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THE DISPUTE RESOLVER

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FROM YOUR PUBLICATIONS SUBCOMMITTEE

Anthony D. Lehman, DLA Piper (US)
anthony.lehman@dlapiper.com
(404) 736-7805

Anthony C. Kaye, Ballard Spahr LLP
Kaye@ballardspahr.com
(801) 531-3069

Anthony L. Osborn, Goosmann Law Firm
Anthony@Goosmannlaw.com
(712) 226-4000

R. Thomas Dunn, Little Medeiros Kinder et al.
tdunn@lmkbw.com
(401) 272-8080

Preparing Witnesses in Construction Cases

By: Daniel I. Small
Partner, Holland & Knight LLP
Boston, Massachusetts & Miami, Florida

Not so long ago, persuading construction industry executives and managers that they needed extensive preparation before testifying in a legal proceeding was a battle. Many confident, articulate executives were convinced they could just "go in and tell my story," and they were insulted by the notion that they needed some lawyer to prepare them. Too many experienced lawyers didn't push back.

Then came an explosion of high-profile lawsuits and investigations, and with them a parade of highly successful corporate executives who proved to be very bad witnesses. Gates, Stewart, Libby, Kozlowski, Lay – the list goes on. Now, executives faced with the prospect of being a witness may wonder if there is some reason this happened, and if it could happen to them. The answers are "Yes," and "Yes." It happened because executives – and their lawyers – failed to understand that they were entering a different and dangerous world. In this world, it's not just about experience and intelligence. It's about preparation, and understanding the audience, the rules, and the "core themes" of the case. People who have already spent years mastering the corporate and construction worlds, must nonetheless understand it takes commitment, time and effort.

The first requirement is to understand the audience. Every proceeding and witness situation is unique, but in most litigation the ultimate audience is the jury or other finder of fact. It's fashionable to bash juries, but it's easy to expect too much of jurors and too little of ourselves. Lawyers and witnesses are teachers. If our students aren't learning, it is usually a shared responsibility.

Juries are composed of individuals. Assume they are ordinary people doing their civic duty and want to understand what a witness is saying. But they

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know little or nothing about construction and related issues. Pick one – let's say juror number six – and ask: How do we reach him?

At the beginning of the testimony in a complex trial, one witness testified as follows:

Q: Would you please introduce yourself to the jury?

A: My name is Bob. I'm a consultant to the company.

On the witness stand, that's a lost opportunity to humanize the witness. Preparation should include recalling the stories that can make the witness real to the jury: the summer job that got you interested in your field, the family tragedy that changed your direction, the family member or other mentor who inspired you. For most people, that kind of thing won't come out, unless it's explored and discussed in advance.

The witness needs to humanize the company, as well. Polls show that the public image of corporations is negative. Jurors need context to get past that stereotype, and the witness has to provide it. The company has a story to tell. It started somewhere, built things, did things, or helped others, or fostered interesting people and projects. Find those stories and prepare for opportunities to present them.

SIMPLIFY THE LANGUAGE

Every profession, industry and specialty has a language. To reach juror number six, a witness has to move beyond that language. Take this exchange:

Q: What management position did you hold?

A: I was responsible for all the R&D projects for BASG for filler metals.

Here, in one short answer, are three terms that juror number six may not know: "R&D," "BASG" and "filler metals." He's left with three bad choices: Ignore the answer, spend the next several minutes of the testimony trying to figure out what you meant, or just decide that the witness is a jerk, and stop listening. Over-coming years of accumulated jargon is difficult work, but it's necessary.

It's also necessary to simplify the message. The experienced executive has a lot of information and under attack may want to get it all out. But juror number six doesn't need to know everything. Avoid getting him distracted and lost in detail. He needs to know only what's really important. (In one complex products liability case, I prepared witnesses by using a simple sign that said "Stop.")

TEN RULES

Testimony is not a conversation. It has its own language and its own rhythm. Question, pause, answer, stop. Guessing, interrupting and volunteering are inappropriate and dangerous in the narrow and artificial world of testimony, where every word is taken down, under oath, and may be picked apart.

In this world, the questioner appears to be in control. It's an illusion, but even the most accomplished witness can fall victim to it. The witness has the right and the responsibility to take control. When it comes to meetings or other interactions, most people know that the way to take control of the situation is not by shouting the loudest, but by utilizing some clearly established techniques or rules. Testimony is just a different kind of meeting, and here are 10 rules for making it happen:

1. Take your time.

Slow it down, think it through, and control the pace. Lawyers want rapid-fire Q&A, but if the lawyer makes a mistake, no one cares. If the witness makes a mistake, it can live on forever. “The Gift That Keeps On Giving.” From the very first question, slow it down.

2. Remember you are making a record.

You are dictating the first and final draft of a very important document, with no rewind button and no second draft, so think about your language. Certain words can take on special meanings. Learn what they are in your case, remembering words can have different meanings to different people. There will be only one transcript.

3. Tell the truth.

This seems obvious, but truth in a witness environment is a very narrow concept. It's what you saw, heard or did. Everything else is a guess.

4. Be relentlessly polite.

This will be personal. They're attacking you. But remember that a witness who is angry or defensive isn't thinking clearly and isn't controlling the language or the pace. Lawyers know that. A few garbage questions, a little righteous indignation, and off we go! It's a scam. Don't fall for it. Be relentlessly polite and focused.

5. Don't answer a question you don't understand.

Is it vague language, strange phrasing or distorted assumptions? Is it just too long to be clear? Don't answer it. Just say: "Please rephrase the question."

6. If you don't remember, say so.

Answer clearly. Just say, "I don't recall," and stop. This is not a test at school: you're not being graded on how much you remember.

7. Do not guess.

Much of what makes people good conversationalists and intelligent, intuitive people involves guessing. But guessing is inappropriate and dangerous for a witness.

8. Do not volunteer.

"Question, pause, answer, stop." That's the rhythm of being a witness. We are not used to silence, but a witness must become comfortable with the silence of waiting for the next question.

9. Be careful with documents.

Documents are just written versions of what someone believed. Treat them mechanically. There is a simple, unvarying protocol witnesses should follow: If you are asked a question that relates in any way to a document: (a) Ask to see the document. Don't allow anyone to draw you into a debate with a document that is not in front of you. You can't win. (b) Read It. There are three issues with any document: credi-bility, language and context. You cannot carefully consider each of them unless you read it. Read all of it, slowly and carefully. (c) Ask for the question again. It's basic fairness. They've read the documents and picked out one little piece to ask about. Now that you've read it, the question will be clearer (and you may get a better question).

10. Use your counsel.

Listen to everything that is said, ask questions when you can and take breaks before you need them.

Most of these rules are difficult for working people. They are contrary to what they're used to, and often counterintuitive. But if they are practiced, they can impose a degree of discipline and control on the process that makes it significantly more fair and productive.

CORE THEMES

A key part of the witness preparation process is to develop and discuss a set of clear and simple core themes for the case. The conventional wisdom used to be to say as little as possible in a deposition, on the ground that it's their deposition. They are trying to build their case, so don't help them. There is still some truth in that, but in many ways, it is outdated.

Litigation today takes longer, is more complex and often involves issues that go beyond the narrow facts or parties of the case. Whether in deposition, trial or other proceedings, witnesses need to maintain the high ground, but do so in a careful and disciplined manner. Keep in mind the basic themes underpinning your case and your testimony. How are they best expressed? What challenges will they draw? How do you find opportunities in all phases of your testimony to bring them out?

Witness preparation is an important part of the litigation process. It involves a careful review of the audience, the rules and the core themes. It should also include extensive and realistic mock testimony. Learning how to testify is like learning to ride a bicycle: You can't do it by talking about it. It might require some trauma and a few bruises. To master this strange world, you need to enter into it, and then review what you've done.

The legal profession too often has failed clients by not preparing them for the challenges of being a witness, sometimes with disastrous consequences. The damage can go beyond one case and reverberate for years to come.

If you are in any construction-related business in America today, you are in the litigation business too, or eventually will be. You need to accept that and understand the process in order to manage it. An investment in witness preparation can be an extraordinarily produc-tive one financially and, as one executive I've prepared has commented, it also will help you sleep better at night.

Dan Small is a trial lawyer with Holland & Knight, in their Boston and Miami offices. His practice focuses on government investigations, complex litigation, and witness preparation. He is a former federal prosecutor and the author of several ABA books on litigation, including Preparing Witnesses (Third Edition, 2009), which is also the basis for CLE programs he gives around the country.

Recent Developments in Construction Law

The following are some recent cases of interest related to construction law and dispute resolution. If you have a case you would like to submit, please contact a member of the newsletter editorial board.

Ohio Supreme Court: Homebuyers Cannot Waive Right to Enforce Builder's Duty to Construct Residence in Workmanlike Manner

In *Jones v. Centex Homes*, 967 N.E.2d 1199 (Ohio 2012), the Supreme Court of Ohio addressed whether a homebuyer can waive his/her right to enforce a homebuilder's legal duty to construct a house in a workmanlike manner. Contrary to the majority of state courts across the nation which have addressed this issue, the Ohio Supreme Court held that this right cannot be waived.

Procedurally, two homeowners filed separate lawsuits against the builder, Centex Homes ("Centex"), after they moved into their homes and discovered that certain electronic equipment did not work properly. The two cases were consolidated. In the lawsuit, the homeowners alleged that their electronic equipment was not functioning properly because the metal joists in their homes were magnetized.

The relevant construction contracts contained provisions waiving all warranties except specific express warranties which were provided in a separate document and not relevant for purposes of this discussion. The lower level trial court ruled in favor of Centex, holding that a waiver of the implied duty to construct the homes in a workmanlike manner is permissible if the waiver is conspicuous, unambiguous and fully disclosed. The homeowners appealed.

On appeal, the Ohio Supreme Court disagreed and reinstated the homeowners' claims. The Ohio Supreme Court reaffirmed that, under Ohio law, every homebuilder has an implied duty to construct homes in a workmanlike manner and can be sued if the homebuilder violates the duty. The Court held that, as opposed to a "warranty," a "duty" cannot be excluded by written contract disclaimer.

Texas Appellate Court: "No Damages For Delay" Clause Bars Contractor's Breach of Contract Claim

The Port of Houston Authority of Harris County, Texas v. Zachry Construction Corporation, 2012 WL 3223597 (Tex. App. Aug. 9, 2012) stemmed from Zachry's construction of a wharf facility for the Port Authority of Harris County, Texas. At the trial court level, the contractor received a favorable verdict in the amount of $23.4 million after a 3-month jury trial; the damages related to a breach of contract claim and included, in substantial part, damages for delays which the jury attributed to the Port Authority.

On appeal, the Port Authority argued that the relevant contract's "no damages for delay" provision barred Zachry's breach of contact claim and associated delay damages. In this regard, the "no damages for delay" clause read as follows:

(*Port of Houston* Authority, Continued)

> The Contractor shall receive no financial compensation for delay or hindrance to the Work. In no event shall the Port Authority be liable to the Contractor or any Subcontractor or Supplier, any other person or any surety for or any employee or agent of any of them, for any damages arising out of or associated with any delay or hindrance to the Work, regardless of the source of the delay or hindrance, including events of Force Majeure, AND EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE PORT AUTHORITY. The Contractor's sole remedy in any such case shall be an extension of time.

Relying upon this provision, the Texas appellate court reversed the trial court decision, construing the "no damages for delay" clause to bar Zachry's recovery for breach of contract damages. In this regard, the appellate court relied upon the parties "freedom to contract" and found the provision did not violate public policy. It remains to be seen whether Zachry will petition the Texas Supreme Court to review this opinion.

Fifth Circuit Court of Appeals: Arbitrators, Not Courts, Determine Whether Claims and Disputes Fall Within Parties' Arbitration Agreements When Those Agreements Incorporate AAA Rules

DynMcDermott Petroleum operates a petroleum reserve for the U.S. Department of Energy. DynMcDermott subcontracted with Petrofac, Incorporated to design and install a transportable degasification plant to service the reserve. The relevant contract contained an arbitration clause. Petrofac and DynMcDermott proceeded to AAA arbitration in which Petrofac sought damages for differing site conditions, delays, disruption costs, lost productivity and acceleration costs.

After a prolonged arbitration process, the arbitration panel issued an award in Petrofac's favor (roughly $7 million) after finding it had authority to arbitrate the claims. The district court confirmed the arbitration award in 2010. Thereafter, DynMcDermott filed an appeal with the Fifth Circuit, in which it argued the arbitration panel exceeded its powers by issuing an award on a claim that was not covered by the parties' arbitration agreement.

The Fifth Circuit affirmed the district court's confirmation of the arbitration award. *Petrofac, Inc. v. DynMcDermott Petroleum Ops. Co.*, ___ F.3d ___, 2012 WL 2892401 (5th Cir. July 17, 2012). Specifically, the Fifth Circuit held that arbitrators, not courts, determine whether claims and disputes fall with an arbitration agreement when the arbitration agreement incorporates the AAA rules. Those rules provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." In this regard, the Fifth Circuit recognized its agreement with the majority position on this issue, citing to cases from the Federal Circuit, the Eleventh Circuit, the Second Circuit, and the First Circuit Courts of Appeals (and the Texas Court of Appeals) while recognizing that the Tenth Circuit Court of Appeals disagrees with this holding.

DIVISION 1: MEMBER SPOTLIGHT

Art Brannan

Arthur D. Brannan, a partner in the Atlanta office of DLA Piper LLP, is certainly one of the most distinguished members of Division 1 if service to the Forum is any measure.

Art was born in Detroit and grew up across the Midwest and California. As a young boy, he was active in the Boy Scouts, earning the rank of Eagle Scout, and played tennis and wrestled in high school. He later wrestled for Notre Dame, which he attended on an ROTC scholarship. From 1979 to 1983, Art served as a U.S. Army field artillery officer, stationed in Germany, where he met his wife, Karen, at a Chinese restaurant. Karen – who is neither German nor Chinese – is actually from Gainesville, Florida, and was in Germany teaching elementary school for the Department of Defense. Art and Karen have been married for 29 years.

Art's interest in the law was piqued when he was asked to assist with an investigation into $4,500 worth of missing sheets to determine whether there was proximate cause to hold a commanding officer liable for the loss. So, after his service, Art went to Michigan Law School. But while he was in the service and at law school, he also managed to obtain an M.S.B.A. from Boston University.

Art and Karen have four kids, aged 19 to 26. Arthur, born when his dad was a third-year law student, graduated from Wake Forest on an Army ROTC scholarship and recently completed his tour of active duty as an armor officer with the U.S. Army's 3rd Armored Cavalry Regiment both at Ft. Hood, Texas, and in Iraq. Daniel graduated from Notre Dame on a Navy ROTC scholarship and currently is a Naval Flight Officer with an F-18 squadron assigned to the U.S.S. John C. Stennis, which deployed to the Persian Gulf on September 1. Kelsey is a senior at Appalachian State University where she is a manager for the ASU wrestling team and is majoring in Chemistry and Secondary Education. Evan is a sophomore at Purdue University where he is majoring in Mechanical Engineering.

Following law school, Art joined Carlton Fields in Tampa and then worked at Holland & Knight and Hunton & Williams. He moved to Atlanta in 1995 and in 2006 opened DLA Piper's Atlanta office with a small group of colleagues.

Karen taught school for 14 years and is now an active member of the Atlanta community and President of her local sorority alumni group. With all four kids now out of the house, they are still trying to figure out what exactly to do for fun. In the meantime, Art stays busy volunteering as an assistant wrestling coach at a local high school and as an Assistant Scoutmaster with a local Boy Scout troop. And, Art and Karen have two rescue dogs, Lucky, a chocolate lab, and Sammy, a lab-beagle mix.

Art focuses his practice on all aspects of engineering and construction litigation, real estate litigation, business litigation, alternative dispute resolution, and international arbitration and dispute resolution. Over the course of the past 25 years, Art has represented large private and public owners, engineering design firms and contractors in connection with engineering and construction disputes involving construction and design defects, delays, and payment and performance bonds relating to various public infrastructure projects, industrial facilities, hotels and resorts, condominiums, and commercial buildings.

Art has been involved in the Forum since the 1980s. He is a member of the Forum's Governing Committee, and he formerly served as Chair of the Forum's International Division (Division 8), as a Co-Chair for the Forum's 2007 Fall Program and as a moderator and co-author for "Advanced Litigation Management Principles," which was presented at the Forum's 2009 Fall Program. He also is a co-editor of *International Construction Law: A Guide for Cross-Border Transactions and Legal Disputes*, a co-author of *The Annotated Construction Law Glossary*, and currently serves as a member of the Forum's Finance, Technology and SPEC Committees.