"It's Getting Better All the Time": Best Practices in Presenting Delay Claims Bench Trial/Arbitration/ Jury Trial

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Woke up, fell out of bed,
Dragged a comb across my head
Found my way downstairs and drank a cup,
And looking up I noticed I was late."[1]
—The Beatles, "A Day in the Life"

A project manager who suddenly "noticed I was late" probably ought to polish a resume and find a new line of work. With schedules having more activities than there are holes in Blackburn, Lancashire,[2] pressure on the PM to follow the project construction schedule is as constant, and nearly as important, as the life-giving pressure imposed on the PM's pulmonary system by his right ventricle. Despite the critical role the project schedule plays in the success, or failure, of a project, delays in construction are commonplace and, more surprising, often ignored or not realized until it is too late to recover. And when recognized or timely realized, causation for the delay and its downstream impacts are often contested. Enter the scheduling consultant and lawyer, who are tasked with presenting a construction delay case to the court in a bench trial, to (hopefully) seasoned construction lawyers and/or consultants in arbitration, or—"well, I just had to laugh"—to a jury.

This article presents recommendations and best practices for presenting a construction delay claim in a bench trial, to an arbitral panel, and to a jury. The latter you should never do. Seriously.

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Presentation of a Delay Case in a Bench Trial

The Practical Realities of the Modern Bench Trial

"Do You Want to Know a Secret?"[3] Every year, the Administrative Office of the United States Courts publishes a report of statistical information concerning the caseload of the federal courts for the previous 12-month period ending March 31.[4] For the 12-month period ending March 31, 2016, the Administrative Office reported a 2.5% decline in civil case filings (274,552), and a less than 1% decline in criminal case filings (79,787).[5] The total number of civil and criminal pending cases for this period was reported as 344,715 and 97,131, respectively. The nearly 450,000 pending civil and criminal cases are distributed among no more than 678 district judges and 551 full- or part-time magistrate judges, the maximum judgeships authorized by Congress. The federal district court caseload nationally is dwarfed by the civil and criminal caseloads of the state courts, for which comprehensive statistical caseload data is not readily available. These statistics demonstrate what every litigator already knows: that judges have clogged dockets and often lack the time and staff to adequately preside over the cases before them, a problem that has become even more pronounced in the last decade with budget cuts and court furloughs and closures.

Presenting a Complex Construction Delay Case in a Bench Trial

Because judges have such heavy caseloads, and because judges preside over criminal and civil cases of virtually

all types, most judges do not possess significant technical knowledge about engineering principles or construction means and methods, and even fewer possess a meaningful understanding of delay analysis, which is part science and part art. This is not a criticism of judges; it simply is an observation of the practical realities of the specialized practice of construction law and the effect of an overworked and underfunded judiciary. This lack of specialized knowledge can be a disadvantage for the parties in a complex construction delay case presented in a bench trial. But counsel can counteract these effects in a number of ways.

First, judges need and expect lawyers to be prepared and to streamline their cases by narrowing the issues in dispute and avoiding unnecessary duplication of evidence or immaterial procedural skirmishes. Judges have no patience for unprepared lawyers, and lawyers who do not make concessions on immaterial issues or claims for fear such concessions reflect weakness to their client. Relatedly, counsel should seek out current information about the judge assigned to his or her case. Many state and local bar associations and legal industry periodicals like the *Los Angeles Daily Journal* publish judicial profiles on all local active judges; the *Almanac on the Federal Judiciary* is a decent first source for judicial profiles of active federal judges. Of course, there is no better source of information than that obtained from other practitioners who have had recent experience with your assigned judge in other cases. Counsel should use this information to discern biases and to develop their strategy and themes.

Second, lawyers proceeding in a bench trial need to be flexible. With overloaded dockets, it is often difficult for courts to reserve in the near term three or more uninterrupted weeks to preside over a bench trial in a complex construction delay case. Even when trial commences, in our dual court system judges usually need to take unexpected recesses or breaks to accept criminal pleas or resolve urgent issues in other pending matters. Interruptions like these are more pronounced in bench trials than in jury trials because judges oftentimes are highly protective of wasting jurors' time and allowing (or facilitating) interruptions that prolong jurors' terms of service. One way of minimizing these issues (aside from engaging in ADR of construction disputes) is to take advantage of the ever-increasing number of specialized business courts, if available in the jurisdiction responsible for resolving the dispute. Also, give careful consideration to asking the court (or accepting its offer) to refer to a special master any matter or matters that are appropriately managed or resolved there. This, too, can minimize unexpected interruptions in certain circumstances.

"I Just Don't Understand."[6] With respect to the substantive presentation of evidence, counsel should take on the role of a teacher. Because most judges do not have specialized knowledge of the technical elements of design and construction or scheduling, counsel should find creative ways to educate the judge on these matters so that the judge can efficiently and effectively decide the disputed issues of law and fact. As most experienced construction counsel will attest, judges, jurors, or arbitrators who do not fully comprehend the facts or law are significantly more likely to "split the baby" and do what seems equitable or fair rather than what is legally required. Delay experts are well-advised to heed this advice, too, and should avoid constant use of terms of art or "techno-speak" until the expert has educated the judge on their meaning, and it is reasonably clear that the judge has gained some understanding of their meaning. In this regard, as part of the expert selection process counsel would be well-served to ask each potential expert being considered for an excerpt of a prior videotaped deposition. Among other obvious clues, videotaped depositions provide valuable insight into an expert's ability to be an educator/teacher.

Another technique essential to the successful presentation of a delay claim is to maximize the use of visual aids. Delay claims and scheduling analyses are almost always complicated, which makes them particularly well-suited for demonstrative aids in the bench trial setting. It is important to remember that judges are people, too, and they get confused and bored just like jurors do. Visual aids—when properly prepared and used—can make complex issues simpler to understand and can grab and hold attention better than testimony alone. Of course, poorly prepared visual aids can have the opposite effect as well, so counsel and delay experts must ensure that the message or focal point of a visual aid comes through uncluttered. In almost all instances, a single visual aid that is cluttered with information is of little value compared to multiple demonstratives with less information depicted because the latter have a clearer message and focus and are easier to digest.

With respect to the scheduling expert's substantive opinion and testimony, it is critically important that the expert know and understand the pertinent provisions of the underlying contract fully and that his or her analysis and opinion takes into account the parties' meeting of the minds on matters that impact time-related claims. Too often experts refuse to state their understanding of contractual terms on grounds that they are not lawyers qualified to render legal opinions (or if they are lawyers, stating they were not asked to render a legal opinion). And while it is for the judge to decide what was the parties' agreement on essential terms, it is fully appropriate for the expert to state what his or her understanding of that agreement is, and how a contrary determination by the judge would or would not affect his or her opinion.

Keep in mind, too, that like arbitrations and dispute review board proceedings, and unlike most jury trials, judges presiding over bench trials tend to become active in the presentation of evidence by, among other things, questioning witnesses directly. Therefore, in addition to opposing counsel, the judge can pose a threat to an

expert's credibility, and an expert witness that is not able to recite with some level of precision the contract's terms and explain how his or her opinion would or would not change if the expert's understanding of the contract ultimately is proved incorrect is much less credible than one who can.

Relatedly, where possible, experts should engage in a conversation with the judge. One way to do this is to ask, "Does that makes sense, your honor?" at the conclusion of explaining an important opinion or describing complicated analyses. This does two important things: first, it directly invites from the trier of fact questions that the expert can answer to help the trier of fact fully comprehend the expert's opinions in a way that is not permissible in jury trials. Second, it builds rapport. It is important to remember that judges have biases, too, and many of them inherently distrust the "hired gun." To the extent the expert witness can become counsel's "teaching assistant," the more credible he or she will present.

Another rapport-building practice for experts is to admit the deficiencies of their client's case. Of course, this cannot be done in a vacuum and the expert and counsel need to work together to temper the client's expectations long before opening statements. But accepting reasonable responsibility for self-inflicted wounds is a fundamental requirement of a winning trial strategy. The same is true with respect to admitting elements of the opposing party's delay expert's methodologies and conclusions. This is especially true if any of those methodologies or conclusions "refined" or "clarified" the expert's opinions during expert discovery.

Another important aspect of a winning trial strategy in a complex construction delay case in a bench trial setting is the expert's ability to be a storyteller on direct examination. While counsel never should read from a list of questions during direct examination in any setting, the number of questions asked of a party's own expert should be far fewer than the number of questions posed to friendly witnesses called during a party's case in chief. Of course, counsel must ensure that the expert's opinions of cause and effect are clearly stated, which can get lost in long narrative testimony. Experts also should use their direct testimony to proactively attack the opposing expert's credibility, methodologies, or conclusions. This is a diluted form of "hottubbing[7]" that invites the judge to make contemporaneous assessments of the relative strengths and weaknesses of the experts' competing opinions. Plus, it allows the testifying expert an opportunity to cast the opposing expert's opinions or methodologies in an unfavorable light. However, testifying experts must take care when criticizing an opponent's opinions or otherwise attacking his or her credibility. Most judges, like most people, tend to dislike overt confrontation and arrogance. For that reason, any criticisms of the opposing expert's opinions and all interactions with opposing counsel on cross-examination should be offered with a respectful tone and demeanor.

Presentation of Expert Witnesses in an Arbitration Setting

The presentation of an expert witness in an arbitration is different from how that same expert would be presented to a jury or judge. The process is far more informal, counsel is not bound by many of the rules of evidence, and discovery is limited.[8] Some of these differences afford greater flexibility in presenting expert witnesses.[9] It is wise for counsel to discuss the differences presented here with the expert as early as possible. This way, the expert can address these differences in his/her report and testimony.

Experts are critical to organization of a party's case. A party's expert should assist with preparing the case-in-chief and the cross-examination of the opposing expert. This collaboration will be crucial to the proper presentation of demonstrative evidence in order to best support the expert's opinions and the party's overall position. This may include charts, diagrams, summaries of the expert's opinion, PowerPoint presentations, and/or photographs.

The earlier the expert is retained the better. This will provide counsel with a thorough evaluation of the case early on, which may assist with settlement negotiations and a reduction in expense for the client.

Construction 101

Construction is a highly technical field with many moving parts and nuances that become critical to a party's case. Unlike a judge or jury, an arbitrator is likely engaged with construction disputes on a regular basis and is thus well-versed in the subject matter.[10] On top of basic knowledge, the arbitrator may also be familiar with the expert's area of expertise. Consequently, the comprehensive "Construction 101" required for a jury and judge can be truncated for a sophisticated arbitrator or panel. Regardless, it is wise to intersperse "Construction 101" throughout the hearing, but the information will not need to be front-loaded as heavily.

An important note to remember, however, is that the arbitrator is not an expert. Do not assume a sophisticated arbitrator or panel is always helpful to the case. All people have biases, preconceptions, and prejudices. The arbitrator's knowledge, while helpful to eliminate the teaching aspects necessary for juries and judges, will come with baggage. Counsel must make sure to unpack those bags before the hearing to ensure as many biases or prejudices against the client are left behind. Be careful to curtail the impact of a technically knowledgeable arbitrator replacing the expert's opinion with the arbitrator's own instead. Furthermore, a knowledgeable arbitrator will not take the expert's opinion at face value. Instead, the arbitrator is likely to engage in targeted questioning and critically evaluate the expert's opinions. Accordingly, it is absolutely imperative that the presentation before a sophisticated arbitrator or panel be exceptionally well organized, targeted, and careful to present the facts in such a way to harness the arbitrator's expertise in a fashion that is helpful to the case. Hyperbole is bound to backfire.

Credibility

As with a jury or bench trial, a party's expert will need a curriculum vitae. The CV will list the expert's education, experience, and specialized training in addition to the previous cases in which he or she has been qualified as an expert for a court case or arbitration hearing. It will improve the expert's credibility with an experienced arbitrator to edit his/her CV to emphasize certain areas of experience that are helpful for the case. Counsel may want to review the expert's CV to assist with this process. Because arbitration hearings are typically shorter than trials, less time is taken to qualify the expert during the hearing. Some practitioners may decide to forego *voir dire* of the expert entirely and limit the expert's testimony to substantive issues only.[11] Some may elect to admit the expert's CV into evidence.

Experienced arbitrators are wary of "professional" experts. It is wise to select an expert that continues to gain practical experience in his/her field given that arbitrators tend to be less impressed with credentials, than with the content of the presentation. With the rising costs of litigation and arbitration, parties tend to gravitate towards experts who will give them the desired opinion, no matter how far reaching that may be. Experts, like counsel, may become deeply invested in the party's case and inherit the advocate position.[12]

However, "to be of real assistance, experts must be independent, objective and not have any interest in the outcome of the arbitration."[13] If the expert falls into this role, he/she will present an opinion that is not a true reflection of the facts and evidence and rather an argument in support of his/her "employer." Sophisticated arbitrators see right through this, and it is deeply damaging to the expert's credibility. As experienced construction law practitioners, we know that no project participant performs perfectly in the execution of their project duties, thus it is important to balance the expert's presentation. In the case of a scheduling expert this requires the acknowledgement of concurrent delays (if they indeed exist). In placing some blame on the expert's "party" the expert will bolster his/her credibility. While it may be difficult for a client to accept this approach, it demonstrates that the expert was actually chosen for his/her knowledge and experience in the field and not a "hired gun."

Written Report

The American Arbitration Association (AAA) Construction Industry Arbitration Rules require expert witnesses to be disclosed and expert reports to be exchanged and provided to the arbitrator prior to the hearing.[14] (Ensure the expert has thorougly reviewed the opposing expert's report. The expert can rebut any fallacious reasoning, incorrect methodologies, or assumptions made about the case during whatever mode of presentation counsel selects.) The written report summarizes the expert's investigation and the resulting opinions. With trials, the rules of evidence allow anything the expert considers in forming his/her opinion to be discovered. However, that is not the case in arbitration. Accordingly, counsel and the expert should exchange as much information and as many opinions and ideas as possible in order to ensure the expert presents the most thoughtful and focused report.[15] With arbitration, counsel can take a far more active role in the drafting of the expert's report than would be desirable for trial.[16] In addition, counsel can choose to completely forego the expert's live testimony and submit the report or an affidavit instead.[17] This method would really only be selected if the expert is believed to be weak during live testimony. The arbitrator will likely weigh the written report or affidavit less than live testimony.[18] While the report is necessary to remind the arbitrator of the expert's opinions, do not assume the opinions will come across as intended. On direct, regardless of the approach taken, counsel must ensure that the expert elaborates on the opinions presented in the report. It is wise to refer to exhibits from the report, so the arbitrator can reference them later.

Presenting the Expert During the Hearing

Counsel has a variety of options in presenting an expert during arbitration. The most common method is direct testimony, then cross-examination as one would do for a bench or jury trial. Counsel may also choose to re-present the expert during Closing or Post-Hearing Oral Arguments. In addition, one party can also choose to present a panel of experts on the same topic at once. Finally, a new trend is for counsel from both sides to agree to "hot-tub" the experts. The same expert, though presenting the same opinions, may be perceived completely differently depending on the method of presentation.

Direct Testimony

There are three options to present an expert on direct. Option 1: the traditional method. Here, counsel will put the expert up on direct, opposing counsel will cross, and then the arbitrator may ask questions at the end. In this method, the expert will be sworn in. Then, counsel will qualify the expert; using the expert's CV as an exhibit is often preferred over a lengthy qualification examination. Even the abridged examination should highlight the expert's career and the particular elements that make him/her an expert in the field. The remainder of the expert's direct examination is much like a trial before a jury or judge.

Option 2: the narrative approach. In this method, counsel will give more control to the expert. The expert will go through his/her entire testimony in a narrative format. Typically, the testimony will be accompanied by a PowerPoint presentation for the arbitrator to later review. Counsel must review the presentation before the hearing. It is extremely unwise to have an expert's presentation go through every aspect of his/her investigation and lose the attention of the arbitrator.

Option 3: invite the arbitrator to question the expert. This is likely the most difficult for attorneys and clients.

For this method, the expert must be well-prepared, perhaps overly so. In addition, the arbitrator should have already read the relevant reports. Counsel could forego direct entirely and invite the arbitrator to question the expert or invite the arbitrator to question the expert after direct, but before cross. Regardless, counsel will be placed in a purely reactive role to "course correct" if necessary. This method lessens the impact of cross and gives a glimpse into the arbitrator's mindset.[19] As counsel loosens "control" on the expert, the degree of preparation increases along with the level trust required between counsel and the expert.

Re-Present the Expert

A party's expert is one of the greatest assets when criticizing the opposing expert's testimony or report. Consequently, it is important that the expert observe the opposing expert's testimony at the hearing. This way the expert can help counsel prepare for cross-examination. With trials, an expert's testimony is limited to direct, cross, and rebuttal, if counsel so chooses. However, during arbitration hearings the expert can be re-presented during closing or post-hearing oral arguments to rebut pertinent points.[20] This approach can curtail any ill effects of the opposing expert's testimony. It also ensures that the arbitrator has a fleshed out understanding of the party's case. In addition, counsel can choose to recall the expert "to explain the rationale for a party's post-hearing proposed award of damages."[21] The expert may be more credible as to damages than the attorney.

Present a Panel of Experts

Counsel may also elect to present a panel of experts simultaneously. The method works if the issue is sufficiently complicated to require more than one expert or if the experts are not particularly strong independently.[22]

"Hot-tubbing"

Hot-tubbing has made its mark on arbitration settings worldwide, but it relatively new to the United States. This approach was pioneered in the 1970s when Justice Lockhart of Australia jointly conferenced expert witnesses before the Trade Practices Tribunal.[23] It was first used in the United States in 2003 in Massachusetts.[24] The approach arose in an effort to reduce the costs and time associated with litigation and arbitration. Highly summarized, hot-tubbing is the concurrent presentation of expert witnesses from both sides in written reports and/or oral testimony.

The American Arbitration Associations rules encourage arbitrators and panels to conduct hearings in a manner that is cost-effective and efficient. AAA Rule 33 affords the arbitrator "discretion to vary [the evidence] procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."[25]

In so doing he/she may "expedit[e] the resolution of the dispute and may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."[26] Accordingly, arbitrators have the authority to present evidence in alternative means, which seems to open the door to utilizing methods such as hot-tubbing for a more efficient and cost-effective resolution to a case.[27] If this method is to be used it should be agreed upon by the parties and arbitrator or panel at the initial case management hearing.[28]

Hot-tubbing can initially take place with expert's written reports. Highly complex or technical cases have found a "primer" document useful.[29] Experts meet and confer on the issues in the case, either with or without counsel present. In a primer document the experts detail where they agree on key terms and background of the case. However, this document does not address contested issues. In addition, experts may prepare a joint report.[30] The report will again detail those issues on which the experts agree, but it also includes the areas of disagreement and the reasoning behind the disagreement.[31] In one of the earliest Australian cases that adopted hot-tubbing, *Zetco Pty Ltd v Austworld Commodities Pty Ltd*, "two of the experts conferred and produced a joint report, in which they responded to six issues that had been formulated by the counsel for each party."[32] In preparing this joint report, the parties were able to eliminate areas that were uncontested.

Alternatively, the arbitrator may appoint its own expert to facilitate the joint meeting, take notes, and prepare the joint report.[33] This will add to the cost of the case, but allows for a more efficient process given the appointed expert has the technical expertise to "concisely and succinctly identify and explain the issues for the panel."[34] Consequently, the process focuses on the critical areas of disagreement, thus creating a higher-quality, more streamlined process.[35]

With oral testimony there are two approaches: (1) a discussion in which the parties cooperatively identify the important issues and attempt to resolve them; or (2) when a resolution cannot be reached, the arbitrator structures the conversation without the "constraints of the adversarial process and in a forum which enables them to respond directly to each other."[36] The experts can question each other, counsel can question each expert, and the arbitrator may also engage in questioning.[37] By having each expert in the same room debating over their positions, the perceived biases are eliminated.[38] Furthermore, this method of presenting oral testimony allows the arbitrator to be exposed to "multiple advisors who are rigorously examined in public." In this way, the arbitrator is better prepared to decisively rule on the issues in dispute given a more complete understanding of the reasoning behind the disagreement.[39] "In that way, the prospect of the experts being 'passing ships in the night' is [minimized]."[40] It allows the experts to debate amongst peers, consequently avoiding counsel eliciting testimony from

a prescribed line of questioning that may not accurately convey the expert's opinion.[41] The result is expert testimony that is a true reflection of the expert's opinion, fully explained and reasoned for the arbitrator.[42] In sum, hot-tubbing gives real-time feedback on hot button issues and avoids the discontinuity of the case, thus creating a far more efficient means of presenting evidence.[43]

There are drawbacks to hot-tubbing. Importantly, in order to effectively utilize hot-tubbing, the opposing experts must have "an equivalent scope of expertise" in order for their concurrent presentation to be useful.[44] Consequently, both the expert and counsel must spend a significant amount of time ensuring that the expert's report is comprehensive. Unfortunately, there will still be significant cost associated with preparing the expert report and evidence before any hot-tubbing begins.[45] There is also the concern that the practice "may result in a one-sided game, where the more persuasive, confident, and assertive expert could win the [arbitrator's] mind, and in effect overwhelm the other expert."[46]

> [However,] the shy witness is much more likely to be overborne by the skillful advocate in the conventional evidence gathering procedure than by a professional colleague who under the scrutiny of the [arbitrator] must maintain the debate at an appropriate intellectual level.[47]

Regardless, this behavior can be circumvented by the arbitrator or counsel.[48] Perhaps the most significant concern among attorneys is that the expert's testimony will not be guided by counsel when critically examined under the microscope of a dueling expert; in other words, counsel will lose "control." Adopting hot-tubbing does have a learning curve and a method that may not be comfortable to many practitioners.[49] Unquestionably the expert must be well-prepared on the issues in dispute and be advised not to add any additional evidence than has previously been disclosed.[50] Counsel will be present during the concurrent presentation of oral testimony in order to redirect any issues that may arise. However, international "experience is generally positive."[51]

To summarize, hot-tubbing has been determined to be a desirable method of presenting expert witness testimony. It will take time for the approach to win over practitioners in the United States, but it has proven to be an effective means of streamlining the traditional process. According to Justice Peter McClellan, a large proponent of hot-tubbing in Australia, "evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would have been necessary."[52]

Presentation of Delay Expert Witnesses to a Jury

Gatekeeper Function and Evidentiary Rules of Expert Testimony

Certainly any discussion of "best practices" of presenting delay claims to a jury must include the nuts and bolts of evidentiary and procedural practice.

Construction 101

By the time the jury hears the judge's statement of the case, counsel's *voir dire* and opening statements, and the initial fact witnesses, it should have a decent basis of understanding of the project and relevant construction methods by the time the delay expert testifies. However, use the delay expert to reinforce the important issues in the project and the construction methods relevant to those issues. The best way to accomplish this is to go through the baseline schedule and discuss the activities at a level that are somewhat summary and easy to understand.

For example, in a delay case relating to excavation where several different methods of slope stability are used, the expert could discuss soldier piles, gabion walls, soil nails, and excavation (and introduce concepts like "lifts" and soil volume expansion). This method not only provides the jury a refresher on the project, but also allows for the expert to lay foundation critical to communicating his opinion: how a schedule looks, how the work activities are logically tied together, and what work activities make up the critical path.

While a typical juror may have a good sense for the type of project and the construction issues at play, a typical juror will likely know very little about critical path method scheduling, float, and other fundamental elements of the delay expert's testimony. Teaching is necessary. It's also a great idea, particularly before a jury.

Conducting a "Scheduling 101" class is one way to introduce the audience to the important concepts of schedule analysis while reinforcing the case theme. For example, after introducing the concept of a predecessor activity (through an easy to understand real life example like a residential home foundation), show the jury how these concepts matter to the case.

Q: What happens when a predecessor activity takes longer than expected?
A: …

Q: We'll talk more about this later, but in this project did any of the predecessor activities take longer than expected?
A: …

Q: Earlier you said that the contractor has less time to do the next part of the work when a predecessor activity takes longer than expected. Is that something that happened on this project?
A: …

Q: What does the word "float" mean in the world of scheduling?
A: …

A professorial expert will use these opportunities to

give the jury (maybe literally, with a demonstrative exhibit or white-board markup) a glossary of the critical terms and concepts used in schedule analysis.

Written Report

In jury trials, where unlike arbitration the rules of evidence will be enforced, expert reports are hearsay and typically not admissible when offered by the proponent of the expert witness in lieu of or to reinforce the trial testimony of the witness.[53] However, statements from an expert report may be admitted for the purpose of impeaching the expert on cross-examination.[54]

From a practical standpoint, not only is the expert's report probably inadmissible, but the mere reference to it by counsel or the expert may backfire. While the jury understands certain information in the trial has been withheld from it (side-bar conferences, and resolving objections outside of the jury's presence, by way of example) the jury is likely to assume those conversations are about "legal stuff" and not facts that could help the jury understand which party is right and wrong. Withholding expert reports fall into a different category. When a party offers into evidence an expert's substantial report, stating opinions based on fact that will get right to the heart of which party is right and wrong, the jury will want to see it. When the judge (almost certainly) denies that ability, the jury may resent that decision amid significant confusion.

On the other hand, knowing the expert conducted a thorough examination of the project documents, interviewed witnesses, and performed an independent evaluation of the project schedule may provide the jury with another reason to believe your expert. To mitigate the inevitable reference to the report, explain to the jury that an expert report exists, that the court's rules prevent them from seeing it, but that the expert is going to tell them everything that's contained within it.

Credibility and Cohesion

Many trial lawyers erroneously fall into the trap of thinking jurors are incapable of understanding sophisticated expert testimony. But studies have shown 64% of jurors prefer complex problems to simple ones.[55] In a study conducted by Daniel Shuman and his colleagues relating to complex medical malpractice cases, Shuman concluded:

> We did not find evidence of a ''white coat syndrome" in which jurors mechanistically deferred to certain experts because of their field of expertise. Instead we found jurors far more skeptical and demanding in their assessments.
>
> Jurors made expert-specific decisions based on a sensible set of considerations—the expert's qualifications, reasoning, factual familiarity and impartiality. Our data do not lend support to the critics who paint jurors as gullible, naive or thoughtless persons who resort to irrational decision-making strategies that rely on superficial considerations.[56]

However, while jurors in the Shuman study based their decisions on the medical expert's qualifications, reasoning, factual familiarity and impartiality, does that translate to a typical juror's understanding of complex scheduling issues? According to experimental research, the answer is a resounding, "It depends on the lawyer and expert."

> Although jurors struggle and are occasionally misled, they generally make reasonable use of complex material, utilizing the expert testimony *when it is presented in a form that they can use. Their struggles suggest that there is room for improvement in the way that complex material is presented*, and that advocates and experts who fail to address this need may, as a result, fail to persuade jurors that the testimony they are offering should be accepted.[57]

Why can't juries always understand complex material? One communications expert and legal commentator, Dr. Ken Broda-Bahm, believes the problem is something called cognitive load, which means there is too much going on in the courtroom to focus on learning what the delay expert is trying to teach.

The juror is listening to evidence, watching the parties and witnesses, remembering prior evidence to make connections, and thinking about any number of the normal nonlegal things that occupy the mind: Cognitive load in that new situation is normally high. Add any difficulty, like complicated terms or explanation, and the next thing jurors hear is likely to be missed.[58]

How, then, can the construction lawyer overcome cognitive load when presenting complex scheduling issues? "Jurors in post-trial interviews consistently rank attorneys with streamlined presentations as more credible then attorneys who belabor points, repeat issues, or who appear disorganized."[59] According to Dr. Broda-Bahm, the following tactics will help keep it simple.

- Shorter is better: Use shorter words and sentences and shorter paths to your point.
- Visual is better: If the listener gets a mental picture or a literal picture of what you're saying, that is better than abstract knowledge.
- Translation is better: Don't use specialized terms unless your jury can't get your point without them.
- Repeated explanations are better: Don't just give one opportunity for understanding, give as many as you can.[60]

Direct Testimony

Unlike arbitration, where the construction lawyer may present an expert in one of several different ways, the rules of evidence require an expert in a jury trial to testify by providing answers to non-leading questions. Volumes have been written on general best practices in presenting expert witnesses to a jury. Best practices specific to the

scheduling expert flow from these general themes, but should be adjusted in critical ways to increase the jury's comprehension.

1. Organize by Time

At the most basic level, every scheduling expert is testifying about time. When something happened, how long it took (and why), its relationship in time to other things that happened. It is helpful for an expert of any subject matter to use organizational visual aids during testimony, but for scheduling experts it is critical to use charts and timelines.

A scheduling expert must not only explain to the jury the fact that the project was late, but also why. In concert with the expert, the lawyer must deftly "zoom in and out" of the Gantt chart to tie project documentation showing the facts of the project to delays to schedule activities. Whether the lawyer organizes the project timeline into sections (which must have some reason or appeal to the layperson), or uses presentation software like Prezi to demonstrate the big picture and the minute details at the same time, the jury must be able to determine where this fact fits into the big picture of the schedule, and why this fact matters to the jurors' decision about who caused delay.

2. Use Documents Created by the Parties, Not the Expert

Project documentation will form the basis of every scheduling expert's analysis. But often that documentation is underutilized during the trial presentation. Most construction lawyers are aware of the McGraw Hill study, which found:

> seeing and hearing the information not only leads to greater immediate retention (85% for seen and heard content versus 70% for content that is just heard), but more importantly leads to greater retention of that information days later (after three days, 65% of the information both heard and seen is retained, compared to just 10% of the content that is just heard).[61]

While parading every daily report or photo before the jury may be counter-productive (see cognitive overload, above), asking the scheduling expert to explain a few letters, reports, and photos, and how each were used in the analysis, is critical for the jury to understand the schedule analysis. To bolster this method, and avoid the expected attack from the other side that the expert was merely cherry-picking evidence, prepare a "pimple chart" timeline showing a dot for every letter or report or photo used in the analysis (and, perhaps, save it for rebuttal).[62] This allows the expert to stand behind a mountain of evidence without having to burden the jury with every document.

Time-lapse photography or video, compared with BIM-loaded scheduling, can be a persuasive way to demonstrate the actual progress of a project (time-lapse) with the planned (BIM). The two graphics, placed side by side, provide a clear comparison of what wasn't done on time, and can assist the jury with pinpointing which of the trades were late.

3. Causation, Causation, Causation

Depending on the contract and whether the project is public or private, a delay claimant's burden of proof will vary between law and equity.[63] But from a jury-persuasion standpoint, the legal burden is a distinction without a difference. Jurors want to know who had control[64] of the project schedule, who caused[65] the delay, and why. As stated above, using project documents is critical to showing the jury who caused the delay. And the Gantt chart is critical to showing the effect of that delay. But consider reinforcing the concept of causation in a straight line to illustrate to the jury the effect of delay based on the causing event. By way of example:

Q: What happened on October 15?
A: The contractor asked the architect whether it should build the interior walls tight to the ceiling above or leave some room for deflection. The plans gave instructions in different places to do it both ways, but doing it both ways is impossible.

Q: What was happening with construction at that point in time?
A: The contractor was building the walls in a factory offsite so it could deliver and install them quickly.

Q: What did the architect say in response to the contractor's question about how to build the walls?
A: The architect didn't say. Its response was "follow the plans." So the contractor followed the architect's statement in the plans that details drawn in pictures are more important than words written in notes and built the walls tight to the ceiling.

Q: Was that a problem?
A: Not until the architect came to the jobsite in December and complained the contractor shouldn't have built the walls tight to the ceiling and demanded all the walls be taken down and re-built.

Q: How long did that take?
A: …

Q: What was the effect of re-building the walls on the project schedule?
A: …

To summarize this line of testimony, a graphic showing the dates of the contractor's question, architect's response, and resulting re-work will reinforce that the cause of the delay was not the architect's direction to build the walls with room for deflection, but actually the cause of the delay was the architect's initial failure to answer the question on that same topic.

Conclusion

In sum, while there are many similarities between the three forums on how to present a delay claim with an expert witness, the distinct differences warrant significant consideration. For example, regardless of the forum chosen, time will be expended to reduce biases or frame them in a manner beneficial to your client. However, the three forums are completely different when you consider the importance of background knowledge. It is critical to consider the complexity of presenting a delay claim to a either a judge or jury with absolutely no background with delay claims. Conversely, a highly specialized arbitrator with extensive knowledge on delay claims is not necessarily a strength. Ultimately, the forum selected may be outcome determinative.

Endnotes

1. This paper was initially presented during the Beatles-themed Fall 2016 program in Chicago, which was relocated from Montreal because—ironically as it might be—the Montreal hotel failed to properly consider the impact of its construction program schedule on its actual ability to host the Fall 2016 Meeting as it committed to do.
2. Four thousand, according to John and Paul.
3. The Beatles, The Early Beatles (EMI Studios 1963).
4. *See* 28 U.S.C. § 604(a)(2).
5. *See Federal Judicial Caseload Statistics*, U.S. Courts, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016 (last visited Apr. 17, 1017).
6. The Beatles, Live at the BBC (Apple Records 1963).
7. A method of presenting the opposing experts simultaneously. See Section C(4)(d) for more information on "Hot Tubbing."
8. George Ruttinger & Joe Meadows, *Using Experts in Arbitration*, Disp. Resol. J., Feb.–Apr. 2007, at 46, 48.
9. *Id.*
10. *Id.*
11. *Id.* at 49.
12. Hon. Peter McClellan, *Expert Witnesses—The Experience of the Land and Environment Court of New South Wales*, XIX Biennial Lawasia Conference 2005, Gold Coast, 8–9 (Mar. 2005).
13. Patricia D. Galloway, *Using Experts Effectively & Efficiently in Arbitration*, Disp. Resol. J., Aug.–Oct. 2012, at 26, 26.
14. Am. Arbitration Ass'n, Construction Industry Arbitration Rules & Mediation Procedures, P-2. Checklist (2016) [hereinafter Construction Arbitration Rules].
15. Ruttinger & Meadows, *supra* note 8, at 49.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Wayne Condon & Eliza Mallon, *Concurrent Expert Evidence in Patent Cases*, Practical L., http://us.practicallaw.com/2-526-6847#a384449 (last visited July 18, 2016).
24. *Room in American Courts for an Australian Hot Tub?*, Jones Day (Apr. 2013), http://www.jonesday.com/room_in_american_courts.
25. Construction Arbitration Rules, *supra* note 14, R-33. Conduct of Proceedings.
26. *Id.*
27. *See id.*
28. Galloway, *supra* note 13, at 33.
29. Condon & Mallon, *supra* note 23; *Danisco v Novozymes [No. 2]* (2011) 91 IPR 209 (Austl.).
30. Galloway, *supra* note 13, at 30.
31. Hon. Peter McClellan, *supra* note 12, at 18; Galloway, *supra* note 13, at 30.
32. § 1.01 INTRODUCTION, CONLU s 1.01; *Zetco Pty Ltd v Austworld Commodities Pty Ltd [No. 2]* [2011] FCA 848 (Austl.).
33. Galloway, *supra* note 13, at 30.
34. *Id.*
35. Hon. Peter McClellan, *supra* note 12, at 11; Galloway, *supra* note 13, at 30.
36. *Alphapharm Pty Ltd v H Lundbeck A/S* [2008] FCA 559 (Austl.) (escitalopram); *Concurrent Evidence—Hot Tubbing*, Acad. of Experts, http://www.academyofexperts.org/guidance/users-experts/concurrent-evidence-hot-tubbing (last visited July 18, 2016).
37. *See* Hon. Peter McClellan, *supra* note 12, at 17.
38. Galloway, *supra* note 13, at 33
39. Hon. Peter McClellan, *supra* note 12, at 19.
40. Condon & Mallon, *supra* note 23.
41. Hon. Peter McClellan, *supra* note 12, at 17–19.
42. *Id.*
43. Condon & Mallon, *supra* note 23; Jones Day, *supra* note 24.
44. Condon & Mallon, *supra* note 23.
45. § 1.01 INTRODUCTION, CONLU s 1.01.
46. *Id.*
47. Hon. Peter McClellan, *supra* note 12, at 19–20.
48. *Id.*
49. § 1.01 INTRODUCTION, CONLU s 1.01.
50. Condon & Mallon, *supra* note 23.
51. *Id.*
52. Hon. Peter McClellan, *supra* note 12, at 19.
53. *See* Ake v. Gen. Motors Corp., 942 F. Supp. 869, 877–78 (W.D.N.Y. 1996) (finding the expert "may testify about . . . things in the report, but the report itself is inadmissible").
54. 28 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure: Federal Rules of Evidence § 6206 (1997) ("Where a prior inconsistent statement is offered only to impeach, it is not hearsay since it merely shows the witness is unreliable and says nothing about the truth of the facts asserted therein.").
55. Speicker paper at 36.
56. Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 Brook. L. Rev. 1121, 1144 (2001) (citing Daniel Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 Psychol. Pub. Pol'y & L. 242, 242–58 (1997)).
57. *Id.* (emphasis added).
58. Dr. Ken Broda-Bahm, *Experts: Use Small Words*, Persuasive Litigator (Oct. 3, 2013), http://www.persuasivelitigator.com/2013/10/experts-use-small-words.html.
59. Dr. Shelley Speicker and John H. Madden, at 37
60. Broda-Bahm, *supra* note 58.
61. Dr. Ken Broda-Bahm, *Remember, Jurors Are Always Forgetting*, Nov. 12, 2010, Persuasive Litigator (Nov. 12, 2010), http://www.persuasivelitigator.com/2010/11/remember-jurors-are-always-forgetting-.html.
62. *See* Fed. R. Evid. 1006, Summaries to Prove Content.
63. Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1243 (10th Cir. 1999) ("Under the contract, however, and the federal-contracting law that it incorporates, [claimant] did not have to prove an entitlement to common-law breach-of-contract damages. It had to prove an entitlement to equitable adjustments to the contract price.").

64. Control as a method of jury persuasion has been described as "role control." Dr. Kevin Boully, *Stop the Ripples in Construction Jury Persuasion*, Persuasive Litigator (Aug. 3, 2015), http://www.persuasivelitigator.com/2015/08/stop-the-ripples-in-construction-jury-persuasion.html ("Jurors need to see that a defendant contractor took control and responsibility for their role in the project—both for the project's successes as well as the delays. The best presentation is often a story of differing but coordinated roles among the defendant parties—not unlike the coordinated roles of actors in a play. Even the best actor cannot astonish the audience in the story's pivotal scene until the story is ripe for that scene's events. A contractor or subcontractor cannot effectively perform and complete its role until the time and site conditions are right. Be clear about role first, articulating the obligations each party accepted; then demonstrate role control, delineating how you effectively performed your role as much as possible before, during and after the project goes off course. And remember that when a contractor has contributed to a delay, it is often most persuasive to own up to its portion of the problem so jurors can look to the other parties to own up to their responsibility for lengthier or more impactful delays.").

65. Howard L. Nations & Amy Singer, *Communicating During the Trilogy of Persuasion: Voir Dire, Opening and Summation*, http://www.howardnations.com/wp-content/uploads/2013/08/persuasion.pdf. "Of great significance to trial lawyers is the fact that the attribution theory tells us that jurors will establish cause and effect links if the attorneys do not."

