

WHAT AN ARBITRATOR MAY EXPECT OF COUNSEL IN A COMPLEX SURETY OR CONSTRUCTION ARBITRATION

I. Introduction

This presentation is designed to try to provide some insight into how various arbiters may view the activities of the attorneys and the events that occur during the process of the arbitration of a construction dispute. There are several basic philosophies of approach that should be followed uniformly. These are:

A. **Treat the arbiter as you would treat a judge unless and until the arbiter clearly indicates a desire for a more informal relationship.**

Arbiters are not only judges, but they are, in many ways, more powerful than the trial judges before whom you will conduct bench trials. The scope of review of an arbiter's decision is extremely limited. An arbiter has more flexibility in the admission and exclusion of evidence. While the arbiter may not have the power of adjudging counsel or a party in contempt, the arbiter has relatively unfettered control over the outcome of the dispute. This can act as a sufficient substitute for contempt power.

It is generally wise to treat an arbiter essentially as one would treat a judge. However, some arbiters prefer a more informal atmosphere. Take your cue on this from the arbiter. Make sure the arbiter wishes to have this more informal atmosphere. Even in the informal atmosphere, always maintain a position of friendly respect.

B. **Operate on the assumption that arbiters want to be fair.**

Like human beings, arbiters come in all stripes and shapes. They also come in all degrees of inherent biases, prejudices and personal quirks, as well as the better qualities of consideration, thoughtfulness, intelligence and insight. The best philosophy is to operate before any arbiter as though you believe the arbiter wants to do the right thing. It may be difficult to maintain this stance if the prima facie presumption of neutrality has long since disappeared. This is not to say that you do not protect the interests of your client to the extent you can. By all means, disagree with the arbiter's comments or rulings, where appropriate. But, any disagreement should always be presented as though you believe the arbiter is trying to be fair.

Bear in mind that people who engage in litigation generally do so because they enjoy the process. Most attorney arbiters in construction cases will be or have been litigators. In addition, many of those who apply for and become arbiters who are design professionals or contractors have acquired their experience in litigation in which they have been involved either as litigants or as expert witnesses or both. There will be arbiters who will fight with you, tease you, and do things with which you disagree simply because they enjoy judging your reaction and skill. Such conduct may not indicate anything about how they really feel about the case.

As we will discuss shortly, in some arbitrations with a three arbiter panel, two of the arbiters are beholden to and, in fact, spokespersons for the side that appointed them. If this is so, it should not change your demeanor and attitude towards the other side's arbiter. If an arbiter is being noticeably and blatantly unfair, conduct your case with equanimity and courteousness. This may well swing the vital neutral arbiter in your favor. (The presumption is that the arbiter whom your client selected is already disposed to your side).

C. Treat deadlines as though you are in the strictest federal district court in the country.

Arbiters may be flexible about deadlines. There is certainly nothing wrong with requesting extensions of deadlines where necessary. Usually it is better to try to work out an agreed extension with your opponent if at all possible. Of course, even with an agreement to extend the deadline, it probably makes sense to request the approval of the arbiter or panel if in fact the extension may affect other deadlines and particularly if it may affect the hearing date. However, minor extensions of time, if agreed to among the parties, probably need not be brought to the attention of the arbiters. If a deadline has not been extended, make sure you do everything to try to meet that deadline.

It is vitally important not to consider that arbitration is somehow or other a second class or sloppy process. Under some arbiters, it may become that way. But, then again, what takes place in the courtroom before some judges may be less than ideal.

II. Hypothetical Situation

The hypothetical situation involves a construction contract bonded by a surety. Plans and specifications were prepared by the design professional and the design professional was also charged with the responsibility to approve shop drawings, inspect, consider requests for extension of time, extra work, approve payment and periodic inspection of the work.

After the dispute arose, the owner stopped paying the architect on the grounds that it was entitled to a set-off because of another claim the owner had against the architect on another job. Discovery following the dispute disclosed that the owner had planned to do this all along. The architect ceased performing for a period of about 6-months. Many of the problems that led to the dispute arose during those 6-months. The architect was then paid by the owner, came back on the job, resolved all existing problems in the owner's favor. The arbitration between the owner and the contractor followed. The surety agreed to participate in the arbitration and sought to assert as a defense the owner's fraud in procuring the bond.

III. Selection of the Arbiter

A. In General.

The theme of this paper relates to interaction between counsel and arbiters. The selection of an arbiter is a very important matter and will be discussed briefly. It is important to obtain

resumes from prospective arbiters. If at all possible, talk to people who have had arbitrations before any proposed arbiter. If the parties are proposing arbiters to each other for consideration either as the sole arbiter or as the neutral on a three-arbiter panel, it is not necessarily inappropriate to talk to the proposed arbiter to determine availability, the possibility of conflicts and past experience. The parties should have an agreement, in writing, concerning how any such direct contact with a proposed arbiter is to be handled. It may be better to conduct such a discussion with counsel for both sides involved in the discussion or to communicate by letter signed by counsel for both sides.

Where each party selects an arbiter who will choose a neutral, is that selection process to be designed to secure a friend at court with whom the party can communicate and who is expected to espouse your position? Or is it to select a person you believe will make a good arbiter and be inclined towards your point of view, but otherwise act as a neutral?

The author has seen it both ways. In the author's judgment, the better way is to agree that the parties will select someone in whom they have confidence (which means one whom they believe will probably lean their way), but not have ex-parte communication about the merits of the dispute once the selection is made. However, it certainly is appropriate for the party's selected arbiter to discuss with the party the selection of a neutral. Furthermore, it should be agreed, in advance, if both party selected arbiters are to be considered as neutrals. If this has not been agreed upon before hand, it is a good idea to bring it up at the time of the first pre-hearing conference or in correspondence prior to that time.

B. Arbiter selection methods.

The parties may seek to agree on an arbiter. If the parties are unable to agree, application can be made to a court to have the court appoint an arbiter. In other words, failure to agree on an arbiter should not prevent the process from proceeding. Essentially the same applies if each party selects an arbiter and they are unable to agree upon the neutral on a three-person panel.

The arbitration may be designated to be administered by a designated organization or group (often the American Arbitration Association or "AAA"). The contract may further provide for the selection of an arbiter from a roster, with time limits regarding selection of arbiters, whether it will be a multi-arbiter panel and whether arbiters may be selected by the parties.

Using the AAA as an example, a list of approved neutrals is sent to the parties. This may occur at the very beginning or used as a default procedure depending on the arbitration agreement. Generally, the AAA does not provide for conflicts checks until an arbiter has been selected from the roster. Usually some biographical information is provided when the roster is provided. Each party is given three strikes for cause from the panel if it is to be a single arbiter and five strikes if it is to be a three person arbitration panel. The rest of the potential arbiters remaining on the list are then available for appointment by the AAA.

One method the parties may designate is that in addition to the striking, the parties will rate the remaining arbiters. Then the selection of the arbiter will be based on a combination of

the ratings of both parties. Another method occasionally used is for each party to submit three names. The other party can then investigate the three names submitted. It selects the one from the three submitted by the opponent that it prefers. This will leave two preferred choices. The choice of arbiter is then determined by lot. The author has used this method twice. In both cases, after the two finalists were determined, the parties agreed among themselves, as to the choice of arbiter from among the two names remaining without drawing lots.

When crafting a method for selecting arbiters, one balances an assurance of getting a good arbiter against a selection process that is reasonably prompt and avoids resorting to the courts. The more the process is designed to try to get the best possible arbiter, the more likely it may lead to delay or an impasse. If an arbiter is to be selected by the court, make sure the agreement provides that the parties may submit proposed arbiters. One should have determined there is no conflict and provide biographical information for the consideration of the judge.

C. The Surety's Involvement.

The Surety, having decided to participate in the arbitration, may have better sources of information to make an intelligent evaluation of either suggested names. The evaluation of the qualifications of the proposed arbiters should get immediate attention. The time limits are likely to be relatively short. If there is a disagreement between the contractor and the surety over who should be selected, it is probable that the contractor ultimately controls the choice. Considering this possibility, the surety may prefer not to commit to joining the arbitration until the name of the arbiter is known. There is case law that some issues (in many cases most issues) relating to Surety's liability to Brown will be foreclosed by the decision of the arbiters. So Surety may be joining the party whether it wishes to or not. In such a case, not much is lost if Surety tries to assist the principal in the selection of an arbiter.

IV. Preliminary Procedures and Preparation for the Arbitration

A. How best to approach the arbiters to obtain discovery.

1. In general.

Counsel should bear in mind that one of the purposes of arbitration is to avoid the onerous costs and delays associated with the discovery process which is so prevalent in litigation. It is particularly a problem in the more complicated cases. Generally speaking, if there is a good reason for it, arbiters are likely to be fairly lenient in allowing document discovery from the other side.

As a practical matter, arbiters (like judges) prefer not to get involved in discovery problems. Therefore, counsel for the parties should make every effort to resolve document production issues. If your opponent is being unreasonable, that is the time to bring it before the panel either by telephone conference, in a pre-hearing conference or in correspondence. If your request is clearly reasonable, you will probably not only have the request granted, but to some degree, there may be some adverse reaction to your opponent's position.

Generally speaking, arbiters are not enthusiastic about allowing interrogatories unless the arbitration agreement allows them. However, in a complicated case, arbiters often can be persuaded to require something more by way of contentions than merely the arbitration claim. Do not expect that an arbiter will order contentions with the specificity and detail so often required in court. (See “Construction Industry Dispute Resolution Proceedings”, American Arbitration Association L-5(c).)

Arbiters are not likely to require discovery depositions beyond the number usually specified in the agreement where the parties agree. Arbiters would have the authority to order more depositions if a very good showing could be made. Often expert depositions are added to the agreed number. Furthermore, they may order depositions for testimony.

Affidavits are preferred when they are merely for the purpose of authenticating documents or establishing relatively routine matters. Usually the same result can be achieved more efficiently by stipulation. The more important the testimony of the affiant, the more arbiters may feel that they should have an opportunity to hear the witnesses live.

In general, arbiters like for the parties to set the discovery deadlines and parameters and work issues out among themselves. Counsel should be careful only to bring before the arbiter or arbitration panel discovery disputes where it is obvious that counsel’s position is a reasonable one (even though it may turn out not to be accepted).

B. What to expect in the preliminary hearings.

You must assume that arbiters will prefer that as much as can be resolved between the parties in terms of witnesses, depositions, other discovery, handling of documents, presentations to the arbiters, whether or not the hearing will be phased, the time of the hearing, dates for the hearing, etc. be agreed upon in advance. If there is a disagreement about some of these matters, generally arbiters prefer that each party indicate its position and the nature of the disagreement by written communication prior to the hearing. In this way, the hearing will concentrate on working through calendars to finalize dates, the arbiters blessing the agreements of the parties (usually although not inevitably) and decisions on those matters on which the parties cannot agree. If you have not previously met the arbiter or members of the arbitration panel, this is an opportunity to size them up.

C. Matters to consider when discussing the timing of the arbitration hearing with the panel.

Generally speaking, it is desirable to conduct the arbitration evidentiary hearing from beginning to end and not in bits and pieces. Sometimes the calendars (particularly if there is a three member panel) of the arbiters, counsel and the parties does not permit this. Sometimes an arbitration may lend itself to severing issues. One must consider this very carefully. As a party, I would be very reluctant to push for a severance of the issues unless the other side agrees. Remember arbitration is a consensual process. The parties can consent to vary the terms of the

agreement. This consent, if accepted by the arbiters, would avoid an appeal on the grounds that the arbiters had exceeded their authority.

Be as realistic as possible about how long the hearing is likely to take. An important consideration is how promptly does your client want to have the dispute resolved. If speed is very important, then everything you do must be designed to insure, insofar as possible, that the hearing is short, the discovery process is not extensive and that your time is available even if it means moving other things to get the earlier hearing date.

Normally arbiters realize when one party is trying to push for a hearing and the other is trying to delay. Unless the reasons for the delay appear justifiable, most experienced arbiters tend to have a natural prejudice against delay. It may raise the inference that the party seeking the delay is not as confident of its position as the party seeking the earlier hearing.

D. Dealing with the panel regarding the use of experts.

Experts are part and parcel of any construction dispute. In my experience, arbiters will usually allow the parties to require their opponent to prepare a report of their expert's testimony. Some panels will allow phased designation of opposing experts and reports. Some panels will allow depositions of experts although you cannot rely on the assumption that this will be approved. If the panel does not allow deposition of opposing experts, particularly if you have asked for them and been refused, then they are more likely to hold the expert to the areas clearly outlined in the report.

E. Stipulations and handling of documents.

It is generally a good idea to discuss with your opponent and agree upon how stipulations will be handled, deadlines for stipulations and how documents will be marked and authenticated. Will you have a copy of each document for each arbiter on a three person panel? Generally it is a good idea to do this. But there may be certain very bulky documents where it is not necessary to do this. In such a case, make three copies of those portions of a lengthy document you wish the arbiters to study and one copy of the document itself to look at in case there is a desire to refer to something else in the document.

F. Do you want to have decisions made in advance of the hearing for viewing the premises, conducting experiments, video tape evidence and the like?

This involves counsel's discretion. Viewing the premises is often done in construction cases. Counsel may consider suggesting that the arbiters take a look at the building in question prior to the hearing so that the arbiters have some general idea of how the premises appear, where they are located and the surrounding landscape. If there are specific items to view in the course of the testimony, it is best to work those arrangements out with one's opponent. If there is going to be a problem, try to anticipate that problem in advance and bring it up either before the hearing or at the beginning of the hearing.

As a general rule, one should display all documentary evidence, including video tapes, to one's opponent prior to arbitration, excluding possibly impeaching material. It is best to agree on the ground rules with your opponent. Any agreements on hearing procedures should be reduced to writing and presented to the arbiter(s) for their approval (which will almost routinely be granted if both sides have agreed).

G. A reporter's transcript.

Either side may have a reporter present. It is clearly better if both sides can agree on a reporter. Some arbiters prefer a transcript, particularly in a long or complicated arbitration. Other arbiters look at their role as deciding what is a just result. They are more interested in getting the sense of what happened as the testimony proceeds. Some arbiters like post-trial briefing in which you use a reporter's transcript to remind the arbiter what was said, others do not.

H. Special considerations relating to the surety.

It is very important in an arbitration where the surety is involved is to determine what discovery the surety can demand and the degree of the surety's participation in agreements on discovery and procedures. The surety should probably propose, as a condition for joining the arbitration, that its agreement be required for any arrangements by consent of the parties. If this is a problem, the surety may nonetheless participate, but seek to immediately obtain such a ruling from the arbiter or the panel. In the author's judgment, it is likely that the panel would grant such a request.

It is generally very important to determine who goes first. Normally, the first party requesting arbitration will go first. In this particular, we have a third party who has entered the arbitration by its consent and the consent of the other two parties. A determination should be made by agreement or otherwise by the arbiters of the extent to which Surety's attorney may examine or cross-examine witnesses to present evidence and the like. These procedures can be worked out by agreement.

I. The participation of surety: special problems.

In our hypothetical, we have assumed the surety is participating in the arbitration. How this comes about can be very important both to the contractor, to the owner, and especially to the surety. If the owner demands or requests that the surety become a party, it is much easier for the surety to make the decision to become a party. It is also easier for the surety to demand and expect participation as a separate party. This would include participation in the selection of the arbiter, participation in the examination and cross-examination of witnesses, the presentation of evidence, and the like. On the other hand, if the arbitration is sought without any request that the surety participate, the surety may elect to offer to join the arbitration. Such an offer normally should be contingent on an agreement by the other two parties that the surety have equal rights as a party.

However, if the surety is particularly anxious to join in the arbitration (usually because it has some concern as to the ability of its principal to carry through), it may not be in a position to obtain such agreements as a condition of its entering the arbitration. This would not prevent it from seeking the right to do these things with the arbiters. Most arbiters, where a surety has entered an arbitration voluntarily, are likely to give the surety some status as long as it does not create a fundamental unfairness. If a surety is in a state or has circumstances where its offering to arbitrate with the certainty that the offer will be turned down by the owner may give it some advantage (for example, that the result of the arbitration may not constitute estoppel on the record as to certain issues under the law of that state if the owner prevents the surety from participating) then it maybe wise not to impose any conditions to joining the arbitration.

J. Special problems of depositions.

There are a number of special problems that may arise either with respect to discovery depositions or use of deposition testimony in arbitration. The reader is particularly encouraged to read the article in the Fall, 1998 issue of Tort & Insurance Law Journal, "The Discovery Powers of Arbiters in Federal Courts Under the Federal Arbitration Act" by Teresa Snider. This article and the cases cited in the article can help one get one's feet on the ground with respect to depositions. It is very important to have a good understanding as early as possible about how one goes about securing such depositions, whether they can be used, and the power to compel deposition testimony. This is a matter that must be raised with the arbiter or panel immediately if it is likely to be a problem. It is especially important to look carefully at the contract provisions or the arbitration provisions incorporated into the contract with regard to depositions. For example, if the contract references the Federal Rules of Civil Procedure as applying to discovery, then you may have expanded power to issue subpoenas.

V. The Arbitration Hearing

A. Length of the hearing.

It is very important for counsel to be realistic concerning the length of the hearing. Most lawyers tend to underestimate the period required. Furthermore, the estimates of lawyers not experienced in arbitration may be based on their litigation experience, yet arbitration is different. Some aspects of arbitration will tend to make the hearings more expeditious than those in court and other aspects will tend to make them less expeditious. In making an estimate of the time required, counsel needs to consider how each of these factors is likely to affect the case at hand.

Because the rules of evidence are more relaxed, very little time is spend arguing over what evidence is or is not admissible. Because evidence is admissible that would not be admissible in a trial, there may be more of it. Because affidavits and summaries tend to be admissible more easily than in trial, the time spent providing foundation and full presentation of facts on an issue may be reduced.

From the history of the arbiter or the panel, one can generally get a sense of whether the arbiter will allow what is, in effect, discovery during the hearing. This can make a tremendous

difference in the length of the hearing. Trials in litigation involve significant time spent in motion practice during the trial while others do not. In general, the functional equivalent of motion practice in an arbitration hearing is virtually non-existent.

B. Approaches to take with arbiters during the hearing.

There is no “one size fits all”. It is very important to make judgments about the arbiters based on your experience with them and your understanding of the experience of others in prior arbitrations they have handled. Is this an arbiter who prefers a deposition to a live witness? Is this an arbiter who prefers to have written documentation to study in the evening or early in the morning rather than reading the documents during the hearing (where reading the documents is not necessary to understand oral testimony being presented at that time)? Sometimes it is possible to ask questions or have discussions during preliminary hearings that will give you considerable insight in how a given arbiter or arbiters feel about these and like matters.

Usually in front of a jury, the author’s desire is to present evidence sequentially (that is in terms of when the events being described in the testimony occurred) insofar as it is possible to do so. With an arbiter or arbitration panel very experienced in construction, it is somewhat easier to do it by categories of effort. What was done with the shop drawings? The inspection process from beginning to end, etc.

C. Handling introduction of evidence and witnesses.

It is a good idea to understand whether the arbitration panel will put limits (in an arbitration not likely) on the length of examination, the length of cross-examination and whether the panel will allow re-cross and re-redirect, etc. Some arbiters do not wish to spend the time establishing the qualifications of experts and prefer to have a resume. Arbiters are more likely to allow witnesses out of order. For example, if the respondent has someone who is only available at a time during the claimants case. In addition, arbiters are probably not likely to be very moved by an argument that something raised on cross is outside the scope of the direct. These are matters that need to be carefully considered in the presentation and handling of witnesses. These also may be raised with the arbiters prior to the hearing.

D. Expediting the arbitration.

Experienced arbiters espouse arbitration, in which they spend part of their professional lives, because it is supposed to be expeditious. With most arbiters, anything you can do to expedite the process will be appreciated. These include stipulations, other agreements among counsel, the presentation of summary evidence, and the like.

An arbiter has more discretion to comment during the evidence. For example, an arbiter may say that certain documentary evidence would be of interest, ask for a view of the premises, ask for a particular witness to be brought back or suggest issues that the arbiter would like more fully explored. This does not happen often, but it can happen. Obviously it makes sense for a party to provide the requested information if it is available.

E. The demeanor arbiters are likely to expect.

Most arbiters prefer a courteous, even performance. They expect that advocates will be advocates and will push their client's position. They will listen very carefully to evaluate your trustworthiness as counsel. If you misstate evidence, misstate what you are intending to prove, make statements about what a rule ought to be or what an issue is with which they significantly disagree it will inevitably injure your client's cause. In a lengthy arbitration on a complicated case, where the possible resolution of the issues is very close, the fact that a party and its counsel "plays it straight" throughout the hearing is often the determinate.

VI. Final Argument and Briefing

A. Briefs.

In some instances, the arbiters will prefer briefs both in advance of and following the hearing. This would be particularly true in a complicated case. Arbiters are less likely to want detailed summaries of evidence in the pre-hearing brief. Such a brief ideally should discuss issues, present a brief summary of the evidence related to each issue and present key legal precedents for the arbiters to consider. The fact that arbiters may not be bound by a legal precedent in the sense that a trial court judge is so bound does not mean that they will ignore such precedents. One of the purposes of a legal precedent, particularly in a contract setting, is for the parties to know the conduct to which they have committed themselves in advance and what they have a right to expect other contracting parties. Where there is a legal doctrine that sets out such rights or responsibilities arbiters are not likely to overlook that doctrine unless they feel that a "technical" application of the doctrine would work an injustice in this case.

In general, I would recommend that briefs be filed and exchanged simultaneously. The panel may ask for responsive briefs. But in general, one should not rely on the opportunity to file responsive briefs. If in fact one party is to brief first and then the second follows with an answer brief, the arbitration panel is very likely to allow a reply.

B. Final argument.

There is very little advice about final argument before an arbiter or panel of arbiters that would be any different from the advice one would give for final argument in a bench trial. It is more likely than not that the arbiters have more general information about the subject matter in dispute than would be true of a court in a normal bench trial. The arbiter normally have had practical experience as a practicing lawyer, practicing design professional, contractor, or the like, in the construction field. Under these circumstances, you may wish to play to that experience in shaping your argument. This might be particularly true of the type of hypotheticals you would use to make points about the resolution of issues.

Because the arbiters have relatively unfettered access to the documentary evidence, it may be better to briefly summarize what the documents show and then provide information of exactly where to look for a further study if the arbiter or panel wishes to make a further study. By this

time, you may have a pretty good feel for how the arbiter or panel is reacting to exchanges between counsel and the panel. It may not be unreasonable to ask the panel about a particular subject to determine whether they want to hear more elaboration on that particular point.

VII. Basic Principles To Consider Throughout Arbitration

I will not repeat here the three principles mentioned in the Introduction. Obviously they apply to this section of the paper as well. This section will concentrate on basic principles that apply more fully to arbitration than to litigation. In the author's opinion, these are:

- A. Bear in mind that the touchstone is what is fair;
- B. Bear in mind that the technical rules of evidence are much less likely to be applied;
- C. Bear in mind that you will probably have a panel who will be far more familiar with the subject matter of the dispute than is true either in a bench or a jury trial.
- D. Bear in mind that other than an arbiter or panel going outside the submission or the arbitration agreement, the likelihood of success on an appeal is very remote. You are trying your case once.
- E. In many construction disputes, the ultimate resolution is rarely one side winning or losing everything. This is particularly true in arbitration. An arbiter will consider it quite reasonable to reduce the amount of damages that may be shown by the evidence because of some conduct or occurrence during the course of the project which the arbiter believes may not legally exonerate the party paying the damages, but ought to reduce that party's responsibility. It is very important to keep this in mind.
- F. This is nothing new. Arbiters, most of whom are experienced in the field which is being discussed in the arbitration, will be more likely to be able to identify and evaluate the presentation of evidence and the comments of counsel or a witness that is less than candid or are disingenuous than a jury or judge.
- G. In a construction case, any arbiter will be familiar with the construction industry. You can assume the arbiter will be familiar with customs and practices of the construction industry. Therefore, those customs and practices will undoubtedly be considered by an arbiter to fill in gaps in making decisions. If there is a particular custom or practice in the industry that you think should not apply in this case, be sure to provide evidence or argument, or both, to support that thesis. On the other hand, if you want a result which relies on custom and practice, do not rely on saying nothing because the arbiter must know about it. Point the arbiter by evidence and/or argument to that practice and its relevance to the issue you are trying to resolve in your client's favor.

VIII. Conclusion

I have cautioned the reader to maintain technical compliance with all of the rules and orders of the arbiter and to conduct oneself essentially as though one were in court (except to the extent it is clear the arbiters desire something different). It is still a fact of life that arbitration in almost every instance, is somewhat more informal than a courtroom procedure. This will provide appropriate opportunities to help persuade the arbiters of the strength of your client's position and the weakness of your opponent's position as to certain issues. Such espousal should be done in a courteous fashion and not with an obvious intent to take unfair advantage of your opponent.

As a matter of fact, being discourteous or taking unfair advantage of your opponent in the presence of the panel may provoke a more damaging reprisal or put a bad taste in the panel's mouth or both. There are some people, as I have said, who act as arbiters who enjoy the cut thrust of a good battle between counsel. But, they certainly are a minority. Do not operate on the assumption you are appearing before such a person until it is fairly clear to you that is the reality you face in that particular arbitration.

Because they have been there, seen that, and done that, arbiters are more likely to catch attempts to go past the edge of the envelope than may be true of judges or juries. So, it is important to emphasize yet again, that candor and fairness is a must with the arbitration panel, with the evidence and with opposing counsel. This is true for two reasons. It is the best way to practice law. In the long run, it is more likely to benefit your client than help them. At all times, whether before a court, jury or an arbiter, counsel should conform to the highest standard of conduct.