a dialogue about the claims so long as he or she is not searching for the arbitrator's point of view and conclusions.

14. Using Rebuttal to Repeat Earlier Testimony

This is a mistake similar to Mistake Eight. Recalling a witness to rebut testimony

given on cross is fine, but having that witness repeat earlier testimony is not. The arbitrator could exclude repetitive or cumulative testimony based on an objection or on his or her own initiative. Rule R-31 of the AAA commercial rules permits the exclusion of evidence deemed by the arbitrator to be "cumulative or irrelevant," and Rule R-33 of the construction rules authorizes the arbitrator to exclude testimony that he or she deems to be "cumulative, unreliable, unnecessary, or of slight value compared to the time and expense involved."

Recommended Solutions

Rebuttal testimony should be fresh. It often requires the use of a new witness. Attorneys should present in rebuttal only evidence that qualifies, contradicts or nullifies the adverse party's evidence. Repetition may merely serve to dilute the strength of earlier testimony.

15. Making a Closing Statement that Does Not Match the Opening or Fails to Highlight the Most Important Exhibits or Testimony

We have heard attorneys say in closing that now they finally understand their case and are fully convinced of its simplicity and merit. When this happens, the closing statement is probably very different in content and tone from the opening statement.

It is helpful to write both statements before the evidentiary hearing begins. This will give the author a better understanding of the case and avoid the disconnect between opening and closing statements.

As the hearing progresses, new questions may arise, requiring additional analysis or revision. Therefore, it will be necessary to change the closing statement. Thus, a closing statement prepared before the hearing is a work in progress until all witnesses have completed their testimony. Nevertheless, it can serve as a checklist to make sure that the revised statement addresses all the elements of proof required to prevail.

Before presenting the closing statement, counsel could prepare for the arbitrator a bullet-point outline (or give the arbitrator a binder with the key exhibits and arguments that support each claim). This outline will focus the arbitrator's attention on the closing and may provide enough information so that the arbitrator will not need to take notes at the same time. We guarantee that the arbitrator will refer to the closing outline during deliberations and in writing the award.

Arbitrators often ask questions during closing argument. Counsel must be prepared to respond. Many arbitrators, the authors included, often schedule closing argument to follow the receipt of post-hearing briefs so they can clarify any points they did not fully understand.

Five Post-Hearing Mistakes and How to Avoid Them

16. Adding New Claims for Relief

It is usually less costly and more efficient to include all claims arising out of a particular project or transaction in one arbitration, rather than commence separate arbitrations for multiple claims. Attorneys who do not identify all claims in the

demand or answer sometimes find themselves adding new ones later on. Adding new claims in the post-hearing phase condemns them to being disallowed and makes the attorney who made this mistake look unprepared or perhaps sly.

A note of caution: If the amount of damages sought for any claims have changed, and the evidence supports the change, explain to the arbitrator in the closing statement or post-hearing brief why the claim is not new or different and provide the reasons why it should be considered.

New claims that attorneys can add in the post-hearing phase are claims for arbitration costs and arbitrator fees caused by the adversary's delay tactics or obstreperous behavior.

17. Including New Arguments in Post-Hearing Briefs

It is just as disconcerting for an arbitrator to find new legal arguments in a post-hearing brief, as it is to find new claims. If a different legal analysis is needed to rebut contentions made by the opposing party during the hearing, counsel should explain that fully to the arbitrator in the brief.

It is best to avoid causing the arbitrator to reopen the hearing. Under Rule R-36 of the AAA commercial rules and Rule R-38 of the construction rules, the arbitrator may reopen the hearing if there is a need for further information. Post-hearing briefs that direct the arbitrator to the evidence needed to decide the dispute should preclude reopening of the hearing.

A practice point: Attach judicial opinions or statutory law to the post-hearing brief. Arbitrators appreciate having at hand the law upon which the parties are relying.

18. Not Highlighting the Most Important Exhibits or Testimony in the Post-Hearing Brief

We have said that the closing statement should match the opening. But that doesn't mean that the post-hearing briefs should match the earlier briefs. Post-hearing briefs should do more than just restate the pre-hearing brief. If they don't, they are likely to be disregarded. The post-hearing brief should address issues and evidence of particular concern to the arbitrator. It is wise to ask the arbitrator at the close of the evidence if he or she has any concerns that should be addressed in the post-hearing brief. The answer can be very revealing. This procedure is more common in arbitration than in court.

Post-hearing briefs should:

- Use sub-sections to delineate the elements of proof.
- Refer to significant testimony, particularly unrebutted testimony. Quote from the hearing transcript, if there is one.
- Emphasize the failings in the other party's proof.
- List the damages sought and how they were calculated.
- Attach key exhibits to the post-hearing brief.

19. Not Providing the Arbitrator with a Proposed Award

Even if the attorneys did not make Mistake Five (failing to ask for a particular type

of award), they may make the mistake of not offering the arbitrator a proposed award at the conclusion of the evidentiary hearing. If post-hearing briefs are to be filed, the attorneys should attach a copy of their proposed award to their briefs.

The proposed award should address each item of relief sought for each claim and break down the damages into subcategories. A lump-sum award is often unsatisfactory, as it does not tell the client anything about the components of the award.

Counsel for the respondent should be especially careful to include any offsets in the respondent's proposed award.

Itemizing the recovery of damages in the proposed award may be necessary if, for example, further legal or arbitral proceedings are contemplated (i.e., the client intends to follow this arbitration with another proceeding against insurers or other contracting parties). Without a breakdown of the amount awarded, it may be impossible for a party to determine if it prevailed on claims covered by insurance. An itemized award may also be needed to pursue other parties, for example, suppliers or subcontractors.

Further proceedings may require that the award contain particular language. Recovery under consumer protection laws, for example, may depend upon certain findings having been explicitly stated. Counsel for the party who intends to file further proceedings should include such language in the proposed award, along with a statement explaining why this language is important.

If the parties want a "reasoned award," they should discuss with the arbitrator and opposing counsel what is meant by "reasoned," since that term's meaning varies among arbitrators and counsel. For example, the word could mean detailed findings of fact and conclusions of law, or a legal opinion in the style typically issued by many courts and boards of contract appeals, or a brief explanation of the reasons for the decision on each claim.

20. Leaving the Hearings Without a Closing Date

Many times attorneys rely on the arbitrator to decide when to declare the hearing closed. It can be a mistake to do so. Although Rule R-35 of the AAA commercial rules and Rule R-37 of the construction rules address the timing of the closing of the hearing, there is enough latitude for an arbitrator to extend the closing of the hearing beyond the end of the evidentiary hearing.

The AAA rules call for the hearing to be closed when the arbitrator is satisfied that the record is complete and the parties have no further proof or witnesses to put on (usually upon the conclusion of the last hearing day). But if post-hearing documents are to be submitted, the arbitrator is to close the hearing as of the due date for those documents.

The attorneys should not assume that an arbitrator would accept post-hearing briefs or other documents. A request to submit such materials should be made at the hearing before the arbitrator declares it closed. This way the arbitrator can decide whether to accept post-hearing materials, what they may contain, and whether to permit a reply. Once the hearing is closed, it is too late.

Post-hearing briefs are not always desirable. For one thing, they delay the issuance of the award and increase the cost of the proceeding. If the hearing is not long, the issues in dispute are few and not complex, or the pre-hearing statements and other written submissions are adequate, there is no need for a post-hearing brief. The attorneys should have a frank discussion with the arbitrator about whether briefing after the hearing is closed would be helpful and whether budgetary considerations make it sufficiently valuable.

Rule R-41 of the commercial rules and Rule R-43 of the construction rules provide that the time for issuance of the award runs from the date of closing of the hearing. The attorneys should ask the arbitrator to confirm the date of closing of the hearing before they leave in order to determine when the award will be due. In some instances, it may be impractical or impossible for the arbitrator to finalize the award in the time allowed under the AAA rules. If the parties agree, the time for issuance of the award may be extended.

Conclusion

A unique aspect of arbitration, when contrasted with a judicial proceeding, is the extent of the interaction between the arbitrator and counsel. Because arbitration is a creature of contract, initiated by agreement of the parties, the opportunity exists to tailor the process to the individual case. Indeed, the AAA rules specifically provide that the parties may vary its rules by agreement.

Avoiding the mistakes described in this article requires that attorneys collaborate with each other and the arbitrator in order to obtain an efficient arbitration, with clearly presented and easily understood evidence that will allow the arbitrator to carry out his or her decision-making responsibilities.

The authors serve on the American Arbitration Association's national panel of arbitrators for commercial and construction disputes and are Fellows of the College of Commercial Arbitrators. Judith Ittig, an attorney in Ittig & Ittig, P.C., based in Washington, D.C., is also a Fellow of both the American College of Construction Lawyers and The Chartered Institute of Arbitrators (London). She can be reached by e-mail at jbi@ittig-ittig.com. Mr. Coleman can be reached by email at hcoleman@road-runner.com.

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Farewell from Austin

By Robert J. MacPherson, Gibbons, P.C.

Editor's Note: At the 2010 Annual Meeting in Austin, Texas, Robbie MacPherson ended his term as Immediate Past Chair, addressed the attendees at the business lunch meeting, and reflected on his experience in the Forum.

While preparing my remarks I stumbled upon a little known fact. "Forum on the Construction Industry" is actually several acronyms. That is not surprising. Every day, construction lawyers throw acronyms around "like punches in a barroom brawl" (to quote Robert Earl Keen).

RFQ, IFB, BFO, NTP, CO, RFI, AAA, UAA, UCC…

NRBQ – If you know what that means, you're either old or very cool.

And one of my personal favorites: "TLA" – which stands for Three Letter Acronym. But I am here to talk about the Forum, and I'd like to share with you what I believe the words that make up "Forum on the Construction Industry" signify.

Forum

Friends - We joined to share experiences with other construction lawyers. We stay because we have become friends.

Oracles - There are some very bright people in this group who are very generous with their knowledge.

Reliable - The programs and publications never disappoint.

Unassuming egos don't get in the way.

Many sided - all parts of the construction bar are represented.

On

Observant – The Forum is always looking ahead.

Novel – You will not see the same thing over and over at a Forum program.

The

Teamwork - The Forum works because every project is a team effort.

Humor - We bring a sense of humor to the things we do and have fun doing them.

Excellence - We always strive to do our best.

Construction

Creativity - We value new and different ideas.

Organization - We run a tight ship.

Nationwide – We represent every part of this great country.

Service – The Forum exists to serve its members.

Teacher – The Forum works because every member is both a wonderful teacher and most willing pupil.

Renewal – The Forum is not stagnant. Its leadership changes on a regular basis making way for new faces and ideas.

Understanding – We understand that our strength is our People, Publications and Programs.

Civility – The Forum is a nice place to hang out.

Timely – We don't just present cutting edge information – we are cutting edge.

Incisive – The Forum is where you come for penetrating, clear and sharp analysis of construction law issues.

Original – Our programs and our publications are created by our people.

Nuanced – The Forum is all about detailed examinations of issues important to construction lawyers.

Industry

Immersion – The Divisions offer the opportunity to explore in depth topics affecting the many different practice areas within the field of construction law.

Network – The Forum is a large and vibrant network that gives as much as we put into it.

Deep-Rooted – The Forum's history is rich and deep, and a constant source of growth.

Unmistakable – There is no organization that offers to construction lawyers what the Forum does.

Savory – The Forum is always interesting and satisfying.

Theatrical – There is a flair to what the Forum does.

Rock N Roll – The Forum rocks.

Young Lawyers – We are all ages but we share a love of learning new things from new members soon to be old friends.

I am so very grateful to have had the opportunity to work with all of you and look forward to many more years of spending time with my friends. I cannot thank you enough.

Robbie MacPherson is a Director at Gibbons, P.C. in Newark, New Jersey, and a former Chair of the Forum.

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The Newsletter of the ABA Forum on the Construction Industry

UNDER CONSTRUCTION

IN THIS ISSUE

FULL ISSUE AVAILABLE FOR DOWNLOAD

EDITOR'S NOTE

The Forum "News" Letter

Jeffrey R. Cruz, Editor

One mission of Under Construction is to keep the membership informed of what is going on around the Forum. But our function as a news delivery system is somewhat hampered by the frequency of our publication. In 2011, we are expanding to four issues (March, June, August and December), but I still feel a little bit like that guy who reports on baseball twice a year for The New Yorker magazine. Neither one of us is as up to date as the daily sports page or the ESPN app on your smartphone.

So where can you go for the latest news in the Forum? The Forum website and your email Inbox are the obvious and most current sources, so make the Forum website a “favorite” and visit it regularly. Also, visit the ABA Subscriptions Portal – you can access it via the button on the first page of Under Construction – and update your preferences for receiving electronic communications from the ABA.

Another great way to get the latest news is to step up your involvement in the Forum. Join a Division, meet fellow lawyers who share your practice area or interests, and stay active. The Divisions hold monthly conference calls, circulate information on their Forum website pages, and offer the latest opportunities for speaking, writing and other Forum activities.

Now, for you news junkies out there…

- The Forum publishing juggernaut cranked out five excellent books in 2010.
  - Justin Sweet – An Anthology of Construction Law Writings
  - Federal Government Construction Contracts, Second Edition
  - Construction Accounting: A Guide for Attorneys and Other Professionals
  - The Design Build Deskbook, Fourth Edition
  - The Annotated Construction Law Glossary

- The Forum Midwinter Meeting will be held in New York City on Thursday, January 20, 2011. The program is titled “Do You Think It’s Alright? Pushing the ADR Envelope.”
- The Women and Minority Fellowship program will be accepting applications early next year. For a preview, here’s a link to last year’s application.
- The Nominating Committee is accepting candidates for the Governing Committee and Chair-Elect.
- Next year’s Forum Annual Meeting will be held in Scottsdale, Arizona on April 14-16, 2011. The program is titled “Cutting Edge Tools: Advanced Techniques for Construction Practitioners.”
- Law Professors of the Forum – The Law Student Writing Competition is open until December 30. Papers written any time in 2010 are eligible. For a complete set of the rules and a description of the prizes, see the announcement on the Forum website, or the home page of this issue of Under Construction.

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American Bar Association Forum On The Construction Industry Law Student Writing Competition

The ABA Forum on the Construction Industry announces a writing competition for law students. The competition is open to all law students in good standing and currently attending ABA accredited law schools.

Students may submit writings on any topic related to construction law. The format of the articles should resemble the articles published in either of the Forum's two publications, *The Construction Lawyer* (law journal format) and *Under Construction* (newsletter format with articles of 1000-2000 words).

Senior ABA members will judge the submittals. Criteria for selection include creativity, clarity and precision of writing, strength of argument, novelty of subject, and quality of research.

The author of the first place submittal will receive a cash prize of $2,000; travel expenses and registration to attend the annual meeting of the ABA Forum on the Construction Industry, where a first prize plaque will be presented; a one-year membership in the Forum and recognition in the Forum newsletter, *Under Construction*, and on the Forum's website. One or more submittals may receive honorable mention, which will be recognized with a plaque.

Submittals receiving first place and honorable mention will be considered for publication in either of the Forum's two publications, *The Construction Lawyer* and *Under Construction*.

The deadline for submission of articles for the 2010 competition is **December 30, 2010**. All articles shall be submitted to Mark Nagasawa and Marilyn Klinger in Word format.

For more information, contact Marilyn Klinger at 213/615-8308.

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