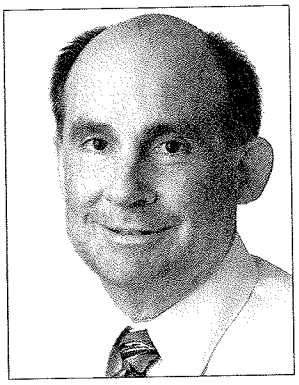
Construction Lawyer: Problem or Problem Solver? The Need for Cost-Effective Dispute Resolution in the Construction Industry

By Don W. Gregory and Peter A. Berg



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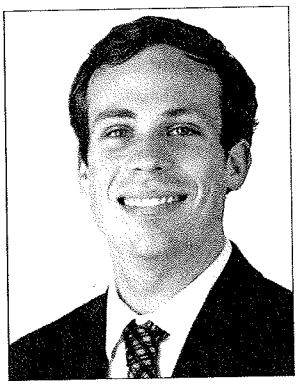

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Construction industry participants tend to seek out the most efficient means of resolving their disputes.[1] Minimal profit margins, harsh competition, and overburdened work schedules make it paramount for construction contractors, design professionals, and owners alike to resolve disputes in a timely and cost-effective manner before working relationships are negatively impacted. Indeed, these concerns have been a major driving force behind the construction industry's widespread use of alternative forms of dispute resolution.[2]

The industry's recent movement toward new forms of alternative dispute resolution (ADR), designed to remove attorneys from the dispute resolution process as much as possible to facilitate quick and inexpensive settlements, is driven at least partially by a perception in the construction industry that lawyers, especially in their capacity as litigators, only get in the way of efficient settlement. The use of partnering agreements, dispute resolution boards (DRBs), and mediation has become routine in the industry.[3] Wary of being the proverbial fish between two cats,[4] construction industry participants have adopted ADR mechanisms that potentially minimize the lawyer's role and, insofar as it is possible, keep the dispute in the hands of the involved parties with less reliance on outside counsel.[5]

Even with this movement toward using ADR processes to resolve disputes, many in the construction industry still see construction attorneys as more of the problem than anything else. Indeed, many believe that lawyers, trained more in the art of litigation than that of construction, have driven dispute resolution mechanisms toward formalistic processes that are not always the most efficient or most effective means of resolving conflicts. For example, a disgruntled professional engineer recently wrote:

> By their reluctant embrace of that attorney-driven process over the years, architects and engineers have unwittingly transferred their traditional control of the construction process to their attorneys—so much so that, today, they dare not make a move without them.[6]

The concern is not so much with the currently used processes: mediation, DRBs, and partnering agreements are widely used across the industry with much success.[7] Rather, some construction industry participants have become disenchanted with the legal profession's ability to guide a dispute toward efficient settlement. Instead of desired "problem-solvers," construction attorneys are viewed by some as "profit eaters" or "unnecessary overhead" as legal fees eat up steadily decreasing profit margins industry-wide.

Consequentially, an interesting tension has heightened between construction players and construction attorneys. On one hand, many construction attorneys remain focused on their roles as trusted advisors of their clients. These attorneys see their role as problem-solvers on behalf of their clients and, with considerable force, strive to achieve their clients' objectives on their projects. These attorneys are naturally driven by their desire to provide quality results to their construction clients, which can often lead to significant costs for clients in legal fees. However, those legal fees seem justified in the minds of these problem-solvers, who believe their clients benefit from their high-priced assistance rather than weathering the legal pitfalls of the industry on their own.

A good construction lawyer, immersed in the industry for the long haul, appreciates that prompt and cost-effective dispute resolution is what builds reputations and

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keeps clients coming back for years. Often this means that behind the scenes they are working to help clients get past their emotional reactions and instead focus on practical solutions. By training and experience, a good construction lawyer brings unique skills to a construction project that can meaningfully contribute to project success. This is precisely what most of us find most rewarding about our job, just like other professionals in the construction industry.[8]

On the other hand, construction industry participants may see lawyers as much more of the problem than as a part of the solution. These parties often reminisce about the good ol' days where an entire floor could be added to a building without the need of a formal change order. Contractors fondly relate stories about when contracts were written on cocktail napkins and the aid of an attorney was thought to be a last resort. Now parties are faced with detailed and, in many cases, inequitable and technical contract language readily churned out by the latest computer. This aversion to the legal process has likely been a strong force behind the industry's recent movement towards novel forms of alternative dispute resolution that minimize the role of the attorney.[9] Even then, however, some still view ADR processes as being overly driven by construction attorneys. Though they may recognize the good ol' days are essentially over, many do not see the transformation towards a more lawyer-guided and legally driven process as a good thing.

At the same time, many construction attorneys are worried. Increased use of ADR processes designed to help disputants resolve their differences without resort to attorneys—principally by reducing the formalities typically seen in litigation[10]—not only seems adverse to the natural desire of these attorneys to maintain quality (which often equates to high billable hours), but also cuts at the very utility of the construction lawyer. If construction lawyers are thought of only as problem-creators, it seems likely attorneys will be increasingly cut out of the process as the industry moves forward.[11] Though some may view this shift as a good thing, it is important to think critically about what may be lost in such a transformation. Although industry participants have little interest in subsidizing their attorneys' salaries, it is beyond question that the contractor, engineer, or owner is keenly interested in the resolution of any dispute. Though the parties may represent themselves in newer forms of ADR, should they? Do industry participants stand to lose more by minimizing or removing the role of the attorney in the dispute resolution process than what they potentially save in "representing themselves"?[12] Though settlements may come at a lower initial cost, a general desire to entirely remove lawyers from the dispute resolution process may be ill advised.[13]

This article emphasizes the importance of lawyers in any dispute resolution process and attempts to legitimize the lawyer's oft-criticized costs by highlighting the important role a lawyer plays in any dispute. Although short-term gains in both time and money may be realized by minimizing legal involvement in some disputes, completely removing attorneys from the dispute resolution process comes with many significant consequences. This article defends the importance of the construction bar's role in the construction industry.

Though the implications of this article likely apply to a number of industries, the concerns here are particularly relevant to construction lawyers who are likely to see a *smorgasbord*[14] of dispute resolution processes throughout their career.[15] Indeed, traditional construction litigation has dramatically declined as ADR processes such as mediation have gained favor.[16] Today's construction attorney must be aware of the newest forms of ADR and know how to best serve clients in this less-traditional field of resolving disputes. Ultimately, construction lawyers need to redefine their role in construction-related disputes with a heavy emphasis on ADR and cost-effective advocacy.

ADR in the Construction Industry

ADR has been around in the construction industry virtually since the industry came into existence. Indeed, there is nearly a half century of AAA arbitration in the industry.[17] The construction industry has always presented an interesting opportunity for up-and-coming ADR mechanisms to be put to the test. At the "cutting edge of experience with dispute resolution processes"[18] and at the "spearhead of experimentation with mechanisms aimed at avoiding disputes by addressing roots of controversy,"[19] construction participants have always tinkered with the various means by which disputes in the industry can be resolved.[20] In recent years, real-time ADR processes such as partnering and DRBs have continued to gain widespread use.[21] These processes have been featured in many standard industry contracts. Along with maintaining congenial working relationships between industry participants, the main impetus of this movement toward new forms of ADR processes has been a desire to keep costs as low as possible.[22] ADR processes are seen as a means of reducing dispute-related costs.

The Prevailing Perception: Lawyers Only Get in the Way of Efficient Dispute Resolution

There is a perception (that many share) in the construction industry that lawyers only get in the way of efficient resolution of disputes.[23] For one, the use of attorneys is often thought of as being too expensive.[24] Formal litigation is thought to be anathema to the goal of most construction participants: to do the most amount of work in the shortest amount of time possible. In a recent survey conducted by the Associated General Contractors of America (AGC), a strong majority of American contractors reported their litigation costs as either "significant" or "very significant" business expenses.[25] Efforts to minimize these costs are a major driving force behind the industry's desire to develop alternative means of resolving disputes.

Retaining an attorney can also be detrimental to the

construction participant's business relationships. For instance, hiring an attorney can often be seen as a sign of intransigence.[26] There is a significant amount of concern that lawyers—trained in legal reasoning and the law—are narrowly fixated in their approach to resolving disputes.[27] What may be more readily handled by the parties themselves quickly transforms into countless motions and incessant posturing, both often destructive to resolving a dispute in a quick and low-cost fashion.[28] Moreover, hostile negotiation tactics or tough bargaining can cause damage to long-term contracting relationships.[29] The construction industry is known for its relational contracting;[30] thus, maintaining good business relations is particularly important. The effective use of ADR processes to maintain goodwill between contractor, owner, and architect can mean the difference between a successful and an unsuccessful project.

For these reasons, the construction industry, like many other facets of American society,[31] has been increasingly focused on finding new forms of resolving disputes in a cost-effective and timely manner.[32] Over the years, this quest towards efficiency has progressed through many different forms of ADR.

Traditional ADR Mechanisms in Construction Disputes

Traditionally there were two means of resolving construction disputes without resort to litigation: adjudication with the project architect or design engineer acting as the ultimate decision maker, or binding arbitration.[33]

In the first of these two traditional forms, the project architect often exercised near-dictatorial authority over contract matters, making quick and (presumably) informed determinations with respect to disputes between the owner and contractor.[34] It was thought that the architect, heavily involved in the contract- and plan-drafting portions of the construction process, was in an optimal position to make objective and informed decisions regarding certain performance issues.[35]

Over time, however, resolving disputes through the project design professional's determinations became controversial. This is primarily because of the architect's dual role as both designer of the project and agent of the owner. Acting as the owner's agent on the construction project created an inherent conflict of interests[36] that left the architect seemingly unable to produce objective, unbiased rulings on matters in dispute between the owner and other contractees.[37] Adding to the problem was the fact that the design professional has a liability risk for design defects or other errors in the construction documents.[38]

Because of these conflicts of interest, the design professional's opinion might understandably be viewed in some cases as nothing more than "meaningless charades which contribute[d] little to the prospect of settlement and merely postpone[d] binding adjudication in some other form."[39] Nonetheless, adjudication through the design professional remained a viable option for many construction disputants, primarily because of its low cost.[40] Only now that many other ADR processes without these same inherent conflicts of interest have gained greater use is the adjudicatory role of design professionals thought to be somewhat outdated.

Another traditional method of resolving disputes in the construction industry is binding arbitration.[41] For decades, binding arbitration was thought to offer several key advantages to construction disputants: "limited process, a relatively prompt hearing, privacy, informality, and, above all, informed judgment which could soften the hard edges of the law within the elastic bounds of arbitral discretion."[42] Despite those advantages, many difficult questions have grown out of the continued use of arbitration. Discontent among design professionals, contractors, and owners alike recently prompted the American Institute of Architects (AIA) to delete a mandatory binding arbitration clause from its standard form contracts.[43] Removing the binding arbitration clause presumably returns litigation to the default means of resolving construction-related disputes[44]—illustrating the level of discontent in the construction industry with binding arbitration.

Binding arbitration has been widely criticized by construction disputants because of its increasing resemblance to traditional litigation, without the benefit of appeal.[45] One author calls this synthesis (of arbitration and litigation) the "isomorphism" of construction arbitration.[46] "Isomorphism" is thought to be driven by lawyers, transforming binding arbitration from what it once was—an informal mechanism designed to provide quick resolutions of disputes—into something that looks a lot more like traditional, costly, litigation.[47] Indeed, in the eyes of many, construction arbitration has become too costly as an alternative form of resolving disputes.[48] Concerns about the "quality of construction arbitrators, the effectiveness of the arbitrator selection process, and the completeness of biographical information provided to the parties regarding perspective arbitrators" also deter further use of binding arbitration in the industry.[49]

Instead of these more formal, traditional types of ADR, industry participants have continued to seek out less formal, less costly, and, oftentimes, more effective means of resolving construction disputes.[50]

New(er) Construction ADR Mechanisms

Particularly over the past 15 to 20 years, construction industry disputants have been increasingly focused on finding efficient and useful means to resolve disputes with their counterparts.[51] Consensual early intervention (or "rapid resolution") ADR methods with litigation remaining the ultimate default option are now the industry standard.[52] This result has stemmed from a long history of participation in various forms of ADR.[53]

Among the many lessons learned from the "quest for the right ADR process" is that no one mechanism can be a cure-all for all disputes.[54] Indeed, "there is no single perfect process."[55] A broad study of construction

industry participants, including architects, engineers, contractors, and construction attorneys, was conducted in 1994 to study the overall sentiment of industry participants involved in the then-occurring ADR revolution in the construction industry.[56] By that time, the word was out. Survey data made it clear that mediation and minitrials, along with other newer forms of ADR, were quickly becoming the favored means of resolving construction industry disputes.[57] Binding arbitration, litigation, and adjudication with the project design professional serving as neutral appeared to be losing favor.[58]

Indeed, this movement away from traditional forms of dispute resolution has only hastened over time.[59] The latest forms of dispute resolution in the construction industry focus heavily on resolving disputes as close in time to the underlying events giving rise to the dispute as possible.[60] The most used forms of ADR in the construction industry include mediation, DRBs and standing neutrals, the minitrial and summary jury trial, and partnering agreements coupled with an ADR enforcement mechanism.[61] Entities (like AAA) specializing in dispute resolution services long ago realized the need for quick and efficient modes of dispute resolution in this industry, and have undergone significant reform to try to satisfy that need.[62]

Virtually all substantial construction disputes are submitted for mediation at least once, and courts often impose mediation as a requirement before litigants go to trial.[63] The mediation process facilitates candid discussions among those with settlement authority to try to resolve a dispute, preferably in its early stages. Mediators are called on to use their experience in the industry and knowledge of the law to instill realistic expectations in the parties and attempt to find middle ground. Though construction-related mediations typically involve attorneys on both sides, the goal is to keep the decision-making power in the hands of the client and cut back, as much as it is possible, on unnecessary posturing and other advocacy tactics that often impede settlement.

One of the more innovative forms of ADR used in the construction industry is multiyear alliances or formal "partnering" agreements.[64] These agreements focus on strategic project planning and brainstorming at the impetus of the project, with a heavy emphasis on various means and methods of resolving disputes between participants down the road.[65] By concentrating on building a "team" to prevent disputes from arising in the long run, project participants use "creative cooperation" to minimize the potential for conflict and to implement procedures to handle inevitable disputes in a quick and effective manner.[66]

Similarly, DRBs have been used with high frequency across the construction industry.[67] These boards typically include three independent experts whose job it is to supervise the project and employ expertise and impartial judgment to make recommendations to disputing parties on a construction project.[68] The success rates of DRBs are particularly impressive, especially for large and complex projects where disputes are practically inevitable.[69] Both partnering and DRBs as ADR processes involve little participation of lawyers, as the contracting parties are encouraged to negotiate and plan for contingencies on their own with their own interests in mind and without outside assistance.[70]

A considerable amount of research has been done investigating the benefits and disadvantages of employing these ADR processes in place of more traditional forms of ADR or courtroom litigation.[71] These newer forms of ADR are thought to "open the channels of communication between the parties to facilitate the resolution of the dispute at an earlier stage in the dispute."[72] The goal is to settle disputes at the lowest project level possible.[73] Also, enabling the bargaining and exchange processes that ordinarily underlie relational contracts is thought to be key to efficiently resolving disputes.[74] The hope is that by resolving disputes quickly and informally, disputes will cause minimal disruption to the project and long-term relationships will be protected.[75] Real-time dispute resolution mechanisms have been surprisingly[76] effective at achieving cost-effective outcomes.[77]

Contractors fondly relate stories about when contracts were written on cocktail napkins and the aid of an attorney was thought to be a last resort.

The Construction Bar's Response

Despite the potential consequences, construction attorneys, for the most part, have supported the movement toward these newer forms of ADR,[78] often discouraged themselves by binding arbitration's likeness to litigation and the inefficiencies inherent in more adversarial techniques in the modern world of e-discovery.[79] The movement toward ADR has stemmed from the advocacy of industry professionals and trade organizations as well as from legislative and judicial forces.[80]

Naturally, however, there is some concern—even if it is not discussed publicly—that the construction lawyer's role will be threatened by the introduction of new ADR methodologies. This is especially true given that these newer methods are focused on obtaining quick and informal settlements shaped by the parties themselves, with minimal resort to lawyers.[81] The concern is not so much that the lawyer's billable hours will be reduced—though that may be present enough concern in and of itself.[82] Lawyers are well-aware that clients do not enjoy, and the construction industry does not benefit from, paying excessive attorneys' fees. Rather, the concern is that, with these new ADR

methodologies, the utility of the construction lawyer will be reduced. When a client handles the dispute him- or herself, the lawyer loses his or her opportunity to advise the client and guide him or her through the dispute. In turn, the client stands to lose out on the many advantages that come with the experience of a skilled construction attorney.

Lawyer as Problem-Solver

Despite the fact that newer forms of ADR seem driven by a desire to minimize the role of the attorney, there is a strong argument to be made that concerns about inefficiency and cost downplay the significance of what a lawyer, acting as both counselor and advocate with experience in handling similar types of cases, can add to the dispute resolution process. By bringing perspective and practical solutions, attorneys can play an important role in almost any dispute resolution process.[83] Attorneys don't always add needless cost and often bring real value.[84]

The effective use of ADR processes to maintain goodwill between contractor, owner, and architect can mean the difference between a successful and an unsuccessful project.

Although certain inefficiencies and costs are unavoidable with the addition of legal counsel, those costs are frequently justified given the tremendous positive effect legal representation can have in the resolution of a dispute. Increasing use of dispute resolution processes in the construction industry may be unavoidable. However, this should not necessarily correlate to a reduction in workload for construction attorneys, some of whom are actively engaged as mediators and other facilitators. The benefits gained by employing experienced and knowledgeable legal counsel to guide a client through a difficult dispute are well worth a reasonable fee.

The Need for Cost-Effective Advocacy

It is very unlikely to see a shift in the current dispute resolution paradigm, focused on obtaining fast and efficient settlement of construction disputes. Instead, construction lawyers need to both understand the importance of ADR in this industry and learn how best to adapt their skills to meet the demands of these newer ADR processes. Importantly, this does not mean construction lawyers should be eliminated from dispute resolution processes generally. Rather, the attorney's role must change to reflect what is most needed by clients in this industry: cost-effective advocacy.

The Advantages of Using ADR Mechanisms in the Construction Industry

In order to understand the importance of lawyers in the resolution of disputes in the construction industry, it is important to understand why ADR mechanisms are of such great utility in this particular industry. There are six generally accepted reasons ADR—as opposed to litigation—is more suitable to the resolution of most construction-related disputes.[85]

First, construction is by its very nature technologically complex.[86] Construction projects involve a wide variety of applied sciences all employed in unique circumstances and geographical locales.[87] This results in a large aggregation of various types of businesses, all operating concurrently, in a relatively confined and mostly uncontrolled environment—the "project site."[88] Flexibility is crucial in any dispute resolution mechanism used in the industry, as is a process that can keep up with rapid technological advances. ADR mechanisms provide that flexibility in a way that litigation does not.

ADR works well in the construction industry because it provides that flexibility and is capable of resolving disputes in a timely manner. The months or years it takes to resolve a dispute via litigation are unacceptable in an industry dependent on quick turnover and quick payment.[89] ADR can also account for the complexity of the issues that arise in construction-related disputes by encouraging parties well-versed in the intricacies of each project to resolve disputes themselves with the advantage that knowledge imparts. It is expensive to educate judges and juries on the details of each case—especially where the case involves complex fact patterns or testimony from expert witnesses. The parties are often better off resolving the dispute themselves or through a single third-party neutral, already experienced in construction disputes.

Second, the construction industry is the largest segment of the production sector of the US economy.[90] The number of disputes that arise in this sector is astronomical compared to any other.[91] Without ADR processes, the construction industry could not operate. The construction industry demands alternative forms of resolving problems without resort to a court. The use of processes like mediation is not only desirable but also necessary as the complexity of the claims, and the numerous parties involved, only further demands quick and informal dispute resolution mechanisms.[92]

Third, as the construction industry has progressed and become more complex, so has US law governing construction contracting.[93] Construction contracts necessarily involve a large and intricate web of interrelated parties and legal relationships, particularly as more and more specialized subcontractors are being utilized.[94] The contract disputes that arise from large projects can be daunting.[95] Disputants require means of resolving disputes outside the court system, in order to do business without being weighed down by expensive and lengthy litigation.[96] Moreover, the days of simple form contracting are largely over,

as more and more companies favor proprietary contracts of their own creation.[97] The interpretive issues that arise out of the use of differing (and in many cases one-sided) contract terms have resulted in a deluge of cases, thereby further increasing the demand for ADR processes.[98]

Fourth, the complexity of construction litigation often makes the use of expert witnesses necessary.[99] Causation and quantification of damages are very difficult issues to work out in construction disputes.[100] This is primarily a result of the intricacy of the construction project and the difficulty of determining who "caused" the problem and how to properly measure damages. ADR mechanisms employed by knowledgeable persons can often utilize those individuals' knowledge and experience in place of detailed expert opinion.[101] By reducing the demand for expert witnesses, ADR mechanisms save disputants time and money.

Fifth, maintaining healthy business relationships in the construction industry is of paramount importance.[102] Large- to medium-scale projects often go on for years. For that reason, it is essential to the success of any project that parties be able to cooperate and work together throughout its duration. ADR mechanisms work to bring parties together—even within the context of a dispute—to achieve mutually beneficial outcomes. By eliminating the "distinction between victor and vanquished" typically seen in the aftermath of litigation, ADR mechanisms can work wonders in terms of maintaining strong business relationships after the resolution of a dispute.[103]

Finally, removing disputes from local fact-finders can increase the impartiality of dispute outcomes.[104] Local biases and prejudices are often perceived as important components in any litigation.[105] ADR mechanisms provide an opportunity to place the authority to decide in the hands of independent and impartial neutral parties, thus removing the impression of local biases changing the outcome of the case and hopefully fostering settlement.

The Evolving Role of Construction Lawyers

Contrary to the construction industry's prevailing perception (that is, that attorneys only get in the way of efficient resolution of disputes), the construction lawyer *belongs* in these newer forms of dispute resolution. The construction industry's demand for new alternative means of dispute resolution should correlate to a concurrent *increase* in the importance of the construction bar. Through his or her knowledge, expertise, experience, and education, the construction attorney is well equipped to handle various forms of ADR as well as to represent clients at virtually any stage in the dispute resolution process. The benefits of obtaining quality legal counsel in an ADR process are many, which extend beyond the expertise in the law that an attorney brings to the table.

A lawyer is more than a litigator,[106] and provides more than just knowledge of the law.[107] More than anything else, a good lawyer is a trusted advisor and a good problem-solver,[108] as exemplified by the numerous roles in which attorneys excel including such roles as "counselor, advisor, intermediary, government official, prosecutor, judge, arbitrator, representative of entities . . . and as individuals" in society.[109]

More than just a zealous advocate, the best lawyer, particularly through the use of ADR processes, uses his or her role as counselor or advisor to minimize the destructive effects of conflict and to put in place a collaborative process to develop "an integrative ('win-win') solution."[110] Abraham Lincoln had it right when he said: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses and waste of time."[111] When the lawyer acts as a "consensus builder" rather than simply as a zealous advocate of only the lawyer's own client's interests,[112] construction industry participants can benefit from their services tremendously, even when accounting for the attorney's cost.

With respect to ADR in particular, the lawyer serves as a sort of "gatekeeper" in helping his or client select the appropriate ADR mechanism for each dispute while decreasing the chances of disputes arising in the future.[113] Again, this is particularly beneficial for construction disputants who seek to minimize both cost and future disputes. The best lawyer also understands not only his client's interests, but also his opponent's interests; is able to communicate those interests effectively; and is adept at developing options or alternatives that will be amenable to all of the disputing parties.[114]

Another area in which the construction lawyer can strive to become more cost-effective is developing processes by which modern electronic document management is simplified and made more expedient for his or her client. In recent times, e-discovery has made the cost of litigation extremely prohibitive,[115] likely hastening the movement toward ADR processes. A construction attorney that can adapt his or her practice to modern times in a cost-effective way can provide great value to clients.[116]

Moving forward, the construction attorney needs to be aware of how he or she can best serve clients interested in participating in newer and more cost-effective forms of alternative dispute resolution.[117] To be most effective, lawyers must put to practice *more* than what they learned in law school.[118] The construction bar should put aside the paradigm of being only a zealous advocate of his or her own client and consider a move towards "collaborative lawyering."[119] Lawyers should take advantage of the fact that ADR processes are not only useful but also necessary in the construction industry given its high volume of complex disputes. More important, construction attorneys should be acutely aware of their clients' needs, and fully cognizant of the industry's general need for cost-effective advocacy.

Conclusion

The construction industry will always seek more efficient means of resolving inevitable disputes. Especially in tough

economic times, profit margins are so slim that construction industry participants are keen to save costs by any means possible, including paying less for the services of attorneys.

With that in mind, construction lawyers should aim to serve their clients in the way that they need it most: being as cost-effective as possible. Contrary to popular belief, at least in the construction industry, lawyers have an important role to play in all alternative dispute resolution processes. The perception that lawyers only get in the way of the efficient resolution of disputes is misguided at best.

The construction bar can best ensure its importance moving forward by acting as "consensus builders,"[120] seeking to resolve disputes with determined deliberation and minimal posturing. Attorneys should work to eliminate as much as possible the things that interfere with an efficient dispute resolution process, including too much legal maneuvering and expense.[121] Construction lawyers should look for opportunities to employ technology as an ally in organizing, digesting, and effectively presenting positions. At the same time, the attorney must effectively encourage open communication and facilitate creative problem solving.

ADR works well in the construction industry because the construction industry possesses characteristics that maximize the benefit of timely and cost-effective resolution of disputes. The construction bar should take advantage of that connection and work to be at the forefront of ADR mechanisms in the construction industry into the future with one primary goal in mind: to serve justice and solve problems in an equitable and cost-effective fashion.

Endnotes

1. The one consistency in the construction industry is that it is always changing. *See* John Hinchey & Laurence Schor, *The Quest for the Right Questions in the Construction Industry*, 57 DIS. RES. J., no. 3, Aug.–Oct. 2002 at 8, 10 ("[N]o Sector of American Industry is more directly affected by current trends."). Improvements in technology, modifications in contract law, novel regulation from Congress, or changes in the economy in general all have significant effects on the nature of the construction industry and how industry participants go about doing business. Indeed, the construction industry is the largest industry in the United States in terms of employment and is a significant, if not predominate, factor in the overall business climate. This tendency to change has also been seen in the means by which parties choose to resolve their disputes. Though the construction industry typically employed binding arbitration as its primary ADR mechanism for resolving disputes over the past century, in recent years, a broad array of dispute resolution processes have taken over.

2. The construction industry is a hotbed for new and innovative dispute resolution mechanisms. Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 498 (1998).

3. For a detailed discussion of construction disputes and up-and-coming ADR mechanisms used in the industry, see Am. Bar Ass'n, *Essay on Construction Disputes* (2012), http://www.americanbar.org/content/dam/aba/migrated/dispute/essay/constructiondisputes.authcheckdam.pdf. Lawyers, equipped with an adversarial mind-set likely obtained at an early age and only strengthened by time in law school, are generally thought to be "ill-suited to consider non-legal interests and non-adversarial solutions. The fear is lawyers will not prove helpful in ADR and may just mess it up." Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 391 (2010).

4. As Benjamin Franklin once famously said, "A countryman between two lawyers is like a fish between two cats."

5. "Not surprisingly, much of the current trend toward facilitated conflict resolution and project planning is anti-lawyer in spirit." *See* Stipanowich, *Reconstructing Construction Law*, *supra* note 2, at 498; *see also* Philip L. Bruner, *Rapid Resolution ADR*, CONSTR. LAW., Spring 2011, at 6 ("Consensual early intervention rapid resolution ADR methods now are becoming the industry standard, with litigation remaining the ultimate default option.").

6. Walter J Wells Jr., *Viewpoint: Lawyer as Constructor*, ENR.COM: ENG'G-NEWS REC. (Apr. 30, 2013), http://enr.construction.com/opinions/viewpoint/2013/0506-viewpoint-lawyer-as-constructor.asp.

7. "While the different providers of mediation services in the United States cite somewhat different success rates, it is clear that there is *at least an 80 per cent* chance that mediation will reach a settlement. Some cite statistics greater than 90 per cent." Robert S. Peckar, *Mediation of International Construction Disputes—Has the Time for US-Style Mediation Arrived?*, WHO'SWHOLEGAL (May 2010), http://whoswholegal.com/news/features/article/28353/. This same success is seen in the use of DRBs in the construction industry. "60% of projects with a DRB had no disputes . . . 98% of disputes that have been referred to a DRB for hearing result in no subsequent litigation or arbitration. The worldwide use of DRBs is growing in excess of 15% per year, and through the end of 2006 it was estimated that over 2000 projects with a total value in excess of $100 billion had used some form of DRB." Randy Hafer & CPR Constr. Advisory Comm. Dispute Resol. Bd. Subcomm., *Dispute Review Boards and Other Standing Neutrals: Achieving "Real Time" Resolution and Prevention of Disputes*, CPR Dispute Prevention Briefing: Construction (2010), http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/640/Construction-Briefing-Dispute-Resolution-Boards-and-Other-Standing-Neutrals.aspx.

8. In a response to the *ENR* article "Lawyer as Constructor," *see* Wells, *supra* note 6, Andrew D. Ness emphasized the value that a construction attorney provides to the project, not only in its early phases but also throughout the project's duration. Andrew D. Ness, *Bash All the Lawyers? Not So Fast*, ENR.COM: ENG'G NEWS-REC. (May 21, 2013), http://enr.construction.com/opinions/viewpoint/2013/0521-bash-all-the-lawyers-not-so-fast.asp.

9. Bruner, *supra* note 5, at 6. A 1967 survey of a dispute resolution system that employed binding arbitration with the architect serving as arbitrator, where there was little attorney involvement, hypothesized that "lawyers and courts [would] probably remain relatively unimportant in this sphere of conflict resolution," given the successes that the system had in efficiently resolving disputes.

10. Newer ADR processes, such as partnering agreements and DRB, are acutely focused on maintaining informality.

11. *See* Stipanowich, *Reconstructing Construction Law*, *supra* note 2, at 498 ("As the construction industry experiences a reformation in its approach to controversy, many construction attorneys are, naturally, alarmed. After decades of expansion, their ranks may be thinning; having devoted their energies to mastering the intricate minutia of construction litigation, their art is imperiled.").

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