article

The View from the Middle Seat

By Charles G. Ehrlich

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Now, dear reader, you're probably thinking that these points are so obvious that you needn't read further. Indulge me, though. Let's just pretend that a little reflection can be worthwhile. If you're willing to indulge that suspension of disbelief, you could well find the following observations interesting.

Let's start with credibility – a concept that has numerous faces, including credibility of your position(s), credibility of your witnesses, credibility of your party-appointed, and credibility of your counsel.

As a ceding or assuming company, building the credibility of your position begins well before there is a dispute to be arbitrated. If your assumed re team has doubts about a cession, you'll want to show any eventual arbitration panel that your concerns were valid and in good faith – and not, as the cedent will argue, ginned up to evade a legitimate claim. So, from the very beginning your team should be making a record that demonstrates timely, clear and focused inquiries addressing the issue(s) of concern – not boilerplate demands for umpteen categories of information that have little if anything to do with the problem at hand but are the easiest way to push back on a cession. Then, if the cedent responds to your focused inquiry, you are well advised to actually address the merits of what they say – which will benefit you in two ways. First, a focused and thoughtful dialogue might actually solve the problem. Second, if you end up in arbitration, your demonstrated seriousness and good faith effort can weigh significantly with the panel. In contrast, the easy response of a boilerplate list of demanded information – particularly information a panel will know that you'd never actually look at – cuts heavily against your eventual credibility.

By the way, if rightly or wrongly, you suffer the industry reputation of being "slow pay – no pay," you can't ignore that elephant in the room. It would be a good idea to devote extra attention to building a strong, supportable case that will convince the panel of your bona fides.

In addition to creating a good record, it is never too early to start thinking about arbitration witnesses if you see a dispute coming down the pike. In arbitration you'll want witnesses who come across as thoughtful, reasonable and sincere. But what if the fellow handling the file is going to (un) impress a Panel as a disagreeable twit? He may be a fine professional who will, nevertheless, make a rotten impression

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The challenge of maintaining credibility continues into the conduct of the arbitration itself. The lawyer is the face of the client, and if the lawyer's credibility erodes away, that can't help the client. Moreover, when a lawyer takes questionable positions, he puts his party-appointed arbitrator in a tough spot.

Maintaining credibility is a particular challenge for a lawyer in love with case law. A one of a kind reinsurance decision by a judge in Kansas will likely carry little weight with a panel of industry experts, no matter how much you pound the table. And, you doubly trip yourself if you give the panel the impression that you don't know this. Or let's assume you want to take the deposition of the cedent's CEO in a $2,000,000 dispute. The cedent is a multi-billion dollar company and the CEO submits a declaration that she has never heard of the matter. Yet you continue to push. Yes, you will lose credibility with the Panel. But even worse, you're putting your party-appointed arbitrator in a terrible position. If she supports you, the Umpire must now suspect her judgment, i.e., her credibility. That's not good. And, if she doesn't support you, you've started to cleave her away from The Cause (envision the White Cliffs of Dover with chunks falling into the sea) and, once begun, that process of cleaving may continue into more important issues. In other words, you don't want to force your party arbitrator into becoming comfortable with voting against you; it may become a habit.

Speaking of your party-appointed . . . if you haven't agreed to a neutral panel let's confess (at least between ourselves) that you want your party appointed to be a tireless advocate for your position. But she can't be a mere mouthpiece (or the less polite term often used) because then her influence with me, the Umpire, is at risk. So pick someone who is forceful but willing to bite the bullet if you have the lesser side of a position. Also, pick someone who is hard working. I've found it very helpful, perhaps even persuasive on an issue, when a party appointed is fully conversant with everything relevant in the record over the entire course of the arbitration and can support her argument with facts as well as conviction. A very smart party-appointed is also a good idea. An Umpire takes everything with a grain of salt; so intelligent reasoning helps conquer innate skepticism.

Credibility's cousin is common sense.

A classic abandonment of common sense is to endlessly complain that your opposition is committing the most awful blatant horribleness since the Spanish Inquisition. This is a world in which really terrible things happen to millions of people on a daily basis. So, the fact that your opponent was disagreeable at a deposition or served a pile of silly interrogatories may well call for a remedy from the panel but it isn't an atrocity; don't treat it as one.

Common sense is also often a fatality in the wonderland that is discovery. (This calls for a war story.) Years ago I was in front of a federal judge in Los Angeles, a nasty fellow but very bright. Ahead of me was a status conference in which two very prominent lawyers started telling His Honor about their plans for a document depository, a special discovery master, and related mush. His Honor cut them off after about two minutes. "Here's the deal," he said, "plaintiff brought this case and I trust has two or three good reasons to support it. Defendant likewise has two or three good reasons to oppose it. That's what discovery is going to be about. And, if you have any disputes, forget about a master – you'll bring them to me and the loser will probably be sanctioned."

Most reinsurance disputes likewise feature but a handful of real issues. If you want to impress the panel and also save time, money, and effort, draft your discovery requests with a laser focus on what's truly important and necessary. Don't ask for every document that "records, reflects or memorializes" every triviality you (or the assigned associate) can think of. Also, consider reasonable alternatives to discovery. If you need to know how the reinsurer's filing system is organized try for an agreed informal tour of the file room -- perhaps opposing counsel also wants to embrace common sense. That tour could be much more informative, and certainly far less expensive, than deposing a custodian of records.

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When a panel asks counsel to "meet and confer," it's looking for the parties to solve a problem that should within their grasp. The panel isn't – I promise – hoping for what it far too often gets, i.e., a series of increasingly strident letters and emails that will eventually be attached to a motion and opposition.

So, I offer a couple of suggestions to make the "meet and confer" possibly useful rather than wasteful. If both lawyers are in the same town, then really meet – get together for coffee (a D.C. lawyer I know uses ice cream very effectively) and actually work at solving the problem rather than making a record for the panel. If you're at a distance, talk on the telephone -- don't resort to e-mail (aka "the anger escalator"). Second, rather than passing the job downhill, have the senior lawyers talk to each other. With some (much?) luck, they'll have less ego invested, see the bigger picture, and be less focused on accumulating small but meaningless triumphs of argument.

Common sense plays a big role in brief writing as well.

An effective brief doesn't bloviate; it straightforwardly educates the panel about your position and why it should prevail. The sooner you get to substance, the better because that's what I want to read. I'm greatly helped if you set out at the beginning precisely what you want me to take away, e.g., "this brief supports X proposition by showing Y and Z."

And, don't be afraid to be, well, brief. There is a sense that if a brief isn't unbrief, the panel won't think you're serious about your position. Quite the opposite is often true; an excellent short brief can make your conclusions appear self-evident. If there's an important court decision involved, give the panel a copy. But since arbitrators aren't judges, it's usually more persuasive to have an argument that fits their concepts of common sense and industry standards than to ask a case to do the heavy lifting.

The dissonance between common sense and hyperbole we've already touched upon. The vast majority of folks in our business are decent human beings just trying to do their jobs well. They aren't war criminals. So let's kill the inflamed rhetoric. (I've been tempted more than once to order that no adjectives or adverbs may be used.) Hark back to President Lincoln: when really angry he would pen a very nasty letter but then he'd put it away in a drawer never to see the light of day.

A final common sense suggestion: pay attention to an arbitrator's questions and answer them carefully. If this seems obvious, my experience proves otherwise. A panel question can be a soft pitch or a vicious curveball. If a panel member asks, "is it significant that this treaty refers to widgets while the other treaty refers to piglets," that person most likely: (a) is genuinely puzzled, or (b) sees the distinction as meaningful, or (c) wants to be reassured that it isn't, or (d) wants support on a point that the panel is considering. In any of these cases, your answer may well influence the ultimate decision. So, don't shoot from the hip. Just because you haven't thought about the point doesn't mean it's not important – at least to someone who is, in turn, important to you. And, it's ok to say, "I'd like to give that some thought and get back to it."

My last suggestion is that you tell a good story, and tell it well.

In a world of chaos, we yearn for logic and order. We want events to make sense. So, show the panel the business narrative underlying the contested contract – and why that narrative favors your position. What were the parties aiming to accomplish when they put this business arrangement together – and how does the result you want fit their plan like a glove? Admittedly, this is a huge challenge when the deal was done decades ago and/or we're facing a fact situation that, in truth, the parties never contemplated in their wildest nightmares. If, however, you can demonstrate that your solution meshes with the business framework, you've added strong support to your case.

A good story is only as good as its presentation. If the panel can't follow you, you're getting nowhere – as well as frustrating your audience. Clarity is a particular challenge on cross-examination. You're buzzing through the witness like a chainsaw through butter – but the panel has no conception of what you're proving. Let us know what you're getting at. Yes, you help the witness a bit if you preview where you're going, e.g., "Mr. Witness, let's talk now about the efforts you made to understand the cession," but that's a small price compared to leaving the panel lost in the dust.

And pay attention to organizing documents. What good does it do you to carve up the witness on point X if the Panel is ten minutes behind, still trying to figure out which document you were talking about on point Q? Prepare for examination by agreeing with your opponent to use differing sets of exhibit numbers or simply one set of continuous numbers; then the panel won't get lost because you're using respondent's exhibit 1091 and we're looking at petitioner's exhibit 1091. If you have an exhibit put together from non-consecutive "Bates" numbers then do the panel a gigantic favor – renumber each page within the exhibit consecutively. Even a Perry Mason cross-examination would fail before a panel that's fumbling around trying to locate the document that's being talked about. And, it's ten times worse if you're fumbling because then you look (are?) lost. May I suggest that there could even be a few arbitrators who will stop trying to follow where you're going if it becomes too frustrating?

One of the pleasures of serving as an ARIAS arbitrator is the exceptionally high quality of the reinsurance bar. This niche legal practice attracts smart lawyers who think well, write well and present well. It's with great respect that I offer my suggestions and thoughts from the middle seat. ▼

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