

PRACTICE ALERT

New ADR Professional and Ethical Requirements

Alternative Dispute resolution processes are firmly established under federal and state laws. Competent legal representation therefore requires attorneys to be familiar with those laws and ADR issues, and to advise clients as to ADR alternatives. See Rules 1.1, 1.2(a) and 1.4(b).

Rule 1:40-1 (effective September 5, 2000) provides that State complementary dispute resolution programs are an integral part of the judicial process, and states specifically that “attorneys have a responsibility to become familiar with available CDR programs and inform their clients of them.”

ALTERNATIVE DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY

By Richard H. Steen, Esq.

Richard H. Steen is a member of Richard H. Steen, LLC, Attorneys at Law, with offices in Mercer County, New Jersey. His practice emphasizes the management and resolution of complex construction, commercial and environmental disputes through alternative dispute resolution techniques. He is an experienced mediator, arbitrator, trainer and facilitator, and serves as a neutral for the Federal and State Courts, the American Arbitration Association and in private proceedings.

The construction industry has become known as one of the most adversarial and problem-prone, with claims and disputes on construction projects frequently the rule rather than the exception. Cost overruns and schedule delays can be the subject of expensive and protracted claims and litigation, and pose serious risks for all parties to a construction project.

As a result, a clear majority of owners of construction projects rely heavily on ADR to prevent or resolve construction claims and disputes. Frequently, multiple ADR techniques are designated by contract, with binding arbitration the forum of last resort if other techniques are unsuccessful. Litigation is simply too time consuming, costly and acrimonious for construction industry participants.

The ADR techniques discussed in this article have been widely used and accepted by the construction industry as effective ways to promptly reach practical solutions to the myriad claims and disputes that are a reality on every construction project. These techniques can be used sequentially to provide a comprehensive blueprint for management of claims and disputes. The techniques include informal, quick and cost-effective procedures, and, those escalating in cost, formality, time and the level of hostility to full-blown litigation.

Neutral Experts. One of the most effective ADR procedures developed in recent years is to designate, at the time of the contract, a person or organization to serve in a neutral capacity during the construction process. Construction projects necessarily

involve numerous parties and participants, each with a stake in the outcome and each with obligations and responsibilities they may or may not perform competently.

Project owners can minimize the impact of problems by providing for a neutral expert to monitor the project. The neutral expert is familiar with the type of construction being undertaken and becomes familiar with the project, the participants and the responsibilities, goals and objectives of the parties. The neutral expert must have experience in identifying potential problems at the embryonic stage, and have expertise in defining the problem, evaluating responsibility for the problem, quantifying the impacts and facilitating a resolution between or among the parties.

The contract documents, or separate agreement if the neutral is engaged after the start of the project, must identify the neutral, define their role, and provide a mechanism for expeditious referral of a dispute to the neutral, prompt evaluation of the dispute and meaningful resolution and closure. The cost of the neutral's services can be shared by the parties.

It is axiomatic that the longer a dispute goes unrecognized and unresolved, the more serious the problem becomes and the more difficult it is to resolve. Parties who have the ability to call in a neutral who is familiar with the status of the project and the responsibilities of the parties can significantly shorten the time and reduce the cost to achieve resolution.

Dispute Review Boards (DRB) were first used in tunneling contracts, but in recent years have been used on a variety of construction projects. While there is a perception that DRBs are only suitable for very large projects because of their cost, this need not be the case. The scope and cost of the DRB can be easily tailored to fit the project.

The DRB is established in the contract documents. The board, normally comprised of three members experienced in the type of construction involved, can be selected jointly by the owner and the contractor or in cases of publicly bid contracts appointed by the public body and named in the bid documents. The role of the DRB is to monitor construction, keeping abreast of progress and any potential problems. The monitoring may involve actually attending job meetings or simply reviewing project documents on a periodic basis. Once a party has identified a dispute that the parties have been unable to resolve themselves, they will ask the DRB to convene a meeting. Since the DRB has been monitoring the project, the presentation should be relatively short and focus solely on the issue in dispute. While the meeting is generally informal, the more comprehensive and detailed information the parties present to the DRB, the better able the DRB will be to render a decision.

Under the typical DRB clause, the DRB may take any one of several actions after the parties have presented their contentions. The DRB may ask one or both parties for further information. They may make a decision on entitlement, either ruling that the contractor is entitled to an "extra" and suggesting the parties negotiate over the amount to be paid, or denying the claim.

While the DRB's decision is not binding, it is generally admissible as evidence in any subsequent proceeding. Since the DRB's decision is made by experienced individuals close in time to when the dispute arose, it will be given great weight by arbitrators, judges and juries. The admissibility of DRB decisions is intended to encourage the parties to accept the DRB's decisions, allowing the project to proceed without lingering disputes.

Mediation is perhaps the most widely talked about and becoming the most widely used method of dispute resolution in the industry. The most common misconception is that mediators settle disputes. They don't. Parties will settle a dispute as soon as they decide it is in their mutual best interests to do so. At the most basic level the mediator's function is to keep the parties talking and searching for ways to resolve the dispute. Mediation is a structured negotiation in which the mediator provides the structure. The mediator will establish ground rules and acts as a referee, facilitating communications between the parties.

Recognizing the value and importance of mediation in resolving construction disputes, the American Institute of Architects has added an interim mediation step, prior to binding arbitration, in the disputes clauses of its widely used A201 – General Conditions of the Construction Contract.

The mini trial is a condensed version of the typical trial or arbitration, and can be compared to an executive summary of a lengthy report. The basic concept is to present as much information as possible in the shortest time possible to someone not directly connected with the dispute. This individual will then evaluate the information and give the parties an assessment of the dispute in the form of a non-binding advisory opinion. If the third party to whom the presentation is made is a neutral, their role could end once they give their advisory opinion. The presentation can also be made to a panel consisting of a neutral and high-level executives without direct involvement in the dispute. After the presentation, the neutral may write an opinion that is then used by party representatives as a basis for further negotiations. The neutral also may mediate between or among the executives.

Binding Arbitration can be a very effective form of dispute resolution if used properly. Parties typically agree to arbitration at contract signing, well before any disputes arise, and generally with the hope and expectations that there will be no disputes. If the only ADR mechanism in the contract is arbitration, other techniques that may be more appropriate may be unavailable if either side wishes to enforce the arbitration clause.

Arbitration can be tailored to fit a particular dispute. It also offers significant advantages over litigation in many respects, including time, cost, informality, privacy, the degree of control by the parties, and access to a decision-maker with relevant industry expertise.

Fear of losing control of the process and of aberrant awards with no judicial remedy is a common complaint about arbitration. Control can be assured by carefully drafted arbitration clauses. In fact, parties are free to craft their own dispute resolution process. In fact, the parties are free to craft their own dispute resolution process. The parties may provide for discovery, exempt certain types of disputes from binding arbitration, and arguably, provide for judicial review and define grounds for overturning or vacating an award beyond those in the New Jersey Arbitration Statute or the Federal Arbitration Act.

Whether by contract, or as is occurring more frequently in litigation through the court-annexed ADR programs, your client's disputes may be subject to some form of ADR. Being able to take advantage of the opportunities presented to achieve a successful resolution of the dispute is an important service you can provide.

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ADR INTERNET RESOURCES

American Arbitration Association

www.adr.org

American Bar Association Section of Dispute Resolution

www.abanet.org/dispute

ADR Resources

www.adrr.com

ADR World

www.adrworld.com

Association for Conflict Resolution

www.acresolution.org

CPR Institute for Dispute Resolution

www.cpradr.org

JAMS-Endispute

www.jamsadr.com

National Arbitration Forum

www.ARBITRATION-FORUM.com

The Conflict Resolution Information Center

www.crinfo.org

Mediation Information and Resource Center

www.mediate.com

State of New Jersey Judiciary Complementary Dispute Resolution

www.judiciary.state.nj.us/services/cdr.htm

NJ Association of Professional Mediators

www.njapm.org
