global construction solutions

JAMS

THE LATEST NEWS IN CONSTRUCTION ADR FROM THE WORLD'S LEADING NEUTRALS

Expedited Construction Adjudication: A Better Process for Resolution of Performance Bond Disputes

By Patricia H. Thompson, Esq.

For the sake of the parties and the construction project, it would be ideal if major contested construction disputes, including those involving claims on performance surety bonds, could be resolved:

- quickly enough to allow the project to proceed with as little impact on the schedule as possible;
- with the least possible legal expense;
- based on the decisions of an impartial decision-maker knowledgeable about construction processes, construction, surety and dispute resolution law, as well as the facts specific to the project at issue; and
- while also preserving the parties' rights in the event of decisional error significant enough to warrant a party seeking later review.

> See "Expedited Construction Adjudication" on Page 5

Winning in Arbitration: The 10 Golden Rules

By Hon. Curtis E. von Kann (Ret.)

Even the best advocate can't win an unwinnable case. But for the many cases that could go either way, the quality of advocacy is often the decisive factor. Having conducted arbitrations for 22 years and observed both very good and very bad advocates, I have concluded that those who observe the following rules generally win their cases.

Rule 1: Never Impair Your Credibility with the Arbitrator

In arbitration, relaxed evidentiary rules, less formal proceedings and sophisticated decisions-makers mean that counsel's representations are relied on more heavily by arbitrators than by judges or juries. If your arbitrator believes that you have misstated the

> See "Winning in Arbitration" on Page 6

Also in our Summer 2017 Newsletter:

ConsensusDocs Lists JAMS as One of Only Two Named Providers

By Philip L. Bruner, Esq.

ConsensusDocs Coalition, publisher of one of the most widely used sets of standard form construction contract documents in the United States (www.consensusdocs.org), has formally listed JAMS in its contract forms as one of only two named American providers of construction mediation and arbitration services. Previously listed to provide arbitration services, JAMS now has been listed to provide mediation services as well in contract forms updated at the end of 2016.

Under the ConsensusDocs Dispute Resolution clauses, contracting parties now may select JAMS to administer mediations and arbitrations by simply checking the JAMS box on the contract form at the time of contract signing or by filing a request for mediation or demand for arbitration with JAMS after a dispute has arisen. Filing instructions for commencement of mediation or arbitration are provided at www.jamsadr.com.

The inclusion of JAMS by name in the ConsensusDocs Dispute Resolution clauses is significant because ConsensusDocs contract forms are written and endorsed by 40 distinguished national member organizations of the ConsensusDocs Coalition:

- **The Associated General Contractors of America (AGC)**
- **Air Conditioning Contractors of America (ACCA)**
- **AABC Commissioning Group (ACG)**
- **American Institute of Constructors (AIC)**
- **American Society of Professional Estimators (ASPE)**
- **American Subcontractors Association, Inc. (ASA)**
- **Architectural Woodwork Institute (AWI)**
- **ASFE/Geoprofessional Business Association (ASFE)**
- **Associated Builders and Contractors, Inc. (ABC)**
- **Associated Specialty Contractors, Inc. (ASC)**
- **Association of the Wall and Ceiling Industry (AWCI)**
- **Construction Financial Management Association (CFMA)**
- **Construction Industry Round Table (CIRT)**
- **Construction Owners Association of America (COAA)**
- **Construction Specifications Institute (CSI)**
- **The Construction Users Roundtable (CURT)**
- **Dispute Resolution Board Foundation (DRBF)**
- **Door and Hardware Institute (DHI)**
- **Finishing Contractors Association (FCA)**
- **The Geoprofessional Business Association (GBA)**
- **Independent Electrical Contractors (IEC)**
- **Lean Construction Institute (LCI)**
- **Mechanical Contractors Association of America (MCAA)**
- **National Association of Construction Auditors (NACA)**
- **National Association of Electrical Distributors (NAED)**
- **National Association of State Facilities Administrators (NASFA)**
- **National Association of Surety Bond Producers (NASBP)**
- **National Association of Women in Construction (NAWIC)**
- **National Electrical Contractors Association (NECA)**
- **National Ground Water Association (NGWA)**
- **National Hispanic Construction Association (NHCA)**
- **National Insulation Association (NIA)**
- **National Roofing Contractors Association (NRCA)**
- **National Subcontractors Alliance (NSA)**
- **National Utility Contractors Association (NUCA)**
- **Painting and Decorating Contractors of America (PDCA)**
- **Plumbing heating Cooling Contractors Association (PHCC)**
- **Retail Contractors Association (RCA)**
- **Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)**
- **The Surety & Fidelity Association of America (SFAA)**
- **United States Hispanic Construction Association (USHCA)**
- **Women Construction Owners & Executives, USA (WCOE)**
- **Water and Wastewater Equipment Manufacturers Association (WWEMA)**

These 40 organizations represent collectively a significant number of construction professionals engaged in the American construction industry. JAMS is honored to be recognized by the ConsensusDocs Coalition as a provider of dispute resolution services worthy of being named in its contract forms.

The JAMS Global Engineering and Construction Group (GEC) is composed of neutrals with expertise in construction law and in the customs, practices, contract rights and duties commonly governing disputes arising in the American and international construction industries. JAMS GEC neutrals also are highly experienced and skilled in the management of construction industry ADR methods, including arbitration, mediation, project neutral evaluation, expert determination, structured negotiation, dispute boards, British-style adjudication and advisory "mock" proceedings in advance of arbitration or trial. Such broad expertise is critical for efficient and cost-effective dispute resolution.

The JAMS GEC neutrals include world leaders in construction dispute resolution. Descriptions of the JAMS GEC dispute resolution practice, the backgrounds of its neutrals and the JAMS Engineering and Construction Arbitration Rules & Procedures, as well as other rules and procedures, can be found at www.jamsadr.com/construction.

***Philip L. Bruner, Esq.**, Director of the JAMS Global Engineering and Construction Group, is one of the world's leading full-time arbitrators, mediators and resolvers of construction, engineering and infrastructure claims and disputes arising in the U.S. and globally. He can be reached at **pbruner@jamsadr.com**.*

The Advantages of Mediating Construction Disputes

By Thomas I. Elkind, Esq.

The construction process necessarily involves many parties, some of whom may not have contracts with each other. While the owner usually has contracts with the architect and the general contractor, the architect and the general contractor are not often related by contract, and the subcontractors and consultants of the general contractor and the architect rarely have contracts with the owner. When disputes arise, as they often do on construction projects, it is common for many parties to become involved, since it is often not clear whether a dispute is the result of improper design, faulty construction, defective materials or actions of the owner.

It has become standard practice for construction contracts to contain clauses requiring the parties to arbitrate any disputes that arise. Although these clauses may be stricken from the printed American Institute of Architects forms that are commonly used in the construction industry, lawyers and parties are more likely to amend the printed provisions than to eliminate them entirely. Thus, most construction contracts provide for some form of arbitration of disputes between the parties.

However, arbitration is solely a creature of contract. A party that has not contractually agreed to arbitrate a dispute cannot be forced to participate in an arbitration, although if all involved in a dispute consent, other parties can join an arbitration. This can lead to a situation where all parties involved in a dispute cannot be brought into one proceeding to resolve the dispute. A party can be forced to arbitrate against one or more parties at the same time as it is engaged in court litigation against other parties involved in the same dispute. Such a situation not only can be very expensive, but there is also the possibility of inconsistent results being reached in the multiple proceedings.

If the parties cannot negotiate a resolution, mediation is the best and least expensive way to resolve such disputes. In mediation, all the parties can agree to participate in the process, even if they have not agreed to join in one adjudicatory proceeding.

Parties facing this type of situation are well-advised to seek an early resolution of their dispute. If the parties cannot negotiate a resolution, mediation is the best and least expensive way to resolve such disputes. In mediation, all the parties can agree to participate in the process, even if they have not agreed to join in one adjudicatory proceeding. The cost of the mediation, when spread among all the parties, is minimal when compared to the cost of engaging in multiple adjudicatory proceedings.

Another advantage of mediation in these situations is that the dispute can be promptly resolved so that the parties can get back to productive activities. Construction arbitrations can be very complex, with many facts to examine, experts to testify and documents to review and explain. Hearings of these proceedings can take many days over many months. A related litigation regarding the same issues can take even longer. In addition, many judges do not like handling construction cases, and they may delay the resolution of these cases in the hope that they will settle before trial.

For these reasons, mediation—which is always a good option for resolving disputes—is an especially attractive tool in construction disputes. The advantages of speed, low cost and final resolution of the issues all support using mediation in an early attempt to resolve complicated construction disputes.

Thomas I. Elkind, Esq., *a JAMS Boston neutral and former litigator, has worked throughout his career to resolve construction cases, representing owners, contractors, architects, engineers, sureties and lenders in a wide variety of matters. He can be reached at* ***telkind@jamsadr.com****.*

Six JAMS GEC Members Are Ranked With *Chambers USA 2017*

Hon. William Cahill (Ret.) is ranked as a Nationwide Mediator and described as *"impartial, candid, knowledgeable and tenacious"* for his work handling high-stakes disputes, including complex commercial matters such as securities class actions, contracts disputes and other business matters.

George D. Calkins II, Esq. is included as a California Construction Mediator with *"wide knowledge of the construction industry, spanning public works, commercial, industrial and residential projects."* He is also described as a *"well-recognized...arbitrator."*

Robert B. Davidson, Esq., who is recognized on the International Arbitration: Arbitrators list, is described as *"smart and very capable"* and *"one of the go-to guys in New York"* for arbitration matters in areas such as aviation, energy, intellectual property and real estate.

Kenneth C. Gibbs, Esq. is featured as a California Construction Mediator. Described as *"excellent"* for his work on national and international arbitrations and mediations, he is praised for his ability to quickly grasp issues: *"as a mediator he cuts to the chase and pushes both sides to settlement by reason and logic."*

Barbara Reeves, Esq. is recognized as a Nationwide Mediator, though Chambers also notes that she's a respected arbitrator. The guide describes her as *"very smart and hard-working*" handling disputes involving commercial, construction, equestrian, healthcare and public law issues.

Michael Young, Esq. is listed in as a Nationwide Mediator for his work handling challenging disputes in areas ranging from commercial matters to employment issues, as well as seriatim mediation of joined class actions. Chambers describes him as a *"very talented yet very humble" mediator who "helps parties find a way to settle it themselves."*

*The JAMS Global Engineering and Construction Group provides expert mediation, arbitration, project neutral and other services to the global construction industry to resolve disputes in a timely manner. Learn more at **www.jamsadr.com/construction**.*

New Additions

JAMS announced the addition of **Thomas I. Elkind, Esq.** in Boston and **Ambassador (Ret.) David Huebner** in Los Angeles.

Representative Matters

Kenneth C. Gibbs, Esq. has been engaged by the FAA and a major general contractor to render a neutral evaluation regarding claims on one of the largest air traffic control towers ever built in the United States.

Roy S. Mitchell, Esq. rendered a JAMS Independent Expert Determination acting as a Civil Code interrogator on a dispute involving design, construction, commissioning and testing of a major process plant to finally conclude a matter involving two large international contractors who had previously been involved in ICC arbitration, Mechanics Lien and Foreclosure actions.

John W. Hinchey, Esq. was assigned to serve as a single arbitrator in a dispute between the owner and EPC contractor of a 150 MW solar energy project comprised of 16 photo voltaic (PV) Plants located in Minnesota. He was also appointed and confirmed by the ICC in two matters: as president of a tribunal arbitrating a dispute involving the engineering and construction of a segment of an Interstate highway in Indiana and as co-arbitrator of a dispute involving the construction of a large industrial facility near Corpus Christi, Texas. In addition, Mr. Hinchey was appointed co-arbitrator of an American Arbitration Association-administered proceeding involving a dispute between the owner and design builder of three new plants producing nitrogen-based fertilizers in Louisiana.

Upcoming Events

Philip L. Bruner, Esq., **Hon. Nancy Holtz (Ret.)** and **Patricia H. Thompson, Esq.** will speak at the ABA Forum on Construction Law's 2018 Mid-Winter Meeting in Fort Myers, Florida (January 18-19, 2018).

Ms. Thompson will present on effective arbitration at the ABA Fidelity and Surety Law Committee's Midwinter Meeting (January 24-26, 2018) in Washington, D.C.

Recent Honors & Speaking Engagements

Roy S. Mitchell, Esq. was admitted as a Fellow of the Chartered Institute of Arbitrators.

Gill S. Freeman (Retired Judge 11th Judicial Circuit) spoke on "Maintaining Competency in the Face of Technology Advancements" at the Florida Bar Annual Meeting in Boca Raton (June 21-24, 2017).

Stacy L. La Scala, Esq. spoke at the West Coast Casualty Construction Defect seminar in May about updates to standard forms in the 2017 suite of ConsensusDocs and AIA contract documents, in addition to the expedited arbitration provisions now appearing in surety/performance bonds.

Hon. Nancy Holtz (Ret.) spoke at the Massachusetts Municipal Lawyers Association 7th Annual Public Construction Update (April 13, 2017).

Hon. Geraldine Soat Brown (Ret.) spoke before the Society of Illinois Construction Attorneys about "E-discovery in Construction Cases" (April 18, 2017).

Expedited Construction Adjudication

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A crucial question is whether either conventional "judicialized" arbitration or litigation can achieve these laudable goals. To justify their distaste for either form of dispute resolution, construction and surety attorneys and clients readily cite bitter, expensive war stories and wrongly reasoned rulings. To overcome such reservations, ADR professionals advocate specially drafting arbitration agreements to improve the selection of neutrals and remove the delay and expense of litigation from arbitration proceedings.[1] Similarly, arbitration tribunals, including JAMS, have promulgated rules for the resolution of construction disputes in general to address concerns raised by critics of the process.

Nevertheless, some in the surety industry continue to oppose participation in arbitration, even when other parties to a bonded project try to join them in a pending arbitration proceeding involving common, "intertwined" issues of law and fact affecting the surety's bond rights and defenses. Based on the commonly cited perception that a surety's rights and defenses will not be treated fairly in arbitration, sureties may move to stay or dismiss efforts to compel them to participate in such an arbitration. A successful battle against participation in arbitration can be expensive and fraught with risk at several levels, such as the surety being barred from later litigating issues decided in the arbitration to which it was not a party, or finding itself in front of a judge or jury with no experience with construction disputes and little understanding of the surety's legal arguments.

However, since 2015, new JAMS surety dispute resolution rules, in tandem with a new performance bond crafted by Travelers Casualty and Surety Company of America, provide an alternative method

This expedited method has been credited with reducing construction litigation in the U.K. by 80 percent. Moreover, it is the British experience that the parties usually accept the neutral adjudicator's decisions.

for resolving performance bond contract termination claims by an adjudication process that meets each of the dispute resolution dream goals cited above by binding the parties until completion of the project to expedited neutral decisions on critical disputes about whether the surety's bonded contractor materially breached its contract so as to trigger the surety's obligation to take over performance of the breached contract. In the Travelers bond, the surety agrees it will adjudicate questions of whether its principal is in default, whether the obligee has complied with its contractual obligations and whether Travelers is legally obligated to perform as demanded by the obligee. Moreover, the bond mandates an arbitration process that:

- is immediate;
- mandates quick decision-making—usually within 30 days—to minimize delay to the project and legal expense;
- specifies the use of a JAMS neutral with proven expertise in the construction, engineering, architectural and/or insurance industries, as well as the best construction dispute resolution processes, using the 2015 JAMS rules specifically designed for use in expedited construction surety dispute resolution[2]; and
- is binding on the parties, until the project is completed, but preserves the parties' right of appeal on the merits in the event they believe any perceived error merits the expense of legal proceedings.

While it might appear to be a novel experiment to include the concept of expedited resolution of construction disputes pursuant to JAMS rules as a specific provision of a performance bond, the concept of such expedited dispute resolution has proven successful in international construction jurisprudence. Travelers' bond was modeled in part on a dispute resolution method commonly used in the United Kingdom, known as expedited construction adjudication. Like the procedures outlined in the Travelers' bond and JAMS rules, Britain's construction adjudication process provides that disputes arising during construction will be decided by a party-agreed-upon neutral with proven expertise in construction law, usually within 30 days of submission of the dispute. This expedited method has been credited with reducing construction litigation in the U.K. by 80 percent. Moreover, it is the British ex-

perience that the parties usually accept the neutral adjudicator's decisions. Thus, under this expedited resolution process, delay to the project is minimized, dispute resolution expenses are curtailed and, usually, litigation is avoided altogether, notwithstanding that the parties' rights of appeal are preserved.

The early dispute resolution procedure provided in the Travelers performance bond is beneficial for other business reasons. The promise of quick resolution of the surety's decision to perform addresses the obligee's most common complaint about traditional bonds: the harm believed to be caused to the project by the surety's perceived delay or its outright refusal to perform. Consequently, at this point in time, Travelers is offering the bond on design-build projects as a better alternative to the unconditional letters of credit that obligees might otherwise require as security for contractor performance on large, and especially international, projects.

The great success of similar early dispute resolution methods in Britain, the fact that parties to any surety bond can agree to use the JAMS surety dispute resolution rules after a dispute arises, even though the bond has no arbitration provisions, and the existence of the experienced construction and surety lawyers on the JAMS Global Engineering and Construction Panel should encourage sureties and others in the construction industry to give serious consideration to this quicker, less expensive, business-positive process for resolution of performance bond disputes.

1 This author and many others have recommended the careful crafting of all business arbitration agreements and tailoring the rules and expedited procedures available with nearly every ADR provider to better manage the arbitration process, including, but not limited to, specifying a fair but abbreviated timeline and limitations on discovery and motions.

*2 The new JAMS Dispute Resolution Rules for Surety Bond Disputes (which can be used with or without the Travelers bond) are unique in the surety/ADR industry and were designed to insure a speedy resolution of obligee claims under performance bonds. For more information, visit **www.jamsadr.com/surety-rules**.*

Patricia H. Thompson, Esq. *joined JAMS Miami in 2017 after a successful career as trial and appellate lawyer and arbitrator. She focuses on resolving construction, employment, surety, fidelity, financial insurance and other complex commercial disputes. She can be reached at **pthompson@jamsadr.com**.*

Winning in Arbitration

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holding of a case, or what a witness said on deposition, or the content of a material document, he or she will likely conclude that you don't know your case or you are intentionally seeking to deceive. Either conclusion delivers a body blow to your credibility. Never say anything to an arbitrator unless you are absolutely sure it is correct. If you don't know the answer to a question, don't guess; simply say, "I don't know the answer but will get it for you promptly." Acknowledging that you don't know everything is credibility-enhancing (provided it does not happen frequently), as is acknowledging some of your opponent's (non-critical) contentions.

Rule 2: Neither a Castigator Nor a Whiner Be

Many arbitrators participate in the process because they are sick and tired of lawyers calling one another names, fussing over discovery and screaming that the other side's position is outrageous, dishonest, in bad faith, etc. They have come to arbitration because they want to work with grown-up lawyers who can zealously advocate for their clients and still deal courteously and cooperatively with opposing counsel. Try very hard to develop a good working relation with that counsel. If the other side starts throwing mud, do not reciprocate. Arbitrators like attorneys who get straight to the merits without berating the other side or whining about how badly they have been treated. Taking the high road in arbitration will put you way ahead of those who don't.

Rule 3: Throw Far-Fetched Claims and Defenses Under the Bus

Another threat to your credibility is the "kitchen sink" arbitration demand or response, which includes numerous claims or defenses that have little chance of succeeding. Experienced arbitrators will recognize these as make-weight distractions that should never have been pleaded. Their inclusion will signal that you haven't yet decided what your client's strongest position is and that you are hoping some scattershot missile will strike some target. Arbitrators do not suffer such diversionary tactics gladly. They want to know right away what the case is really about and what law and evidence each side relies on to support its position.

Rule 4: Don't Waste Time and Money on Motions

Many inexperienced advocates file the same motions in arbitration as in litigation: motions to dismiss for failure to state a claim, for a more definite statement, to compel discovery, for sanctions, in limine, for summary judgment ("summary disposition" in arbitration), etc. Almost always, this is a huge waste of time and money. Most arbitrators prefer to deal with procedural issues via conference calls rather than having lawyers hurl lengthy missives back and forth. They are also keenly aware that, in arbitration, there is no appellate body to reverse an improperly granted motion and that one of the few grounds for vacating awards, under both the Federal Arbitration Act and most state arbitration statutes, is refusing to hear a party's evidence. You will save your client money and prove your arbitration expertise if you file no

motions and get ready for the hearing as quickly as possible.

Rule 5: Keep Your Opening Statement Short but Memorable

If you have laid out your case in a pre-hearing brief, the arbitrator has almost certainly read it and won't appreciate an oral repetition. Even if there were no pre-hearing briefs, keep your opening short, providing an executive summary of your case in chronological order without getting into the weeds. Try to sum up some key points in phraseology the arbitrator will remember. If you have compelling evidence, mention it. If your opponent has some evidence that hurts you but is not fatal, take the sting out by mentioning it and citing other evidence that puts it in the least harmful light. Don't overstate your case (that will come back to haunt you), but outline it in a clear, concise and straightforward way. Don't argue; that comes after the hearing.

Rule 6: Forget the Admissibility of Evidence; Focus on Its Weight Instead

A nearly infallible marker of a neophyte arbitration advocate is seeking to exclude hearsay, or a lay opinion or a business record for which a complete shopbook rule foundation has not been laid. The rules of evidence are hardly ever applied in arbitration (except as to privilege and settlement offers). Thus, nearly all the evidence that any party wishes to present will be received "for what it's worth," so fighting over admissibility is a fool's errand.

However, many advocates fail to appreciate the importance of those quoted four words. Evidence that Joe said X about Y will be received. But why should the arbitrator care? Is there any evidence concerning Joe's honesty; what background, education or experience he had to make his observations reliable; any bias or particular perspective he had on the matter at issue; his memory; or his ability to accurately record what he saw and heard?

Similarly, a purported business record whose authenticity is not disputed will be received but given little weight unless the proponent demonstrates that the person who made the entry had sufficient knowledge and incentive to make it reliable, that the recording was close in time to the event and that the business' document maintenance practices provide reasonable assurance that the entry has not been tampered with.

In short, get in the evidence contest that matters in arbitration. It's not about admissibility; it's about weight.

Rule 7: Do Not Ask Leading Questions During Direct Examinations

Arbitrators are unmoved by direct examinations that consist of your witness agreeing to your account of events. Conducting a direct examination without leading questions is hard work. It requires careful planning on your part, thorough preparation of your witness and several dry runs. But if your witness is able to tell a coherent story, clearly and concisely, in his or her own words, that direct examination will have a much greater impact on the arbitrator than any leading you could do.

Rule 8: In Cross-Examination: Less Is More

Ineffective advocates believe that they must address on cross-examination everything an opposing witness said. This is a big mistake. It gives the witness the opportunity to repeat the many parts of direct testimony that you cannot disprove merely by questioning him or her. A far more effective cross-examination is one in which you inquire about a few statements made on direct and force the witness to acknowledge that the statement was incorrect or, better yet, untrue. Usually, that is best done by confronting the witness with a clearly inconsistent statement he or she made in a deposition or document. Your first question should be about testimony on which you have the strongest impeachment. Once you have secured from the witness four or five admissions of error, say, "I have no further questions for this witness," and sit down.

Rule 9: In Briefs: No Bull, No Miscitations, No Typos

All your briefs should be brief, clear and cogent. Make your arguments flow persuasively from the relevant facts and law. Do not overstate your case, harangue the other side or engage in rhetorical flourishes. Scrupulously check and double-check all evidence and legal citations to assure that they are exactly correct. And proof your briefs carefully; typos, misspellings and similar errors connote sloppy work and signal that you were unwilling to take the time required to provide the arbitrator with a first-class product he or she could rely on.

Rule 10: Give the Arbitrator the Tools Needed to Write the Award You Want

By the time of closing arguments, most arbitrators are reeling from information overload.

Poor advocates compound the problem by spewing forth rapidly (because they are rushing to squeeze into their allotted time every point that has occurred to them) detailed factual accounts, dates, names, damages calculations, primary and alternative legal theories, testimony quotes, exhibits numbers, case citations, etc., which the arbitrator is trying frantically to write down.

Good advocates plan their closing arguments carefully; hand the arbitrator at the outset a closing argument notebook (which contains all the materials the arbitrator will need to write the award they want); summarize those materials in a relaxed, unrushed manner; and then invite the arbitrator to ask any questions he

or she may have. Materials that should always be included in every such notebook include the following:

1. A chronology of key events (with supporting record citations for each)
2. A glossary of technical terms in the case
3. Slides from any PowerPoint presentation used during closing arguments
4. A demonstrative exhibit showing how damages were calculated
5. The exact wording of any declaratory relief sought
6. A list of the legal authorities chiefly relied on (with copies of each, if not too lengthy)
7. A list of the key exhibits (with copies of each, if not too lengthy)
8. A list of the key pages (not too many) for the arbitrator to read (if there is a transcript)

Submitting these materials in writing will eliminate the need for the advocate to orally communicate all of this detailed information. And arbitrators will greatly appreciate having these tools to award-writing at their fingertips when they undertake that task.

Other items that might, in appropriate cases, be included in the notebook are:

1. Copies of pleadings, with important language highlighted
2. Copies of stipulations
3. In a case where many witnesses testified, a one-page witness summary of the most important things the witness said (with supporting transcript citations)
4. In a case with many pre-hearing orders, copies of important orders with key language highlighted

A copy of the notebook should be given to opposing counsel at least 24 hours before closing argument so he or she cannot complain about being "sandbagged."

If you aren't already employing these golden rules in your arbitrations, try doing so and watch your win-loss record improve!

Hon. Curtis E. von Kann (Ret.) *is a JAMS neutral in Washington, DC. In his 45 years as a trial lawyer, judge, arbitrator and mediator, he has handled numerous cases involving engineering and construction matters in North and South America, Europe and Asia. He can be reached at* ***cvonkann@jamsadr.com****.*

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