

The Clause

A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

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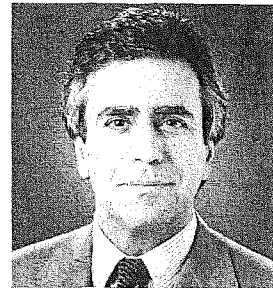
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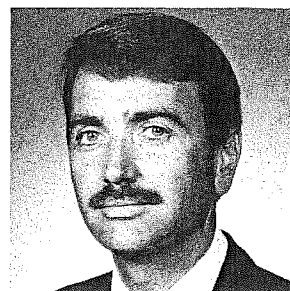
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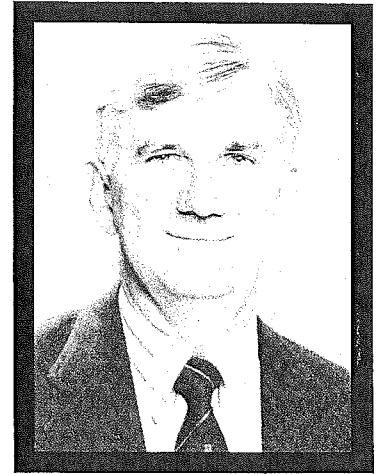
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The nine members of the BCA Bar Board of Governors serve staggered three-year terms. Each year, the terms of three members expire and three new members are elected to replace them (see section 4.4 & 4.5, BCA Bar Association Constitution). Elections coincide with the annual meeting in October.

PRESIDENT'S COLUMN

by James F. Nagle

Oles, Morrison & Rinker Seattle, Washington



James F. Nagle

Recently, a friend of mine told me that he thought “our industry is dying!” By “our industry” he meant government contracting. Certainly the downsizing has affected the government contracting community, on both sides of the table, drastically. Fewer contracts are being let and more of them seem to be bundled for larger amounts and for longer periods. So that the winner will be guaranteed business for quite some time while the losing competitors will go on a starvation diet or, as more often occurs these days, be acquired. The market place is certainly changing, but that is nothing new.

A few years ago I wrote “A History of Government Contracting” that George Washington University Press published. Such feast or famine periods are commonplace in the history of government contracting. In the sixties the same phenomenon occurred and, then as now, mergers and acquisitions proliferated. Martin acquired American Marrietta Company, to form Martin Marrietta, and North American Aviation merged with Rockwell Standard to form the Rockwell we know today.

To say it has all happened before, however, does not ease the pain and uncertainty that many people feel, especially when an extra ingredient — the amazing changes in the contracting process — are also added.

All of these developments will probably mean a lessening of the total number of cases filed at the boards. This does not mean that all the boards’ workload will go down. The Armed Services Board may see its numbers go down, while other boards may increase as more of the federal procurement dollar goes from the military to the civilian agencies. Certainly contractors do not want to litigate. Because of the time and expense involved, and so few of them are entitled to attorney’s fees under the Equal Access to Justice Act, they hunt desperately for any alternatives to litigation. That hesitation to litigate is intensified by the increased emphasis on past performance.

Past performance now has been recognized by Congress and implemented into the FAR as a key evaluation factor in future contract awards. FAR 42.15 was amended to state how such past performance ratings should be generated. One of the items on which contractors will be rated will be “the contractor’s history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor’s business like concern for the interest of the customer.” FAR 42.1501.

Many contractors are petrified that such broad language could enable officials to downgrade them on past performance if they get into disputes over the amounts of equitable adjustment and allegations of defective specifications, or government interference. So many contractors are now thinking twice about submitting a claim and running the long and expensive gauntlet of getting satisfaction out of the claim if they also run the risk that such “litigiousness” may be viewed as uncooperative behavior which may count against them in future award determinations.

At present the FAR simply allows the agencies to provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation.

Because the Contract Disputes Act would not give the boards jurisdiction to hear such appeals from a bad evaluation, contractors who are unhappy with the informal review process may be forced to go to federal district court under the Administrative Procedures Act. It would be a far more efficient use of resources for agency heads to authorize their boards to hear such appeals, especially if concurrent with any associated claims. Such a practice would obviously provide for knowledgeable, impartial decision makers and would certainly go a long way toward providing needed due process into a system which could, in isolated instances, result in de facto debarments.

Well, enough of the soapbox, I appreciate all of your comments and suggestions and will try to implement them. As always, we are looking for quality articles and quality members. So, if you have an idea for an article or the name of an individual who could benefit from joining our association, please let us know.

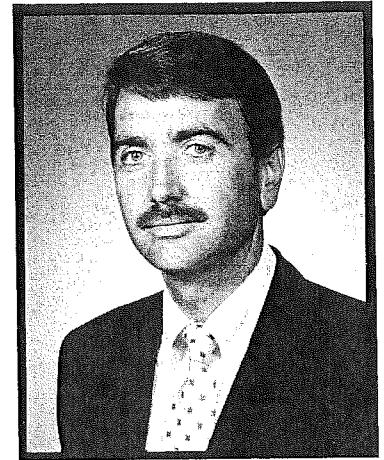
EDITOR'S COLUMN

by Professor Andre Long, CPCM
Air Force Institute of Technology

Change is always difficult, yet to bring progress, change is indispensable. Since becoming a civil servant in a military organization, change is something that I have learned to live with. I have to deal with frequent legislative changes and organizational command decisions that drastically affect my professional and personal life all the time. Sometimes I have to agree with Robert Frost's cynicism that change is nothing more than "truths being in and out of favor". As mentioned in Jim Nagle's column, we contract law attorneys are certainly experiencing a fair share of restructuring that is sweeping throughout the Government procurement process. We all have to "do more with less" and as attorneys that means providing our clients with the best legal advice and service under a much tighter financial spigot. I cannot honestly assess how good a job we are doing, but I do recall the Honorable Paul Michel's recent comments as reported by the Federal Contracts Report. He stated that half of contract appeals to the Federal Circuit are "open and shut" cases which shouldn't have been filed in the first place. I wonder how many board judges feel the same?

I know that many of you have reached your toleration limits regarding the promotion of ADR as a panacea for contract conflict resolution. In our August 1995 issue of *The Clause*, Bill Rudland

shared his views in an article stating that "voluntary ADR is not the solution to what ails Government contract dispute resolution". I welcome this kind of exchange of opinions and have decided to give the membership my two bits worth in an article included in this edition. As always, I look forward to reading and publishing your ideas on this and other related subjects.



Andre Long

OTHER NEWS

The BCA Judges association will give its annual seminar entitled "Government Contract Litigation: Protests, Appeals, and ADR," on April 8, at the Radisson Plaza Hotel, in Alexandria, Virginia. Please look for the notice in this edition. The Department of Energy Board of Contract Appeals has moved. Their new address is: U.S. Dept. of Energy (HG-50), Bldg. 950, Washington, D.C. 20585-0166. Their new telephone is (202) 426-9316, FAX (202) 426-0215.

BOARD OF CONTRACT APPEALS JUDGES ASSOCIATION ANNUAL SEMINAR

On Tuesday, April 8, 1997, 8:00 a.m. - 5:00 p.m., the BCA Judges Association will hold its Annual Seminar at the Radisson Plaza Hotel, 5000 Seminary Road, Alexandria, VA.

The theme is GOVERNMENT CONTRACT LITIGATION: PROTESTS, APPEALS & ADR. The panels will present BID PROTESTS; THE IMPACT OF THE NEW "SCANWELL" LEGISLATION; MAKING THE BEST USE OF LIMITED DISCOVERY; THE IMPACT OF RECENT SUPREME COURT AND KEY FEDERAL CIRCUIT AND BOARD DECISIONS ON GOVERNMENT CONTRACT LAW; and DEVELOPMENTS IN ADR: WHAT'S NEW AND WHAT'S NOT.

Chief Judge Glenn M. Archer, Jr., U.S. Court of Appeals for the Federal Circuit, will give the luncheon address discussing topics of current interest to the Federal procurement community.

A reception follows the seminar. CLE approval is pending in Florida, Kentucky, Ohio, and Virginia. The registration fee is \$125.00. For more information, call Miki Shager at (202) 720-6229 or e-mail at Mikishag@aol.com.

BOARD OF CONTRACT APPEALS JUDGES CONFER ON BANKRUPTCY LAW¹

by Samuel R. Maizel & Robin Iori
Pachulski, Stang, Ziehl, & Young

The Board of Contract Appeals Judges Association held their annual educational workshop in January at the Radisson Hotel in Alexandria, Virginia. The conference, which was very well attended, covered a topic of growing concern and importance for government contract attorneys: bankruptcy law and its impact on government contract appeals. The program, organized by Judge Howard Pollack, of the Department of Agriculture Board of Contract Appeals, consisted of a panel of three noted bankruptcy attorneys from the government and private practice, and discussed general bankruptcy law, the effect of bankruptcy on the administration of government contracts, and the rights and remedies under government contracts after a bankruptcy case is over.

The judges heard from Samuel R. Maizel, Of Counsel with Pachulski, Stang, Ziehl & Young, a bankruptcy firm with offices in Los Angeles and San Francisco; Tracy J. Whitaker, a supervisory trial attorney with the Department of Justice; and Ralph E. Avery, a litigation attorney in the Office of the Judge Advocate General, Department of the Army. Sam Maizel had previously been a trial attorney with the Department of Justice for five years representing the government in bankruptcy cases and appeals throughout the nation. Tracy Whitaker is an assistant director of the Commercial Litigation Branch of Justice's Civil Division, where he supervises much of the Department's bankruptcy practice and develops the government's proposals for legislative changes before Congress. Ralph Avery has over a decade of experience as a bankruptcy litigator for the Army and was a contract attorney with the US Nuclear Regulatory Commission and the Navy for a decade before moving to the Army. All three lecture and publish regularly for legal associations and federal agencies. Of particular interest to the readers of *The Clause* is a recent article by Tracy Whitaker and Sam Maizel entitled The Government's Contractual Rights and Bankruptcy's Automatic Stay: Irreconcilable Differences?²

The first hour of the conference dealt with an overview of bankruptcy law with emphasis on issues of particular concern to the judges, such as the relative roles of the various parties in bankruptcy cases including the US Trustee, the case trustee, the various committees that can participate, as well as the differences between bankruptcy filed to liquidate a corporation and bankruptcy filed to reorganize a corporation. The second hour dealt with the impact of various provisions of the Bankruptcy Code on the rights of the parties to a government contract during the bankruptcy case. Much of the discussion focused on the impact of the automatic stay³ on appeals pending before the boards and on the government's right to terminate a contract with a debtor in bankruptcy. The board judges were interested in the panel's criticism of those board opinions holding that the termination of a government contract was stayed by the Bankruptcy Code.

Two decisions of the Armed Services Board of Contract Appeals have held that terminations of government contracts without relief from the automatic stay by the appropriate bankruptcy court are void and ineffective.⁴ These opinions are supported by and consistent with the majority of cases decided by bankruptcy courts when dealing with non-government contracts.⁵ However, the panel asserted that the unique provisions of government contract law permitting the government to terminate a contract for convenience compel a different result. The government may never be compelled to perform a contract even if its termination was wrongful. The only right the debtor has, according to the panel, is the right to have the wrongful termination for default converted to a termination for convenience and be paid monies in lieu of performance. Because the right to continued performance was never property of the bankruptcy estate, the right to terminate the contract is not subject to the stay (which generally only protects property of the estate) and the Board decisions to the contrary are wrongly decided.

The judges were also particularly interested in the impact of the stay on the commencement or continuation of appeals of government contract disputes. Under bankruptcy law, the commencement or continuation of a judicial, administrative or other proceeding against the debtor or to recover a claim arising before the bankruptcy is commenced, against the debtor, regardless of whether the assets involved are considered property of debtor's estate is stayed.⁶ The panel discussed the concept of whether the government contract is property of the estate and the impact of the automatic stay on the debtor and the government's ability to pursue pre-bankruptcy causes of action. The panel noted that causes of action possessed by the debtor prepetition became property of the estate upon the filing of the bankruptcy petition. Further, the automatic stay does not apply to offensive actions by the debtor or a bankruptcy trustee to resolve those causes of action; nor does the automatic stay prohibit the government from defending such a suit. However, if the debtor is defending a suit brought against it by the government, it may violate the stay for the debtor to appeal from an adverse decision because that would constitute a continuation of an action against the debtor.⁷ The panel pointed out that eight circuit courts of appeals (2d, 3d, 5th, 6th, 7th, 8th, 9th, 11th) have held that the automatic stay prevents a debtor from appealing the decision of a non-bankruptcy forum where that action was originally commenced against the debtor. Only, the 10th Circuit has held to the contrary.⁸

The final hour of the program focused on what happens to rights and remedies under a government contract after a bankruptcy case is over. Of particular interest to the judges was the panel's criticism of several board opinions dealing the ability of a liquidated corporation to pursue an appeal under the Contract Disputes Act. The boards of contract appeals have faced this issue occasionally with uneven results according to the panel. The leading case is

Appeal of Terrace Apartments, Inc.⁹ In Terrace Apartments the board held that a liquidated corporation lacked “standing” to pursue a CDA appeal because such a corporation is “defunct” and lacked the capacity to conduct business, including the prosecution or defense of claims, outside the bankruptcy estate. The board based its ruling on general bankruptcy principles, holding that such activity is inconsistent with the intent of liquidation under bankruptcy law. The panel took exception to this result, pointing out that the Bankruptcy Code recognizes that the debtor can continue to exist after bankruptcy liquidation. For example, the Bankruptcy Code compels that some property which is not otherwise disposed of during the bankruptcy case reverts to the debtor after the case is over.¹⁰ The board in Terrace Apartments concedes that a liquidated corporation “may remain a legal entity until dissolved pursuant to state law.” If that is true — and according to two of the three panel members there is no reason to think that anything but state law controls the existence of a corporation — the panel argued that nothing in the Bankruptcy Code supports the board’s conclusion. Thus, the panel urged the judges to approach these issues by recognizing that the initial issue is not “capacity” or “standing” but rather who owns the cause of action. Only after the reviewing court or board concludes who properly owns the cause of action need it reach the issue of whether that entity has the requisite capacity to pursue the cause of action.

The panel discussed at length the analysis of this issue in Appeal of Caesar Construction Company, Inc.¹¹ The lead opinion by Judge Alan Spector (who was on the panel in Terrace Apartments) relied without discussion on the Terrace Apartments holding. However, there are separate opinions in Caesar Construction that, together, provide a thorough discussion of how these issues may properly be resolved.

A concurring opinion by Judge Martin Harty discusses the first issue succinctly. Judge Harty notes that the board appeal — already pending at the time the debtor’s bankruptcy case converted from a reorganization case to a liquidation case — was property of the bankruptcy estate that was neither disclosed by the debtor nor disposed of during the bankruptcy. Hence, it remained property of

the estate and, he concluded, “it follows Caesar has no standing to pursue it.” This seemed the right result to the panel in that without owning the cause of action, the debtor could not properly bring it before the board.

Judge John Coldren in his concurring opinion and dissenting opinion takes the capacity issue “head-on.” He concludes that Terrace Apartment is wrongly decided and should be overruled. He, the panel asserted, is absolutely correct. The panel thought that Judge Coldren’s assertion that nothing in the Bankruptcy Code supports the conclusion that a liquidated corporation cannot conduct business, including winding up its affairs, was a correct statement of the law. They, like Judge Coldren, concluded that the capacity of a corporation, including the right to sue and be sued, is governed by the law of the state where that corporation was incorporated. In the bankruptcy cases relied upon by the panel in Terrace Apartments, Judge Coldren notes, state law seemed to preclude liquidated corporations from participating in litigation. However, his opinion demonstrates that the applicable state law in Caesar Construction expressly permits “dissolved corporations” to “sue and be sued” if part of its “winding up of its affairs.” Many states provide for dissolved corporations to “wind up” their affairs, including commencing or defending litigation.¹² Hence, the panel concluded that if the applicable state law permits liquidated corporations to pursue courses of action so should the boards of contract appeals.

Although the economy is booming, bankruptcy filings have reached an all time high in America. In 1996 it is likely that over a million bankruptcy cases were filed throughout the nation for the largest number of filings ever. Every judicial district reported an increase in bankruptcy filings and many are facing substantial increases. The ongoing restructuring of the defense community and the shrinking defense budget make certain that the area of government contracting will not be immune from this increasing application of bankruptcy law. As the judges’ request for this conference reveals, it is time all government contract lawyers either learn some bankruptcy law, get the name of a good bankruptcy attorney, or risk losing their rights when faced with a bankruptcy filing.

1. Written by Samuel R. Maizel and Robin Iori, Pachulski, Stang, Ziehl & Young, Los Angeles, California. Copies of the handouts from the conference may be obtained by calling Sam or Robin at (310) 677-2910.

2. Public Contract Law Journal, Vol. 25, No. 4 (Summer 1996).

3. 11 U.S.C. 362.

4. Appeal of Harris Products, Inc. ASBCA No. 30426, 87-2 BCA ¶ 19,807; Appeal of Communications Technology Applications, Inc.; ASBCA No. 41573, 92-3 BCA ¶ 25,211.

5. See, e.g., In re Elder-Beerman Stores Corp., 195 B.R. 1019 (Bankr. S.D. Ohio 1996); In re National Waste Corp.; 191 B.R. 832, 834 (Bankr. E.D. Cal. 1996).

6. 11 U.S.C. § 362(a)(1).

7. For a discussion of these concepts outside of the context of government contracts, see In re White, 186 B.R. 700 (B.A.P. 9th Cir. 1995).

8. Compare Parker v. Bain, 68 F.3d 1131, 1135-36 (9th Cir. 1995) with Chaussee v. Lyngholm, 24 F.3d 89, 91-92 (10th Cir. 1994).

9. ASBCA No. 40125R, 95-1 BCA 27, 458, 1995 WL 30990 (ASBCA Jan. 17, 1995).

10. 11 U.S.C. § 554(c).

11. ASBCA No. 46023, __ BCA __, 1996 WL __ (ASBCA December 3, 1996).

12. See, e.g., In re McCullough and Co., 199 B.R. 179 (Bankr. W.D. Mo. 1996) (holding that a dissolved corporation continues to exist and may commence litigation in its own name if applicable state law permits).

THE ROLE OF MEDIATORS

by Professor Andre Long, CPCM
Air Force Institute of Technology

Typically, parties try mediation when they have been unable to reach an agreement on their own and unwilling to pursue the resolution of their dispute through litigation. As a third party neutral, the mediator's objective is to assist the disputants in the quality and productivity of their dialogue so that they may reach a mutually acceptable resolution.

What does that really entail? The term "mediator" has been so loosely used that I fear some disputants and their counsel are genuinely confused as to what it actually should mean. Mediators assist the parties in their attempt to reach their own settlement. In theory, mediators are purely neutral and have no agenda or even interest in a settlement. However, reality shows us that most mediators want to achieve a settlement but work to that end by leaving the parties in control of the outcome. Mediators usually impose some kind of structure on the process to help reduce and control unproductive interactions and encourage frank and open dialogue. This allows the parties to better listen, understand and overcome any barriers that impede a settlement.

In separating the people from the problem and focusing on interests and not positions, mediators are not overly concerned about past events; they are not deciding whose position has merit and whose doesn't. Obviously, the parties, especially the Government, cannot ignore the facts since any settlement ultimately accepted must be defensible. However, for example, determining whether a design specification is defective and is in fact the cause of the contractor's delay, is not the kind of decision usually made during a mediation. Mediations do not usually decide who is responsible for past events. Instead, the emphasis is on options and remedies for the future that will satisfy both parties.

To accomplish this, mediators must sometimes meet with one party *ex parte* to gather confidential information about the dispute and explore settlement possibilities. For the parties to be successful, the disputant must have trust in the mediator and in the confidentiality of their conversation. If there is a fear that the mediator may divulge the party's bottom line to their opponent, no useful information will be exchanged. Doubt regarding the mediator's neutrality will interfere with the mediator's ability to understand the personal and organizational interests and agendas on which the resolution of the dispute depends.

However, mediators who predict how a board or court would decide a dispute, move outside the realm of mediation. This has been referred to incorrectly by some as "evaluative mediation". Individuals attempting to convince a neutral of the merits of their arguments are engaged in a process quite different than a cooperative search for a "win-win" solution. Typically, they will argue for positions and use tactics in an attempt to seek a competitive advantage at the expense of the other party. There is nothing wrong with "outcome predictions". It is an important and useful type of ADR but it is not true

mediation. A well respected subject matter expert, such as a board judge, who provides a nonbinding evaluation of competing claims, can create considerable impetus in pushing the parties to settlement. However, the dynamics and role of judges and mediators are conceptually different. This is not to imply that judges cannot be excellent mediators; it does imply the importance of recognizing that deciding right from wrong is not the same as encouraging the parties to create options for mutual gain without any "arm twisting".

Most experts in the ADR field agree that mediators do not need to know much about the subject area of a dispute in order to be effective. Instead, they must be individuals that believe in and understand the process itself. Outside Government contracting, most disputants deliberately avoid mediators who are subject matter experts for the same reason lawyers avoid it in jury selection: pre-conceived opinions can cloud a person's objectivity. True, mediators, unlike juries, do not make decisions. However, mediators saddled with opinions and biases can have problems winning the trust and confidence of the disputants, ultimately failing the mediation. Let's face it, it would be difficult to speak candidly to a judge/mediator, knowing that he disagrees with our "novel argument" and will become privy to potentially damaging information, that if known in a subsequent trial by a colleague judge, would negatively influence the outcome. At a minimum, any party who uses a judge/mediator should obtain their agreement not only to treat all communications as confidential, but to also recuse themselves from any subsequent hearing or trial.

This is not inconsistent with my belief that all good mediators are "creators of doubt". To get parties to move from their otherwise entrenched positions, mediators must have the analytical ability to question and challenge parties unrealistic positions and objectives. Having subject matter expertise can give a mediator that extra credibility when they dispense "reality checks", but most mediators exercise extreme caution in this area because the wrong comment can easily lead to a perception of partiality. For example, one means of "creating doubt" may be to note uncertainties in the law, but at some point giving such "legal advice" to a disputant become clearly unethical. If the disputants require a legal opinion, they should get it from their counsel and not the mediator.

It has been said that effective mediators should have the patience of Job, the sincerity and bulldog characteristics of the English, the wit of the Irish, the physical endurance of a marathon runner, the broken-field dodging abilities of a halfback, the guile of Machiavelli, the personality-probing skills of a good psychiatrist, the confidence-retaining characteristics of a mute, the hide of a rhinoceros, and the wisdom of King Solomon. While I doubt any such person exists, there are good mediators available who have the humility, patience, and communication skills to help parties solve even the most intractable of disputes without pushing them into settlements they might find untenable.

SENSE AND SENSIBILITY

Judge Elizabeth A. Tunks



Hon. Elizabeth A. Tunks

Much attention has been devoted to improving civility within the profession. This article focuses on a very narrow aspect of that topic, civility in the courtroom. At the outset, let me state that judges are committed to rendering decisions that are based upon the evidence. In spite of this commitment, it is my view that some litigants do and say things that needlessly complicate the decision-making process.

Everyone knows that the standard of proof before the Board is a preponderance of the evidence and that the party with the burden of proof must tip the scales in its favor in order to win. Many cases are not clear, even after they have been tried and briefed. Some teeter at 50/50. Some teeter at 50/50 for a painfully long period of time. What causes the scales to tip towards one party rather than the other? Does the judge reread the briefs? Reevaluate the evidence? Do more research? Try palm-reading? All of these things are possible. My theory is that after a certain amount of hand-wringing, teeth-gnashing and soul-searching, the judge simply bites the bullet and picks a winner. It is to your advantage if the judge trusts your fact finding and your interpretation of the law. In short, you want the judge to think that you're HOT STUFF.

The importance of the judge's decision cannot be overstated. Right or wrong, it binds the parties unless the Court of Appeals for the Federal Circuit says otherwise. According to the ASBCA's Annual Report for FY 1996, the ASBCA disposed of 1,384 appeals during the year and had 38 cases on appeal to the Federal Circuit. The Federal Circuit may not disturb the Board's fact finding unless it "is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or . . . or not supported by substantial evidence." 41 U.S.C. § 609(b). This is a tough standard to meet and very few cases are overturned on questions of fact. Thus, in the majority of cases, the judge's decision is final.

CIVILITY IN THE COURTROOM

Civility in the courtroom is an aspect of trial practice which is too often neglected. When hearing a case, the judge scrutinizes the attorneys from the moment he or she enters the hearing room (when one side typically rises with alacrity and the other side does its best to imitate the pistons in an automobile engine). Think of a hearing as a type of play that requires you to stay in character as long as you are within earshot or eyeshot of the judge. Your performance in this area may detrimentally affect the judge's perception of your competence and/or the merits of your client's case. Examples of frequently observed self-defeating behaviors include arguing to the death with the judge, successfully imitating the behavior of a spoiled child and failure to control the effects of raging adrenaline.ⁱⁱ

Arguing with the judge over rulings on objections is usually counterproductive. Once the judge rules, that's generally it, that's all there is. There is no more. Kaput. Over and out, Sit down and stop arguing. To persist in arguing after a ruling has been issued, except in the rarest of circumstances, is ill-advised. From the

judge's point of view, it is time to move on with the hearing and you are obstructing progress. Remember, the judge is there to conduct the hearing in an orderly fashion, not to referee a free-for-all. Even if you strongly believe that your objection should be sustained, there may be a valid reason for the ruling which the judge cannot share with you. For example, the judge's ruling may serve to expedite the progress of the hearing. Moreover, not all objections are created equal. Asked and answered in a three-week hearing may have some utility, but in a one-day hearing, it's not a particularly compelling objection. Before pushing the judge beyond the limits of judicial endurance, bear in mind that few rulings on objections actually determine the outcome of a case. So—make your argument, let the judge rule and get on with the case.

-- Another important aspect of civility is body language. Your oral communications may be exemplary, but your body language may communicate something quite different. For example, when a judge overruled an objection of "asked and answered," the attorney literally threw himself into his chair and hung his head between his legs. Such displays may relieve pent-up frustration, but they make attorneys look childish. As a trial attorney, you MUST control your frustration with the judge. When an objection is overruled, no matter how strongly you disagree with the ruling, you must let your irritation go and refocus your attention on the proceedings as quickly as possible. The practice of law is a business, not a personal contest. Second, do not comment nonverbally on the testimony of the other side's witnesses. Do not, for example, have everyone at counsels table hang their heads in unison when the other side's witness says something you dislike and nod their heads in agreement when the witness says something you like. From the bench, it looks like you are attempting either to influence the testimony of the witness or the views of the judge. Both are unacceptable. Third, contain your emotions. For example, when a judge asked one side to give the other a copy of a document during a lengthy and hotly contested hearing, the attorney winged the volume of documents onto counsels table knocking over a glass of water. Counsel was lucky to get off with only an icy stare from the judge.

SETTLEMENT

I will be the first to admit that when I litigated, I settled very few cases. Why not, you ask? Well, it was fun to try cases, particularly small construction and supply cases. I had a good shot at winning. They had a beginning, a middle and an end, In short, it

was personally very satisfying. However, this course of action is not always in the best interests of the client, whether the client is a private party or the Government. With today's emphasis on downsizing, cost cutting and ADR, you'd think that "litigating for the sake of litigating" would be going the way of the dinosaurs in Jurassic Park. But is it?

During a hearing which shall remain without a docket number, the judge concluded that the case should be settled. Both parties had clear liabilities. When the judge broached settlement, one side was very enthusiastic; the other side was tepid. When the judge pursued the issue, the attorney resisting settlement announced that he had an excellent case and would win on the merits; but if the judge INSISTED, he would listen to the judge's pitch. And I thought we had entered the era of ADR. Silly me! After much discussion, the case settled. A subsequent analysis revealed that: (1) the ready-to-settle attorney had made an offer before the hearing, but the resisting attorney had advised his client to reject the offer because he had a winning legal theory; (2) the resisting attorney's legal theory was without merit; (3) it cost the resisting attorney's client more to settle at the hearing than if it had accepted the earlier offer; and (4) both parties incurred needless legal expenses, travel expenses and litigation expenses.

Since "litigating for litigating's sake" appears to be alive and well in Jurassic Park. I submit the following guidelines for keeping the dinosaurs within bounds.

SIX UNACCEPTABLE REASONS FOR AVOIDING SETTLEMENT

(1) It's your first hearing, you're ready to go and you KNOW you can win.

WRONG: Your FIRST duty is to your client. Sooner or later you will try a case.

(2) You want to carve another notch on your belt.

WRONG: Your FIRST duty is to your client, not enhancing your trial skills.

(3) You have a legal theory that's a sure-fire winner.

WRONG: NO legal theory is a sure-fire winner. One solid settlement is probably better for your client than playing Russian roulette with its money.

(4) You want to accrue more billable hours.

WRONG: Your client is your FIRST priority and if you soak it on billable hours you may find yourself without a client.

(5) You like the location of the hearing,

WRONG: Your FIRST duty is to your client, If you do not get to Hawaii this time, you will get there another time, If all else fails, buy an airplane ticket.

(6) You are getting ready to change jobs and you want to beef up your resume,

WRONG: Your client is still your FIRST duty, If you have waited this long to pad your resume, it is probably too late anyway.

PERSONAL COMMENTS

Do not make personal comments to the judges. For example, DO NOT send the judge a list of all the decisions he or she has issued since being appointed to the Board and state that the judge does not seem to be overburdened. Do not point out that the judge's decisions seem to provoke a lot of dissents and/or concurrences. Do not call the judge two weeks after you file your brief and ask when the decision will be ready. It took YOU a whole year to get the appeal ready for trial, Remember? Do not point out that the judge avoids travel to hot weather cities in the summer and cold weather cities in the winter. It is also best to avoid probing the judge's views on race, sex, religion or politics. Likewise, best not to inquire into the judge's age or ask expectantly if the judge will retire soon. No matter how genial the judge, you run a significant risk of giving offense by pursuing such topics. Not only will these verboten subjects cause the judge to emit steam from his or her ears for an indeterminate period of time, the judge may draw unflattering conclusions about you and your case. ASSUME that any one of the attorneys described above represents an appellant that is eligible for an EAJA award. ASSUME that the appellant wins. ASSUME further that your next appeal is assigned to the same judge. MON DIEUX! At best, you've tweaked the psyche of the judge; at worst, you've thumbed your nose at the flying fickle finger of fate.

In conclusion, PLEASE DO NOT annoy, torment, pester, plague, molest, worry, badger, harry, harass, heckle, persecute, irk, bullyrag, vex, disquiet, grate, beset, bother, tease, nettle, tantalize or ruffle the judges. But most of all, remember that what you say and do has an impact on the judge's perception of you and your case. Accordingly, by the power and authority invested in me by absolutely no one at all, I hereby ever so politely request that you henceforth and forever go forth and BE CIVIL.

ⁱ Judge Tunks was appointed to the Armed Services Board of Contract Appeals (ASBCA) on 1 June 1987. The views of the author do not necessarily represent the views of the Department of Defense or its components.

ⁱⁱ Although many of the details have been changed to protect the uncivil, the examples used in this article are basically true.

REVIEW OF THE GOVERNMENT CONTRACTOR TOOLBOX

by James F Nagle¹/John Reed²

Normally, *The Clause* does not conduct reviews and when it rarely does it is on professional books and treatises. While we have not reviewed other products in the past, every once in a while an exception must be made. Software now is often so important that it deserves being brought to the attention of the readership. With that in mind, we have reviewed the Government Contractor Toolbox, a software package designed to aid contractors, consultants, accountants and attorneys in dealing with the vagaries of the Department of Defense Weighted Guidelines Method of computing profit.

The Department of Defense Weighted Guidelines Method has been around since 1964, and has been emulated by many other federal agencies and state and local governments. Although most people involved in federal contracting have heard of the method and the applicable form, DD Form 1547, filling out the form and understanding its rationale can be a nightmare. K & F Consulting, and especially Gregory L. Fordham, one of the principals, has developed the Government Contractor Toolbox specifically to alleviate this problem. The software package, which is available in Windows 3.X, Windows 95, or Windows NT 3.51 or higher, allows the contractor to complete the 1547 by following logical steps and entering the relevant required information. Further, automatic calculations virtually eliminate the potential for costly errors.

The Toolbox on line help is divided into five subject areas: Getting Started, Completing the 1547, Federal Acquisition Regulation, Defense Federal Acquisition Regulation Supplement, and the Weighted Guidelines Method.

Point and Click Approach

When using the ToolBox the top portion of the 1547 is the first thing that appears on the screen and from there the user is guided with easy prompts and directions to fill in the few blocks requiring user input. By double-clicking on each box that is colored, the user can access a step-by-step analysis of how to fill in the box and what factors go into it. For example, under Block 10 of the form, "Contract Type Code," simply by double clicking on the box, a separate screen appears from which the user can choose "firm fixed price," "fixed price incentive," "time and materials," etc. Similar methods are used for other boxes such as "Type Effort" or "Use Code" for which the FAR and DFARS provide alternates. Once the appropriate choices have been made and the appropriate amounts filled in for such things as direct labor and material, the software

automatically calculates the profit objective for each factor. The Toolbox automatically tallies the results, computes the corresponding values and enters it then into the appropriate cells. Finally, the profit objective is automatically calculated by the Toolbox. The user is relieved of the burden of that process.

Easily-Accessible Regulatory Information and Other Background Data

The software also comes with a full regulatory text from FAR 15.9 and DFARS 215.9 and 215.971. Text can be selected, reviewed on the screen, and printed if necessary. By double-clicking on the Weighted Guidelines method, the software presents a screen which explains the Weighted Guideline method in detail. By scrolling through the text to particular paragraphs and double-clicking on Entries, the user can access expert analysis as to how and why certain rules have been developed and how they are applied and/or how the software arrived at the results shown.

The Toolbox's on line help menu line provides bookmarks, help, and the ability to search the various regulatory references and access the data by regulation number or by category. For example, if you need to understand how independent research and development costs (IR&D) are addressed in the regulations dealing with profit, you need only choose the search option, then double-click on IR&D to find the topics which address that subject. The Toolbox itself has a different menu line that permits printing; importing and exporting data; locating, inserting and deleting records; checking value entries and compliance with statutory fee limitations, and help with the Toolbox

Profit calculations can be as difficult as they are important. The package is a worthwhile investment for anyone involved in the determination of profit on basic contracts or adjustment. It provides an expert and easy guide through a complicated maze of regulations and mathematical formulae. It is money well spent. For more information, contact K & F Consulting, Inc., at 1-800-335-1188.

¹ James F Nagle is a partner in the law firm of Oles Morrison & Rinker in Seattle, Washington. He is the president of the Board of Contract Appeals Bar Association.

² John Reed is a CPA specializing in government contractor claims. He is on the staff of Oles Morrison & Rinker.

TREASURER'S REPORT

by Barbara E. Wixon
Williams & Jensen

February 28, 1997

BCA Bar Association Statement of Financial Condition For the Period Ending February 28, 1997

Beginning Balance	\$ 9,247.00	
Fund Income:		
Dues	\$ <u>3,545.00</u>	
Subtotal		<u>\$12,792.00</u>
Fund Disbursements:		
Arnold & Porter		
('96 Annual Meeting Costs)	6,415.00	
A&B Litho (Directories)	<u>3,815.66</u>	
Total Fund Disbursements		<u>(10,230.66)</u>
Ending Cash Balance		<u>\$ 2,561.34</u>

BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Application for Membership

Annual Membership Dues: \$25.00 [Note: The information you provide in this section will be used for your listing in the BCA Bar Directory. Accordingly, neatness and accuracy count.]

SECTION I

Name: _____

Firm/Organization: _____

Dept./Suite/Apt. Street Address: _____

City/State/Zip: _____

Work Phone: _____ Fax: _____

SECTION II (THIS SECTION FOR COMPLETION BY NEW MEMBERS ONLY.)

I am applying for associate membership (for non-attorneys only)

I am admitted to the practice of law and am in good standing before the highest court of the:

District of Columbia: _____ State (s) of: _____

Employment: Firm _____ Corp _____ Govt _____ Judge _____ Other _____

SECTION III

Date: _____ Signature: _____

FORWARD THIS APPLICATION WITH A CHECK FOR \$25.00 PAYABLE TO THE BCA BAR ASSOCIATION TO THE TREASURER AT THE FOLLOWING ADDRESS:

Barbara Wixon
Williams & Jensen
1155 21st Street, NW
Washington, DC 20036
