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The Advocacy Preferences of Construction Arbitrators

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*Dean B. Thomson and Michael T. Burke**

Arbitration is one of the major forms of binding dispute resolution in the construction industry.[1] If it is important for advocates to know their audience, then it is important for construction attorneys to know the practices and preferences of construction arbitrators.[2] A previous article in this journal explored the practices of a large survey sample of construction arbitrators regarding the arbitration procedures they employed and how they approached their decision making.[3] This current article examines and reports on the advocacy techniques that these arbitrators liked and disliked in the construction cases they have arbitrated.

Several helpful articles have been written by individual construction arbitrators, each providing what he or she considers to be effective advocacy strategies,[4] but more perspectives and opinions from hundreds of arbitrators on the subject should provide a broad-based resource for attorneys on how to effectively advocate in construction arbitrations. To get a broad response, a survey was sent by email to members of the ABA Forum on Construction Law, JAMS, the College of Commercial Arbitrators, the Mediate-Arbitrate listserv, and the American College of Construction Lawyers; only those who had experience serving as an arbitrator in a construction dispute were invited to reply. Many similar email requests are deleted as spam before they are

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[1]Bruner & O'Connor on Construction Law § 21.2 (2014).

[2]Aristotle defines rhetoric as the art of persuasion based, in part, on using approaches that appeal to particular preferences of the audience. Christof Rapp, The Stanford Encyclopedia of Philosophy, *Aristotle's Rhetoric* (Spring 2010 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/spr2010/entries/aristotle-rhetoric/.

[3]Thomson and Orman, Inside the "Black Box": The Preferences, Practices, and Rule Interpretations of Construction Arbitrators, 12 J. of ACCL 37 (No. 2, 2018).

[4]*See e.g.* Adrian L. Bastianelli, III, John T. Blankenship & Judith B. Ittig, *From the Inside: What Arbitrators Think You Should Do*, presented at the 2015 ABA Forum on Construction Law Fall Meeting "The Construction ADR Summit."

read, so it is significant that responses were received from 231 construction arbitrators in locations throughout the United States. Their level of experience was extraordinary as they collectively reported to have participated as arbitrators in a range of 9,437 to 14,551, or more, construction arbitrations.

The first part of the survey inquired about the responding arbitrators' general background and experience. Because most of the organizations from which responses were solicited were either groups of attorneys or largely populated by them, it is not surprising that over 89.4%[5] of the respondents were lawyers and judges. The following responses reflect more on their background:

What is your primary professional background?

Value	Percent	Count
Attorney-Litigation	77.6%	177
Attorney—Transactional	9.6%	22
Retired Judge	2.2%	5
Owner/Developer	0.4%	1
Contractor/ Subcontractor	2.6%	6
Design Professional	2.2%	5
Other	5.3%	12
Total		228[6]

Approximately how many times have you served as an arbitrator in a construction case during your career?

Value	Percent	Count
1–5	9.3%	21
6–10	11.0%	25
11–25	22.5%	51
26–50	19.8%	45
51–100	18.5%	42
101–150	9.7%	22
151+	9.3%	21
Total		227

[5]Throughout this article percentages have been rounded to a single decimal place. Due to rounding, sometimes the total percentages will not equal exactly 100%.

[6]The occasional difference between the total number of respondents and the reported number of responses to any particular question is because not every respondent answered each question.

The survey covered a range of topics,[7] but two of its questions are the subject of this article. The first was, "What types of presentations have you found helpful or persuasive in construction cases?," and, conversely, the second was, "What types of presentations have you found unhelpful or unpersuasive in construction cases?" Hundreds of different answers were generously provided by the respondents, and to the extent possible, we have categorized similar answers into more general types. Answers to the first question regarding persuasive techniques are summarized and discussed first, followed by a discussion of techniques the responding arbitrators found unpersuasive.

I. Persuasive Advocacy Techniques

A. Organization

The most persuasive technique recommended by 36 arbitrators was for attorneys to be organized[8] and concise in their presentations. This somewhat anodyne summary becomes more instructive when the following, more specific, individual answers are considered: streamline the presentation; support organized testimony with contemporaneous documents; present according to understood and announced issues, with evidence cited for each issue; highly organized use of exhibits[9] that avoid repetition;[10] well organized, non-leading direct; limited and organized cross;[11]

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[7]Thomson and Orman, see fn. 3.

[8]"To succeed at arbitration, three factors are most important: preparation; preparation; and preparation." John P. Madden, *How to Win at Arbitration*, in ADR A Practical Guide to Resolve Construction Disputes 157 (Alan E. Harris et al. eds., AAA 1993).

[9]"Exhibit preparation represents perhaps one of the least exciting yet most important aspects of international arbitration. In addition to selecting the appropriate exhibits from a substantive point of view, properly marking and organizing exhibits bears quite significantly on the effective presentation of a case . . . . The parties frequently submit (and tribunals oftentimes request) key-exhibit bundles, containing the selected documents upon which the parties intend to rely more heavily during the hearing. If these are not readily available and easy to follow, the advocate's points will be much diluted (if not lost) in a poorly prepared set of hearing binders or exhibits." C. Mark Baker, *Advocacy in International Arbitration*, in The Leading Arbitrators Guide To International Arbitration 397 (Lawrence W. Newman & Richard D. Hill eds., JurisNet 2008).

[10]One responding arbitrator states that he puts an asterisk on each exhibit that is used, and after five asterisks, he announces to the parties how many times they have reviewed the exhibit and suggests it is time to move on.

[11]An excellent list of arbitration cross examination 'Practice Tips' can be found in the John W. Hinchey and Troy L. Harris, International Construction Arbitration Handbook, Chapter 9 *Conduct of the Arbitral Hearings-The Hearing Process*, 627–628 (2018 ed.).

prepared counsel;[12] simple presentation getting to the contract and facts; direct and candid testimony focusing on key issues; organized and to the point; a presentation that follows a plan; clear, simple, and targeted presentations; and, the simpler the better.

One strategy recommended by nine of the arbitrators was to organize presentations around the issues and then exhaust all direct and cross examination and documentary evidence regarding an issue, before proceeding to the next one. As one arbitrator acknowledged, "It is a lot of work for the parties, but it makes the arbitrator's job much easier." Of course, whether a case can be presented issue-by-issue or chronologically depends on the claims involved. If the arbitration revolves around allegations of sequential delays, two arbitrators noted that a chronological presentation may be more appropriate. No matter which approach is chosen, to keep the facts presented in context, 20 arbitrators recommended the use of a detailed, but clear, timeline of significant events.

The arbitrators strongly disavowed the notion that they rendered compromise awards, but several explained that their awards may appear to be compromises because an inadequate proof of damages required that less money be awarded than was claimed.[13] To better organize proof of quantum, 14 arbitrators offered the following suggestions: provide a scorecard of damages claimed for contract balances, disputed change orders, and claims, with corresponding boxes for the respondent's position; a clear and detailed description of all damages sought by the parties; a spreadsheet delineating damages, cross referenced to testimony or documentary evidence; a binder or file of documents relied upon by an expert presenting damage calculations or summary of claims; and a summary of the damages sought at the outset of or early in the case, so the arbitrator can put other evidence in the context of damages.

B. Presentation Techniques

The survey respondents had a variety of recommendations regarding persuasive techniques. Twenty-nine suggested use of graphics and demonstrative exhibits to explain complex issues.

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[12]"In arbitration, as in court, there is no substitute for effective preparation. Effective presentation means not only having a thorough understanding of all aspects of the case, factual and legal, but also considering how to make the clearest and most meaningful presentation to the arbitrators." Commercial Arbitration at Its Best, § 5.2, 223 (Thomas J. Stipanowich ed., Peter H. Kaskell assoc. ed., ABA 2001).

[13]Thomson and Orman, Inside the "Black Box": The Preferences, Practices, and Rule Interpretations of Construction Arbitrators, 12 No. 2, J. ACCL 37, 71–74 (2018).

Other similar suggestions included: building information modeling—also known as "BIM" presentations; posting plans and renderings so they are readily accessible; demonstrative physical exhibits and models; animated computer aided graphics showing the progress of construction or conflicts in the drawings; diagrams and flow charts; and graphic scheduling exhibits.

Another 28 respondents reminded advocates that "pictures are still worth a thousand words" and recommended use of photographs, videos, and, when appropriate, aerial photos. Twenty-three respondents favored the use of PowerPoint to present information. Of those 23, eight respondents suggested PowerPoints be used in opening or closing statements, and another three suggested using it for expert testimony. Fourteen recommended "hot tubbing" experts, which is the technique of calling all experts intended to testify on a certain issue at once and determining the issues on which they agree or disagree.[14] While certain arbitrators may favor that technique, advocates do not often choose to use it.[15] Ten arbitrators encouraged careful and focused use of experts; four of the 10 recommended experts who teach rather than advocate, and two favored just letting the experts narrate their findings, subject to cross examination. To keep arbitration more efficient, some recommend use of witness statements in lieu of direct testimony,[16] but this was considered persuasive by only 12 survey respondents.

C. Miscellaneous Observations

In the battle between using hard copy exhibits and showing them electronically, 10 respondents favored using monitors to show the exhibits, while eight arbitrators favored hard copy exhibit binders; whether hard or electronic documents are used, nine of the combined 18 favored highlighting relevant portions of them. Six arbitrators favored stipulated joint exhibit books, and five preferred joint statements of agreed facts to save hearing

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[14]"This [hot tubbing process] permits the tribunal to ask questions and receive immediately answers from the appropriate experts. It also (1) creates a productive back and forth when the arbitrators ask the experts questions, (2) enables the tribunal to judge the experts' credibility when both are present, and (3) identifies and explains, to the tribunal's satisfaction, the differences in the experts' testimony." The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration, Ch. 17 *Unique Issues in Construction Arbitration* 497 (James M. Gattis, et al. eds., 4th ed. Juris 2017). A useful discussion of the pros and cons of witness conferencing can be found in Bernard Hanotiau, *The Conduct of the Hearings*, 376–377, in The Leading Arbitrators Guide To International Arbitration (JurisNet 2008, Lawrence W. Newman and Richard D. Hill eds.).

[15]Thomson and Orman at 51.

[16]Thomson and Orman at 69.

time. Nine respondents found site visits to be beneficial in the appropriate case.[17] To keep the hearing length to its agreed time, four recommended use of a chess clock.

Eight respondents favored concise pre-hearing briefs summarizing claims and defenses and key evidence regarding each. Although it was not clear whether they liked them as part of an opening or closing statement, or during the hearing, 11 arbitrators encouraged the use of various types of summaries: clear summaries of voluminous evidence; simplified summaries of detailed expert reports; summaries of proffered testimony; scheduling summaries; summary of key documents from counsel; and short, but structured, summaries of the subject matter and anticipated witnesses at the beginning and end of each day.

Nine arbitrators recommended that the advocates take advantage of and respect the experience and knowledge of the arbitrators.[18] In various ways, they stated that construction arbitration is not like a trial before a lay jury and should not be conducted that way. For example, the respondents preferred that advocates not engage in "trial lawyer" gambits and instead employ pragmatic, not combative, presentations; be respectful of the opposing party and tribunal; use non-aggressive behavior; and assume the arbitrator has some knowledge of construction projects and issues. As one arbitrator cautioned, "Remind the lawyers that bluster, posturing, and sarcasm may work in court, and may impress their clients, but are considered unnecessary and disruptive by arbitrators."[19]

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[17] A good discussion of the procedures to consider for a site visit can be found in The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration, Ch. 11 *The Hearing on the Merits*, 271 (James M. Gattis, et al. eds., 4th ed. Juris 2017).

[18] "Many arbitrators believe that attorneys or their clients waste time by failing to recognize and take advantage of arbitrator expertise." Commercial Arbitration at Its Best, § 5.2, 225 (Thomas J. Stipanowich ed., Peter H. Kaskell assoc. ed, ABA 2001) *citing* Thomson, Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators, 23 Hofstra L. Rev 137, 150 (1994). "The parties should be reminded that the arbitrator is knowledgeable in the industry. Therefore, they should be advised to prepare, and try, their cases with that level of competence in mind, and not expend time and costs at the evidentiary hearing 'educating' the arbitrator unnecessarily." Stipanowich at 225, *citing* Poppleton, The Arbitrator's Role in Expediting the Large and Complex Commercial Case, 36 Arb. J., 9 (1981).

[19] An excellent list of arbitration advocacy 'Practice Tips' can be found in John W. Hinchey and Troy L. Harris, International Construction Arbitration Handbook, Chapter 9 *Conduct of the Arbitral Hearings-The Hearing Process*, 623–625 (2018 ed.).

II. Unpersuasive Advocacy Techniques

A. Disorganization

Not surprisingly, the reverse of what they thought were persuasive techniques was often considered unpersuasive to the survey respondents. According to 46 arbitrators, the most ineffective and frustrating presentation style was being disorganized and unfocused, which the respondents described in various ways as: delivering a "data dump" for fear of leaving anything out; a "kitchen sink" approach; repetitive and redundant questioning;[20] duplication of fact and expert evidence; cumulative testimony; throwing favorable facts out there and hoping the arbitrators figure out what happened; testimony on trivial matters; unstructured and unfocused direct examinations; long winded dialogues or rambling by unprepared lawyers and witnesses; and failing to move on after making the point.

B. Histrionics

The next most criticized trait was a bombastic and argumentative style. Twenty-six respondents described the following techniques as unpersuasive: argumentative, aggressive attacks; unnecessary rhetorical presentations; disrespect or showing personal dislike to opposing counsel or witnesses; grandstanding; acrimonious presentations; bombast; emotional jury appeals or theatrics that might be impressive to clients, but not arbitrators; vitriol; abrasive or other unprofessional behavior; scorched earth tactics; and screaming and yelling. As one respondent commented, "Zealous advocacy does not give an advocate a license to be an [jerk]." Another observed, "I am interested in the facts and analysis, not histrionics."[21]

C. Leading Direct and Ineffective Cross Examination

Even though the rules of evidence do not apply in arbitrations, 15 arbitrators found that leading direct questions and the answers to them still were unpersuasive. Of those 15, eight respondents associated the use of leading questions with a lack of candor. One respondent criticized the "cross examination of [one's] own witnesses" in an effort to limit disclosing possibly harmful

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[20]Twenty of the 46 answers mentioned repetitive, redundant, or cumulative evidence as one of their criticisms.

[21]"Arbitration is not a forum where histrionics produce benefits." Commercial Arbitration at Its Best, § 5.2, 225 (Thomas J. Stipanowich ed., Peter H. Kaskell assoc. ed, ABA 2001). "Some of my fellow attorneys believe that 'zealous advocacy' means never conceding a point, no matter how dubious, and debating every point of procedure or substance. Frankly, I've learned from sitting as an arbitrator that these tactics can backfire. The arbitrator may come to resent unrelenting argument, and will certainly tend to discount what the attorney has to say." Stipanowich at 225.

evidence. Another 15 arbitrators criticized cross examination that is: too general; tedious; unfocused; too dramatic; overly aggressive; long and extensive; or argumentative. From these comments, we can infer that focused, to-the-point, and well-planned cross examination is preferred.

D. Use of Experts

Sixteen arbitrator respondents found the following use or behavior of experts to be unpersuasive: experts advocating for a party's position; experts advancing a type of analysis based on attenuated studies or methods lacking general acceptance; schedule or Critical Path Method analysis not sufficiently founded on the factual record; experts making measured mile comparisons on easily distinguishable situations; unqualified experts; technical experts used to explain the meaning of plain words; "paid-for-testimony" of advocate experts; experts who provide testimony about facts better provided by witnesses from the project with direct knowledge; experts testifying before foundational facts of the case are established; overly long and rambling expert testimony; trying to introduce expert PowerPoint decks that have not been covered in the expert's testimony; and experts allowed to take over presentation of the entire case.

E. Miscellaneous Observations

Twelve respondents cautioned advocates not to overuse evidentiary objections or insist upon the application of the rules of evidence, especially as they do not pertain to most arbitrations. Illustrative comments include avoiding: obtrusive objections; excessive objections; objections to strike evidence; and disruptive objections. This criticism relates to another theme mentioned by nine respondents: that advocates do not tailor their presentation to the forum they chose. These respondents complained about using jury style techniques and treating arbitration like litigation. In the field of claim presentations, arbitrators typically are informed consumers. Thus, advocates who limit their techniques to those only available in court do not take advantage of the experience of the arbitrator they selected and miss an opportunity to be creatively, efficiently, and effectively persuasive.[22]

Another 11 respondents criticized the failure to present credible damage evidence, echoing those respondents who found that careful attention to proof of quantum was persuasive. Arbitrators warned that entitlement may be established, but if there is not adequate support for the amount or type of damages requested, the claimant will not justify a full recovery. The arbitrators

[22] An example of an uncreative and tedious use of time mentioned by four respondents was reading documents and depositions to the panel. Presumably, arbitrators think they can read for themselves.

reported they do not appreciate: a lack of damage summaries and calculations; general discussions that leave the arbitrators to calculate damages or schedule issues, such as liquidated damages, concurrent delay, or compensable delay; the failure to tie damages to supporting documentation; or exaggerated damages.

While many arbitrators found the use of PowerPoint effective,[23] another 13 cautioned against its over use, or, as one respondent put it, "death by PowerPoint." Overwrought and overly detailed slides should be avoided, and PowerPoint not focused on the facts or hurriedly presented is not helpful.

There was a spectrum of advice on opening and closing statements from nine respondents. Not surprisingly, long opening or closing statements are not favored. Two respondents did not like opening statements at all, especially if opening briefs already had been provided, but another two did not favor waiving opening statements in favor of briefs. Given the differing views on the utility of opening and closing statements, it probably is prudent to ask the arbitrator's preference during a pre-hearing conference, which is another advantage of the flexibility available in arbitration, as opposed to litigation.

CONCLUSION

Just like beauty, effective advocacy is in the eye of the beholder. The arbitrator selected will judge the persuasiveness of your presentation, so your approach should be calibrated to the skill, experience, and preferences of the arbitrator you choose. The more you can learn about the preferences of your particular arbitrator, the better.[24] If that type of specific knowledge is not available, the answers of the arbitrators responding to this survey should give advocates a more general sense of the techniques to utilize and avoid in presenting their case.

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[23] *See* Section I.B.

[24] The American Arbitration Association offers an Enhanced Arbitrator Selection Process for Large Complex Cases designed to give parties greater flexibility and control in selecting the most appropriate arbitrator for their case. The process can include oral or written interviews of the arbitrator candidates, which would allow the parties greater insight into the candidates' preferences.

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