ProNet Practice Notes

Alternative Dispute Resolution:

There is a Better Way

INTRODUCTION

This issue of *Practice Notes* defines and explores the newest forms of alternative dispute resolution ("ADR"). Particular emphasis is placed on disputes which arise in the context of professional malpractice in the architectural, engineering and construction management areas.

Scope

The perspective of this document is defined by the author's experience and background, so a brief description is warranted. The author is a practicing attorney with twenty-three years of dispute resolution experience, including the resolution of disputes by the traditional techniques of litigation and arbitration. By virtue of a background and degree in engineering, the disputes have tended to be complex and technical and, thus, not necessarily "typical" in the sense of what might be experienced by many other practicing lawyers. However, due to experience in mediation and arbitration as a neutral, the author has observed and resolved many disputes of a much broader range. It is submitted that opinions about dispute resolution are often colored by the experience (or lack thereof) of the participant, and, therefore, this background is disclosed to place the author's comments in context.

Types of Disputes

The type of dispute can be important in analyzing the available dispute resolution options. Controversies can be divided into many categories, including the substantive area of law underlying the dispute. Regardless of the area of law, however, the nature of the dispute is important in selecting the method or technique most appropriate for its resolution.

1. Simple disputes.

For our purposes, a simple dispute is one defined as lacking in complex facts or numerous parties. A dispute between two parties over money normally would qualify as simple. Also, disputes which can be broken down into discrete components can qualify as "simple." A word of caution is in order: Sometimes a dispute which starts out as "simple" can quickly escalate to "complex."

2. Complex disputes.

Disputes become complex either because of the nature of the issues involved (numerous, technical or unusually complicated) or, more often, because the amount of money at issue is large. Unfortunately, most disputes, especially those encountered by professionals, either start as complex disputes or rapidly become so. For example, even seemingly simple disagreements over money often quickly evolve into claims for professional malpractice. Increasingly, any suit brought on behalf of a professional routinely provokes a malpractice counterclaim.

Complex disputes which the parties feel compelled to litigate may at least have component parts which lend themselves to some form of ADR. Virtually all disputes ha e liability and damage components. One way to simplify the dispute is to bifurcate these components and defer one of them. Most often the damage component can be delayed until liability has been resolved.

On the other hand, a case could arise in which determination of the damage component would resolve the dispute. This is a likely result if the cost of determining liability exceeds the anticipated cost, and it is a simple example of the flexibility inherent in ADR. When ADR is utilized, the actual 'dispute " need not be litigated. The parties can choose to go on with life, and the court never has to determine who is liable to whom. The concept of resolving disputes, either through binding or non-binding procedures, regardless of whether "all " the issues are resolved is a basic philosophy of ADR.

Traditional Dispute Resolution

The traditional phases of dispute resolution are these:

Discussion☐ Negotiation☐ Litigation☐ Resolution (by settlement or trial)

If a dispute is not resolved short of litigation, the process of resolution tends to take on a life of its own. Moreover, this life form is exceedingly disruptive and expensive.

Traditional forms of litigation are costly, not only because legal representation is expensive but because they distract key personnel from their primary professional tasks and focus their energies away from efforts that directly promote the objectives of the firm. Litigation (especially before the advent of ADR) follows a set and predictable pattern: Extensive fact gathering, the filing of a pleading—complaint (for plaintiff) or answer (for defendant)—written discovery, depositions and trial. Even after trial, appeals and retrials occur with annoying regularity. In each stage of the litigation process there exists the possibility of in-court battles and other diversions, such as the addition of new parties.

As a result of the increasing cost of litigation, including the cost of judges and courtrooms, a series of reforms has been enacted by state and federal courts. These include rule reforms (close monitoring of the discovery process and limitations on the amount of written discovery and depositions), as well as imposition of some of the mandatory ADR procedures discussed below. As lawyers become more conversant with the increasing number of alternatives to litigation, professionals can expect to hear of innovative and imaginative ways to cut the cost and, concomitantly, decrease the time associated with dispute resolution.

New Forms of Dispute Resolution

The "new" forms of dispute resolution have been in existence long enough to prove their value. Arbitration has been utilized for many years as a contractual requirement in the construction industry. It has been supported by the American Institute of Architects, as well as the Associated General Contractors and others. Mediators have successfully aided parties in resolving disputes for hundreds of years.

What is new is that ADR is becoming mainstream. Lawyers are using it because it produces better results and happier clients. Architects and engineers are using it because it can eliminate or at least minimize the

cost of resolving their disputes and the disruption of their practices. Some would say that the "quality" of justice is better when the parties have more control over the results (non-binding procedures) or at least the process (binding procedures).

The use of ADR allows the selection of a "judge" and a process to suit the dispute. The "judge" is a neutral who the parties, not the court system, determine has the requisite expertise and temperament for the case. The process itself can be one tailored to the nature, size and complexity of the case. In short, ADR is desirable because the parties are empowered to influence how their dispute is resolved and by whom. If they cannot agree, the court system remains to assist them.

Examples of Disputes

Interpersonal

Interpersonal disputes arise every day, and people are accustomed to resolving them. People disagree between themselves and either work it out, or managers intervene to resolve what cannot otherwise be settled by mutual agreement. Some of the techniques discussed below are as applicable to assisting organizations in interpersonal dispute resolution as they are to a large anti-trust case involving the most sophisticated legal issues and processes.

Non-adversarial

Not every dispute involves an adversarial situation. Sometimes people just disagree. A dispute exists over the price you want to pay for something. You negotiate and resolve it. A repair is done and quickly fails again. Both sides agree that it could be the repair itself or something under the control of the owner. A dispute? Yes. Adversarial? Not necessarily. One way to resolve such disputes is to bring in a third party. The third party decides the dispute (binding arbitration), helps the parties decide it (mediation), or recommends a solution or other alternative (non-binding arbitration) which helps to avoid an adversarial relationship.

Adversarial

People head for the courthouse when the consequences or interests involved are significant and adversarial. Sometimes they head there because they are "angry," "upset," or "standing on principle." Heretofore, the method of choice under those circumstances was traditional dispute resolution, i.e., a lawsuit. When a situation has escalated to the point at which the parties cannot see any solution other than one involving a courthouse, they probably cannot even agree on the issues, let alone on how to resolve them. For such people and situations, society provides a way to resolve their disputes—litigation. The cost of this formalized system, however, has risen so high that alternatives have been pondered and new systems devised. There is a better way.

SIMPLIFIED DISCUSSION

This issue of *Practice Notes* is not meant to teach architects and engineers how to resolve disputes by the alternative means described. It is meant to enlighten the reader as to the options available and to encourage the use of alternative dispute resolution clauses in contracts.

What is ADR?

A process to avoid certain forms of traditional dispute resolution. These "traditional" methods include:

- economic or even physical force, including small and large scale confrontations,
- unstructured negotiation, and
- formal court procedures.

A process which relies on consensual, court annexed, or contractually mandated procedures. These procedures include:

- negotiation,
- neutral fact finding,
- early neutral evaluation,
- mediation, arbitration,
- summary jury trial,
- and mini-trial.

There is no need for a dispute to end up in court. Any of the ADR procedures discussed here can informally be agreed upon "pre-dispute" or "pre-litigation" by the parties. ADR, by its very nature, is "alternative" (or, some would say, "additional "). Thus, even after a dispute arises, the disputants can negotiate a means to resolve the dispute even though they cannot resolve the dispute itself.

The resultant dispute resolution contract will, if necessary, be enforced by a court, but such enforcement is rarely required. The agreement to submit a controversy to ADR is drafted and signed voluntarily at a time when the parties are well informed as to the nature of the dispute. Additionally, the parties are under no compulsion to agree upon an alternative dispute resolution procedure and, thus, can freely negotiate the terms. Finally, the process anticipates and delivers a result the parties can accept.

Who Employs ADR Procedures?

Everyone employs dispute resolution procedures at one time or another in day-to-day life. Although there is an unfortunate tendency in recent times to resort to the courts unnecessarily, most people opt for the simplest solution. Even the courts have experimented with ADR procedures and, more and more frequently, they are making them mandatory.

Individuals

As indicated earlier, all forms of discussion, negotiation and intervention by third parties are forms of dispute resolution, and they are used every day. In addition, the concept of alternative dispute resolution is increasingly being taught in schools and by public service messages. Our society is more and more violent, but efforts are being made to teach people about alternatives to violence (itself a "dispute resolution procedure"). The concept of "just walk away" is a dispute resolution procedure. Parents often act as resolvers of disputes and, if properly educated could employ some of the intervention techniques used by mediators. ADR is also being used, or at least considered, in criminal and quasi-criminal cases.

The Army Corps of Engineers has effectively utilized the concept of "partnering" to avoid or minimize disputes.

Companies

The use of ADR procedures by companies is becoming more and more prevalent. ADR can be made part of an employment agreement. Such procedures (usually under another name) can be utilized internally to resolve grievances or externally to address disputes with outside agents or brokers.

Many companies have turned to the use of alternative dispute resolution provisions in contracts with third parties. Outside the construction industry, these clauses are prevalent in the securities, insurance and automotive industries, as well as many others. In addition to promoting customer satisfaction, they provide a barrier or impediment to the institution of lawsuits. Depending on the desired effect, ADR procedures can be a means to keep customers happy or a hurdle which must be surmounted prior to the use of courtroom procedures.

One note of warning: At least one state, North Carolina, recently enacted a statute which barred any contractual procedure which purports to eliminate any party's right to a jury trial. Such legislation would render void (as an abridgment of that right) any procedure which is binding on the parties. Fortunately, a subsequent amendment in North Carolina reaffirmed the enforceability of binding arbitration and other ADR provisions, but the mere fact that restrictive legislation was enacted in the first place demonstrates that not everyone is attuned to the benefits of ADR.

Courts

Courts are increasingly utilizing ADR to reduce backlogs and promote more efficient administration of the judicial system. Although in many jurisdictions mandatory ADR procedures are prohibited by legislative or constitutional guarantees, non-binding procedures are increasingly being required by rule, statute or judicial pressure.

The American Bar Association has worked closely with the federal judiciary to recommend changes to the Federal Rules of Civil Procedure (F.R.Civ.P.). As a result, the F.R.Civ.P. were amended in 1993 to encourage the use of ADR procedures and to enact certain "self-disclosure " requirements. These amendments were not without some controversy and, as a result, individual districts around the country were permitted to opt out of them. Nevertheless, the concept of ADR has been well received in most districts.

At a minimum, the courts now tend to encourage ADR. In fact, many require it as a routine part of pre-trial practice. This is not to say that the courts have the power to impose binding ADR procedures. They are prohibited from doing so by the constitutional right to jury trial. The use of non-binding procedures, however, has been upheld based on the inherent power of the court to control its own docket (similar to the power to hold settlement conferences). While there is a wide disparity in the attitudes of individual judges on the subject of ADR, many strongly encourage the voluntary use of mandatory procedures, and virtually all will enforce contractual agreements to engage in binding procedures.

Many state courts have embraced ADR, particularly non-binding arbitration and mediation. Some states, like Michigan, require a review of medical malpractice claims before a suit is filed and non-binding arbitration before trial. Parties are free to ignore the result of the arbitration, but they risk the imposition of costs if they do not better the result in court.

Mediation seems to be the current ADR procedure of choice. It is now mandatory in at least some districts in a number of states, including Florida, Texas, North Carolina, South Carolina, Indiana and Louisiana, and it is proposed in many others.

How is ADR Implemented?

ADR can be a voluntary procedure or one required by a court or contract. Any dispute can be voluntarily submitted to any of the alternative dispute resolution processes discussed. The question arises, however, as to how any one of the procedures is instigated.

The details of the procedures applicable to any one of the broad concepts is left up to the disputants. For example, it is easy to say that a dispute can be "arbitrated." But what "arbitrated" means depends on the agreement between the parties. Historically, many people have used outside providers who have their own sets of rules to be used in the absence of separate arbitration agreements. Thus, a popular belief that "arbitration" means a dispute resolution which takes place according to, for example, the rules of the American Arbitration Association, is held only because that organization's presence has been so pervasive.

The use of one particular set of rules does not have to be the norm, and, in many instances, consideration should be given to developing rules which more appropriately fit the actual dispute. Depending on the nature of the contract and relationship of the parties, there are an infinite number of possible dispute resolution options. If nothing else, consideration should be given to the various "standard" clauses now available from a multitude of sources other than the American Arbitration Association.

Outside Services

1. Private.

A growing number of companies have been incorporated to provide ADR services as a profit-making endeavor. Several of these companies have stock that is publicly traded (e.g., Endispute and Judicate). These organizations will provide standard language which can be included in contracts, naming them (of course) as the exclusive dispute resolution body for a particular type of dispute resolution service. There currently are literally hundreds of such companies around the country, with more being formed constantly.

Some of these private organizations have full time staffs of neutrals, but most rely on a cadre of people, usually lawyers, who are available as needed. Some are composed entirely of retired judges, such as JAMS (Judges Arbitration and Mediation Services), which recently merged with Endispute. Others do nothing more than broker services for neutrals and market and administer neutral dispute resolution services.

In addition to providing neutrals and administering ADR services, many of these organizations provide consulting and training services. If one party desires ADR but is reluctant to broach the subject with an

adversary, sometimes a neutral can be useful as a "go-between. " The approach of the neutral in such a situation is to suggest to the parties that they "consider " whether ADR might be appropriate. This takes the onus off of any one side making the suggestion and appearing "weak. " On the training side, these organizations can train managers in conflict resolution, negotiation techniques and in ways to facilitate contract administration. They can also consult and develop tailor-made dispute resolution contract provisions.

Caution must be utilized in employing these organizations. References and recommendations from satisfied users are essential.

2. Not-for-profit.

A number of public interest entities have been created to assist in the resolution of disputes. Many are set up to assist families and neighborhoods in resolving problems that otherwise might result in violence.

Business disputes can be referred to several "public interest " organizations, the most prominent of which is the American Arbitration Association (more commonly referred to as the "AAA "). However, increasingly, major universities, especially law schools, are creating their own dispute resolution organizations, and there is at least one corporate, not-for-profit group.

a. The AAA.

The AAA has been the leading purveyor of arbitration services for many years. Because of its pervasive presence, it is important to know what the AAA is and what it is not. The AAA is dedicated to providing dispute resolution services in the public interest. Often these services are cost-effective and of the highest caliber. Unfortunately, over the years the AAA has come under fire in many instances because the quality and cost of its services were deemed not acceptable to the parties in a particular case.

The AAA operates through a central headquarters in New York, with regional offices around the country. Not unexpectedly, some of the regional offices are more efficiently run than others. The effect on the disputants of a poorly run office is that the time from filing the Petition to the conclusion of hearings is lengthy and, concomitantly, expensive. In addition, because the quality of dispute resolution services depends so much on the quality of the neutrals involved, a poorly run office results in the use of neutrals who are inappropriate for a particular case. If a case is poorly administered, delay and added expense result. If an unqualified neutral is selected, delay and added expense also can result but, more importantly, an inequitable outcome becomes a distinct possibility.

Not all of the complaints heard about the AAA are valid. Often the loser in an arbitration (or court for that matter) is critical of the fact-finder. Also, the parties themselves can cause delays and increases in cost by failing to cooperate in the process. The unreasonable striking of proposed arbitrators, for example, often results in the administrative appointment of an arbitrator by the AAA and subsequent complaints by the very parties who had the opportunity to select their own.

The AAA, to its credit, is trying to address past problems. It has created a "complex panel " of arbitrators who are held out to be more qualified than others on its national panel. Members of the complex panel must be chosen by a selection committee and must have certain requisite training and experience. An

effort also is being made to cull out national panel members who have not conducted recent arbitrations or who have had complaints lodged against them. Because of the size of the AAA, however, it is likely that many unqualified arbitrators will remain on the list. The author has observed that there are still members, even on the complex panel, who are placed there more because of politics within the AAA or their name recognition than their abilities in arbitration.

The AAA will administer cases by its own rules unless other rules are specified. Thus, dispute resolution clauses can name the AAA as the administrator of a dispute resolution process, but they need not defer to the AAA rules. A clause, for example, can state that each party to a dispute will be entitled to select its own arbitrator with the two "partisan " arbitrators then required to pick a third. Alternatively, a contract clause could specify an individual arbitrator known to both parties to the contract who will agree to serve at a specified rate of compensation. Logically, the selection of a neutral is far easier before a dispute arises than after the parties begin maneuvering for position.

The AAA has expanded into all current areas of dispute resolution service, and has developed rules for each of these new processes and formed panels of people who can perform the required services. Additionally, of course, the AAA has decided on fee schedules for these new services.

b. The Private Adjudication Center, an affiliate of the Duke University School of Law.

One institution involved in dispute resolution is the Duke University School of Law. Ten years ago Duke organized the Center, a non-profit corporation, as an adjunct to the law school. Since that time, the Center has provided arbitrators for a federal court annexed arbitration pilot program. It also was selected to administer the resolution of claims against a Dalkon Shield trust fund, which was created pursuant to a plan of reorganization in the A. H. Robbins bankruptcy proceedings. The Center devised the arbitration system and provides trained arbitrators to resolve the many pending claims.

Like the AAA, the Private Adjudication Center has researched and prepared alternative systems for resolution of other types of disputes. Also like the AAA, the Center has selected and trained neutrals to provide such services. Unlike the AAA, the Center's administrative fees have remained modest, and it has more closely monitored its panel of neutrals.

c. Other public interest groups.

The Center for Public Resources in New York City (the "CPR ") has a CPR Legal Program—a non-profit alliance of more than five hundred corporations and law firms. Assisting in the program are certain public institutions and law school professors. The avowed purpose of the Legal Program is to study and develop alternatives to expensive litigation. It has developed ADR procedures and has a panel of neutrals available to implement those procedures.

Other public interest groups abound in the field of alternative dispute resolution. Pilot studies and experiments are in progress to find the best mix of services and rules to be applied to particular disputes or classes of disputes.

3. Individuals.

In addition to the organizations which are available to administer disputes, more and more individuals are devoting full or part time to dispute resolution. The AAA and the Private Adjudication Center, of course, utilize the services of such people (lawyers and non-lawyers alike). A single individual may make him or herself available to multiple private and not-for-profit organizations. These individuals, however, can be retained directly and, thereby, less expensively.

What to Expect

Speed

The speed with which ADR proceeds depends upon several factors, all of which are within the control of the parties. The most important factor, regardless of the form of ADR chosen, is the degree to which the parties cooperate. With cooperation, and depending on the complexity of the process chosen, a dispute can be resolved in a matter of days.

Lower Cost

The cost of ADR, by definition, should be less than formal court procedures. In the non-binding procedures, principally mediation, the parties tend to settle because the evaluated cost of not settling exceeds the cost of settling. The so-called BATNA (best alternative to a negotiated agreement) is the factor against which all alternatives are weighed; if the choice of litigation and its various possible outcomes is better than a settlement being offered, the case will not settle. As discussed below, a "decision tree " analysis should include the probable court outcome as well as the transactional cost to achieve the outcome. These transactional costs include lost productivity of key company personnel, as well as diverting the focus of a company, division or department away from its primary goals.

The cost of other forms of ADR, again, should be lower. Even less expensive than mediation is the alternative of pure negotiation. Normally, however, dispute resolution techniques are not discussed until some form of negotiation has taken place, usually and hopefully, without lawyers. Negotiation techniques are beyond our scope here. The reader is referred to some of the classic works on negotiation, including *Getting to Yes* by Fisher and Ury, and *Getting Past No* also by Fisher.

Other forms of ADR vary in cost depending on the factors alluded to above. In addition to cooperation by the parties, the next most important factor is the form of ADR chosen. The form is critical, not merely the name given to it but the actual procedures to be employed under that "name. " Many of the forms of ADR can differ in practice depending on the actual procedures employed. Thus, for example, arbitration under the AAA Rules for the Construction Industry will be different from other forms of arbitration utilized by other organizations or designed by the parties. Even within the AAA, there now are multiple types of arbitration, including both simple and complex case procedures.

Finality

Another advantage of many ADR procedures is the finality of the result. Any procedure that produces a voluntary settlement should also produce a durable settlement. Simply stated, if the parties have

determined as part of a formal dispute resolution process that a particular settlement is in their best interests, it is unlikely that the settlement will come undone (as sometimes occurs) and, of course, there are no appeals from a voluntary settlement. Also, in the arena of binding ADR procedures, by statute in the case of arbitration and by contract in other forms of ADR, no appeal (other than for illegal or unethical conduct of the arbitrator[s]) is possible.

ADVANCED CONCEPTS

With the foregoing as background, a more detailed explanation of the forms of ADR and their applicability to architects, engineers and construction managers follows.

Neutral Fact Finding

What is it?

The use of neutral fact-finding involves the use or employment of a mutually agreed upon individual, usually an expert, who will make either binding or non-binding findings of fact. The neutral's report can trigger a pre-agreed result or be a springboard for negotiation, mediation or some other form of dispute resolution.

The use of neutral fact-finders in courts, as special masters, can assist a judge in complicated cases. Special masters can be appointed on the court's own motion or upon the request of any party.

What type of dispute benefits from it?

Disputes involving complicated factual issues are good candidates for neutral fact-finders. Environmental and construction disputes often have factual issues that might best be resolved by a technical expert rather than a judge or jury. The hoped for effect of hiring a neutral fact-finder is that the cost of the litigation process can be avoided.

What are the problems?

The most significant problem with neutral fact-finding, of course, is inherent in all human endeavors: It depends on the quality of the neutral. The neutral might not find the "true " facts, and, even with the right facts, the neutral might make a bad recommendation. If this happens, the parties may be bound by the neutral's findings (if binding) or, regardless, will have to live with them in future negotiations. Nevertheless, if sufficient care is taken in drafting the questions to be asked of the neutral and in the selection of the neutral, the likelihood of a "correct " result may be better than with a jury composed of lay people.

Another significant problem with the use of neutral fact-finding is that sometimes it is simply too early for anyone to find the facts. Very often, if knowing the facts is the key to resolving the dispute, extensive investigations need to take place. This may be difficult and cause suspicions on the part of one side or the other, especially absent the strictures of court rules.

One other problem with neutral fact-finding is that it can be expensive and yet fail to produce a resolution of the dispute. A lack of definitive results by the fact-finder may not be of any help at all. Also, questions of law are often so intertwined with the facts that the use of a neutral fact-finder is inappropriate. As a result, neutral fact-finding is usually a post-dispute procedure or one left to the neutral's discretion in a pre-dispute clause.

The above notwithstanding, when properly structured and with the right fact-finder, this process can be very beneficial. It is uniquely suited to circumstances in which discrete facts are dispositive of a case.

Early Neutral Evaluation

What is it?

Early neutral evaluation is a process in which the parties to a dispute each make a presentation to a neutral and ask for an evaluative opinion. This process, like many of the others, depends on the procedures made applicable, either by court rule or by agreement. Unlike neutral fact-finding, it does not involve independent investigation. Also, this process, unlike many discussed below, does not necessarily require the involvement of the parties themselves.

What type of dispute benefits from it?

Generally, early neutral evaluation is best suited for cases in which the facts are clear without significant discovery. Also, disputes which are simpler factually and legally can benefit from an independent assessment of the relative merits of both sides. Depending on the rules under which the process is to proceed, benefit can be derived from a hearing in which a neutral is presented with an abbreviated version of the facts and can then share whatever insights are gained from that presentation.

What are the problems?

Early neutral evaluation, by its nature, is not designed to produce a "hard" opinion on what the result of a trial will be. The process is highly dependent on what is presented to the evaluator which, in turn, is highly dependent on what is available to be presented to the evaluator. The advantage is lower cost, but the clear disadvantage is that not all cases can be resolved based on too early and incomplete an evaluation. Nevertheless, if the facts are generally known, a neutral evaluator can be beneficial as an aid to the realistic and objective assessment of a case.

Mediation

What is it?

Mediation is a non-binding, facilitated negotiation process which has a high rate of success in producing voluntary, durable settlement agreements. As a result, mediation is fast becoming the alternative dispute resolution method of choice.

The process of mediation involves the use of an individual who is trained in techniques of negotiation and facilitation. Such training typically includes an analysis of the psychology of not only why cases settle but

why people settle. The best mediators, therefore, tend to be very well informed in a number of different fields related to how people interact, what causes disputes and how resolution is achieved.

Mediation requires that each party be present with an individual who has the authority to settle the case. A typical mediation session will begin with the parties and mediator being introduced to one another, if necessary, and to the process. The differences between mediation and other forms of dispute resolution are explained by the mediator. The parties are informed that the process is a voluntary one and that the mediator has no power (or desire) to coerce a settlement. Everyone is told that the mediator is neutral and unbiased and acts as a facilitator. Any settlement will be the result of both parties' conclusion that a negotiated settlement is better than one imposed by a judge or jury. The mediator will listen to a short presentation of the facts of the case from both sides and will encourage each side to listen to the other side's presentation. Emphasis is placed on the fact that the mediation session will likely be the only time, short of trial, in which the parties themselves will hear from their opponent's lawyer.

After the initial so-called "joint session," the mediator will separate the parties and act as a "shuttle diplomat" between them. These so-called "private sessions" or "caucuses" allow the mediator to become more familiar with the facts so that the mediator can assist both sides in realistically evaluating their cases. These private sessions are extremely confidential, and no information is shared from one room to the next unless permission is received to do so. This allows the parties to be completely candid with the mediator and produces a very focused evaluation by the parties of their respective cases. Court rules and state statutes usually forbid use in court of statements made during mediation, should the case not settle.

As useful as private sessions can be, there are times when there is no need to employ them. If the parties are proceeding towards settlement in joint session, with or without the mediator's help, there is no need to separate the parties. In fact, there is a school of thought which suggests that the "better" practice is to avoid the use of private sessions. The question of whether private sessions will be employed is one that should be asked of a potential mediator.

The mediator does not give legal advice, nor does the mediator evaluate the case for any party. Nevertheless, the mediator is an active participant in the private sessions and often will ask probing questions. By the use of intelligent questions, an experienced mediator can assist the parties in focusing on the most significant aspects of their cases. Also, a certain amount of "devil's advocacy " can be employed to assist the parties in seeing the weaknesses in their cases.

Experienced and knowledgeable mediators also assist the parties in brain-storming alternatives. One of the benefits of mediation is that any settlement which results is not restricted by any preset rule of law. In the courtroom, the judge is bound to apply those rules of law which are applicable. The jury, as well, is restricted by the remedies about which it is instructed (regardless of how free a jury may be to decide liability and damages, it still can only award monetary relief). In mediation there is no limitation on what the parties themselves can devise.

In sum, mediation, when properly conducted, is a consensual process which often produces a binding, durable settlement. The success rate in mediation is very high because the parties come to the mediation with the express purpose of attempting to settle their dispute. If the case can be settled, a qualified mediator can usually achieve that result.

What types of dispute benefit from it?

Virtually all disputes can be mediated. Exceptions include disputes in which one side wishes to establish a legal precedent and disputes involving widely differing views of the facts. An example of a dispute in which a legal precedent is important might be one in which a contractor claims a direct right of action against an architect. In some states, the issue of third party liability may not yet be settled. In that case the architect must weigh the effect of an adverse ruling against whatever settlement is offered (the BATNA). Another example of a dispute in which the facts do not lend themselves to mediation might be one in which the mediation is sought so early that the parties can not accurately assess their BATNA. Again, however, even if the facts are not known, mediation might be preferable to a process of fact-finding which is more expensive than an early settlement.

Often the question is not whether to mediate a case, but when and by whom. If a case is mediated too early, there may not be enough information for the parties to evaluate it accurately, with or without a mediator's help. If mediation is delayed too long, the transactional costs may already have been incurred, and the parties may be disinclined to settle.

Cases are ripe for mediation when sufficient facts are known to enable a reasonable evaluation of the case. Thus, mediation can be conducted without a lawsuit being filed. Both sides may be at an equal disadvantage with regard to missing facts, or sufficient facts may be known to make a rational decision. Also, if the amount in controversy is low, cost/benefit analysis may dictate an early settlement. In that case, a net gain may be achieved considering the cost of filling in the missing facts.

What are the problems?

The biggest problem with mediation is finding qualified mediators. Large numbers of mediators exist; the difficulty is finding mediators who are right for the particular dispute. Unfortunately, a growing number of people holding themselves out to be qualified are not good at what they do, or worse, actually make the possibility of resolving a dispute less likely. For example, mediation, by its nature, is a facilitated settlement conference. Yet, certain mediators take over the process for the parties and try to enforce their own concept of what is "right " or "fair. " If legal or evaluative opinions are expressed, especially after "private " sessions, they can have the effect of polarizing the parties and making settlement less, rather than more, likely. Former judges, as a class, tend to forget that they no longer are in the position of deciding cases but are supposed to help the parties settle their own. Former judges are not alone, however, in succumbing to the temptation to evaluate the parties' cases.

Such evaluations are extremely dangerous because the party not favored by the evaluation will believe that things shared in private sessions have entered into the evaluation. Similarly, the party favored by the evaluation will think that the other side must have disclosed weaknesses and its side must be strong. An evaluative mediator may make a case difficult or impossible to settle. If evaluation is desired, non-binding arbitration is a better choice. In that process, there are no private sessions or *ex parte* communications and a true, non-biased evaluation can be made.

Other difficulties in mediation include the potential that one party intends to use the process only for informal discovery. This possibility is always present, but, fortunately, even when one party or the party's advocate has this tactic in mind, the process tends to overtake the misdirected intent. The mediator usually can sidetrack too many "cross examination" questions if they do not serve the purpose of

educating the parties toward settlement. Also, because the process is voluntary, no one is forced to answer questions or continue in the face of such tactics.

Arbitration

As indicated above, the American Arbitration Association is often considered the leader in providing arbitration services. In fact, at least in the construction industry, the AAA is far and away the most likely source of arbitration rules and arbitrators. Thus, how people in the construction industry think of arbitration has been shaped by the AAA. This situation has changed somewhat, however, especially in the last ten years.

One of the reasons for change, both within and without the AAA, is dissatisfaction with "traditional" arbitration.

What is it?

Traditional arbitration is usually thought of as a process which involves a hearing presided over by a one or three arbitrator panel. The panel is presented with evidence at a formal hearing, and a decision is rendered, hopefully based on the evidence. The panel is usually composed of at least one lawyer and two other individuals knowledgeable in the particular area in dispute. The arbitrators sit much like judges and, thus, rules governing judicial conduct are generally applicable. Thus, the arbitrators are prohibited from *ex parte* communications, unlike a mediator.

The cost of arbitration is thought to be less than formal litigation for several reasons. First, discovery is limited, so less time is spent in reviewing opponents' facts. Second, the hearings themselves should move more expeditiously because the rules of evidence are relaxed. Finally, in most cases, no formal briefs or written closing arguments are required.

The modem trend in arbitration is away from traditional arbitration. Several causes underlie this trend. First, anecdotal evidence has indicated that the cost of the process, although lower than litigation, approaches the same order of magnitude. Second, experiments with alternative arbitration rules and administrative procedures have been successful.

Mandatory arbitration usually arises because a contract clause requires it. Most people in the construction industry are familiar with the standard AAA clause. The reason a standard clause is used is because the mere use of the word "arbitration" fails to identify the particular process. Unless there is a prescribed definition of what the word means, no one would know what rules to apply. There is nothing which prohibits the use of elaborate arbitration clauses in contracts, but people generally are unwilling to lengthen a contract by several pages, especially with language about how disputes will be handled. Thus, even now, the tendency is to incorporate an existing arbitration system, like the AAA's, into a contract.

Numerous alternatives to the AAA standard construction industry arbitration have been developed. The Private Adjudication Center discussed above provides dispute clauses and rules, as does the CPR.

Interestingly, one of the ways the CPR has fostered arbitration and ADR in general has been to obtain the signatures of major corporations and law firms on the CPR "pledge." The CPR pledge requires the

signatory to agree to suggest and employ ADR procedures whenever practicable. Thus, if you are a signatory, you can suggest ADR as a matter of "policy" and not fear that the suggestion will be perceived as a sign of weakness. Similarly, if you check and discover an opponent company has signed the pledge, the suggestion of ADR becomes a simple matter of asking the other company whether they intend to abide by the pledge.

Some of the alternative arbitration rules which may be considered include the following:

- different procedures for the selection of arbitrators
- procedures which limit discovery
- procedures for the presentation of evidence, which may include limitations on the amount of time allotted for its presentation
- limitations on the amount of any award (high or low)

Some form of limited discovery is desirable to expedite the proceedings and to avoid surprises. By getting documents and some disclosure as to contentious issues in advance, hearings can proceed much more expeditiously. Procedures for the presentation of evidence are helpful so that the parties, not the arbitrators, can dictate the form of the hearings. An example of this type of limitation would be the requirement that all exhibits be presented in advance or that all direct testimony be by affidavit. Such procedures can be included in a pre-dispute clause much more easily than negotiated once a dispute arises.

Limitations on time can also serve to expedite the proceedings, and, like limitations on evidence, they force everyone to consider only key points. This usually involves each side being restricted to a set amount of time which it can use as desired. Opening and closing statements which are confined to, say, one hour, probably convey all that is necessary, and the advocates do not have to worry about their opponents spending more time than they. Similarly, if both sides are restricted to a specified amount of time for cross-examination, the parties have a strong incentive to present their key points succinctly. Of course, absent agreement of the parties, the arbitrators would have a much harder time limiting the presentation of evidence or the time for its presentation. Therefore, such limitations must appear in a contract, either pre- or post-dispute.

Limitations on the amount of an award must be determined in the context of an actual dispute. Nevertheless, provision can be made, pre-contract, for the particular type of arbitration. One such clause, frequently called "baseball arbitration," requires each side to submit a number to the arbitrator and the arbitrator is bound to choose one of the two numbers. The purpose of this process is to promote reasonableness on the part of the parties (because if one number is so far out of the realm of reasonableness, the other number will be selected just because it is not so unreasonable).

Another such system usually arises out of a dispute that already has been extensively negotiated. This process, "high/low" arbitration, limits the possibility of extreme results. The plaintiff is guaranteed a minimum amount and the defendant is guaranteed a not-to-exceed amount. A contractual clause which can produce this result would be a requirement of "good faith" negotiation or, more frequently, mediation. This latter process is called "med/arb(hi-lo). "

What types of dispute benefit from it?

Arbitration is appropriate for any dispute which requires an evaluative answer. Thus, non-binding arbitration gives the parties a result from which they can bargain, and binding arbitration, of course, gives a binding award.

Any dispute which cannot be negotiated and which requires resolution will require a binding result. Litigation is the traditional route to a binding result. ADR provides an opportunity to reach a binding result faster and cheaper. The question which remains with ADR is whether it produces a result which is acceptable to the parties. For non-binding procedures like mediation and non-binding arbitration, the result, settlement, is shaped by the parties. Thus, assuming that the process is carried forward properly, the parties should be pleased or, at least, be satisfied with the result. For binding processes, consideration must be given to whether the result is more or less acceptable than a judge or jury verdict. Because, after all, court results are subject to appeal, whereas ADR results, by and large, are not.

The type of dispute which benefits most from arbitration is one in which the risk posed by lack of appellate review is outweighed by other considerations. These other considerations include the amount in controversy, whether the disputant perceives that it is liable and the necessity that the trier of fact have technical expertise. Unfortunately, it is impossible to know any of these factors with certainty at the time a contract is negotiated. As a result, some contracts now provide for arbitration of disputes only up to a certain amount or attempt to limit arbitration to the sole discretion of one party. Ceilings on the amount which may be arbitrated are likely to be enforceable, but problems may arise in the enforceability of contracts which give one side the unilateral choice to refuse to arbitrate.

It is clear that there has been a trend away from arbitration. It is submitted that this trend is due not to the process itself but the way it historically has been implemented. Thus, the lack of popularity is not because the idea of the process is fundamentally flawed; the problem is that, in practice, arbitration has suffered from imperfect implementation.

What are the problems?

The biggest problem with arbitration is the perception that arbitrators ignore the law and tend to apply rough justice to their perception of the facts. This promotes the "cut-the-baby " approach so repugnant to people who "have done nothing wrong. "

Other problems with arbitration arise because the arbitrators, unlike judges, are not used to controlling the dispute resolution process. Thus, it becomes difficult to schedule hearings, the hearings drone on endlessly and the arbitrators cannot make up their minds.

As indicated previously, there is a way to reduce the risk of a panel lacking the requisite training or understanding of the process. This is done by establishing a better arbitrator selection procedure and by pre-dispute clauses which better define the process which is desired in the particular circumstance.

Summary Jury Trial

As one moves up the scale of binding ADR alternatives, procedures start to look more like conventional trials. The summary jury trial is one such alternative.

What is it?

The summary jury trial "typically" consists of a non-binding trial before a jury, with a judge or magistrate presiding. The "evidence" will usually consist of arguments of counsel rather than a formal witness presentation. At the conclusion of the trial, the jury will reach a "verdict," which will be presented to the parties with the idea that it should encourage settlement. Frequently the parties will be allowed to inquire of the jurors what they thought about particular items presented to them.

What type of dispute benefits from it?

A summary jury trial, often recommended by a trial judge, is a way to force the parties to accept reality. If a case does not settle, it is because one or both sides has an unrealistic evaluation of its position. A summary jury trial is one way for the parties to get an independent assessment of the value of their respective cases. It is designed to be expeditious in the sense that evidence is presented in summary form such that a one or two month trial can be condensed into a matter of a day or two.

A complex dispute headed for a jury trial can benefit from a summary jury trial because it is as close to an actual jury trial as one can get without the associated expense. So long as the parties are sophisticated and open-minded enough to listen to the results of the trial, benefit can be derived from this procedure.

What are the problems?

Inherent in the selection of this process is the belief that time and money will be saved. If the process is so restricted that the jury verdict is based on too limited a presentation, it can be a waste of time. Similarly, if the parties are not inclined to listen to the result, regardless how well presented, the process can be fruitless. Also, this process is one of the more expensive because it still entails significant amounts of preparation. Arguably, the preparation is useful for an eventual trial, if required, but often the passage of time to the actual trial diminishes that value. In addition, the process depends on how candid each party wants to be in light of the fact that the summary jury trial will preview the evidence to the party's opponent. In order truly to be effective, both sides must believe settlement is possible and enthusiastically endorse the process.

Mini-Trial

The "typical" mini-trial has aspects in common with both summary jury trials and mediation. In many ways, however, it can be very different.

What is it?

Like all ADR procedures, the mini-trial can be found in infinite variety. A likely form of mini-trial involves an abbreviated presentation by lawyers (i.e., without witnesses) to a neutral (or neutrals). Principals of

the parties are present and hear the "evidence." The neutral(s) may ask questions and, ultimately, render a non-binding verdict. In most versions of the mini-trial, the neutral will then attempt to assist the parties in settling the dispute based on his or her evaluation of the case. In one sense, it is a highly structured mediation. However, because of the fact that an evaluative opinion is offered, the process is very different from pure mediation.

What type of dispute benefits from it?

The advantages of the mini-trial are similar to the summary jury trial in many respects. It is an abbreviated presentation which results in a non-binding, advisory opinion. As such, it produces an evaluation by a third party neutral which can assist the parties in a realistic review of their cases. The mini-trial has the added advantages of greater involvement by the parties themselves and the lack of involvement by a jury. Because of the added participation of the parties, the relatively formal nature of the presentation is more likely to influence the thinking of the party representatives. The lack of a jury makes the presentation easier and lowers the cost. Finally, the use of a neutral who also is an expert in the subject matter (as well as the mini-trial process) saves considerable time.

What are the problems?

Like the summary jury trial, the mini-trial is relatively expensive. Anytime the procedure utilized moves to more formality, the cost rises. Merely deciding what evidence to present to the neutral becomes very similar to trial preparation. As such, although many of the aspects of the trial itself have been diminished, much of the trial preparation is still required. Thus, the timing of a non-binding mini-trial usually is aimed much closer to the actual time of trial and formal trial preparation, so that it does not require too much added effort and cost.

THE FUTURE OF DISPUTE RESOLUTION

In the last twenty years, there has been a growing dissatisfaction with traditional dispute resolution procedures. Because of the overload of the criminal justice system, judges devote a disproportionate amount of their time to criminal matters. As a result, the federal and state judiciaries have been open to and have actively pursued alternatives designed to lessen their case loads. In an era of decreasing or static judicial budgets, the addition of new judges to handle expanding caseloads is unlikely. Thus, within the constraints of constitutional guarantees (like the right to jury trial) and statutory requirements, the courts and legislatures have searched for alternatives to reduce congestion in the courts.

Federal Procedures

In 1983, the Federal Rules of Civil Procedure were amended to include the possibility of extra-judicial procedures being utilized by the parties to assist in resolving their disputes. Shortly thereafter, certain federal judges, notably Judge Thomas D. Lambros of the Northern District of Ohio, became proponents of ADR and began to urge litigants to utilize alternative procedures. Because of the backlog in the courts at that time, ADR became a way to resolve cases short of the courtroom. Judge Lambros developed a summary jury trial procedure which he urged upon litigants.

Unfortunately, the Sixth Circuit Court of Appeals ruled that the district courts lacked authority to require use of the summary jury trial procedure. Nevertheless, several other courts have disagreed with that result, and, regardless, the courts always have had the power to urge the parties to do something they cannot order them to do.

By 1990, the situation regarding ADR had changed dramatically. In 1990, Congress passed the Civil Justice Reform Act, which mandated that the district courts consider ADR in creating plans to control expenses and delay in litigation. In 1993, the Federal Rules of Civil Procedure were again amended to make it clear that settlement procedures may be utilized if authorized by statute or local rule. This rule change, coupled with the mandate of the Civil Justice Reform Act, has prompted most federal courts to consider adopting local rules regarding ADR. Thus far, mediation seems to be the ADR procedure of choice.

Effective in 1993 and 1994, many of the federal district courts began to mandate some form of ADR as part of the pre-trial process. Often, mediation is the ADR procedure which must be utilized absent the parties' agreement as to some other procedure. The judges are encouraged to be active participants in the decision-making process regarding when to initiate ADR and what procedures are to be utilized. Few cases will be exempted from some form of ADR in the districts which have adopted such plans. In some districts, however, resistance to ADR remains strong. But, given the ground swell support for ADR in other districts and its likely favorable success ratio, it can be anticipated that the use of ADR will spread in the federal courts.

State Procedures

To some degree, state courts tend to follow the federal courts. Many states (with notable exceptions) have adopted some form of the federal rules of civil procedure and evidence. If for no other reason, the adoption of similar rules promotes uniformity.

In the case of ADR, the states seem to have started later but moved faster. Several states currently have mandatory mediation programs, either permanently in place or in pilot stages.

Florida was a leader in the area of mandatory mediation, and mediation has become an integral part of trial practice there. In 1992, North Carolina adopted a pilot mediation program which already has been expanded and likely will go statewide in 1995. Virtually all states now have either experimental or permanent ADR systems in place.

Private Arrangements

The future of private dispute resolution is seemingly unlimited. The fact that alternative procedures are being taught from the grammar school level up portends a major shift in the thinking of our future business leaders. Once the philosophy of dispute avoidance and attenuation is in place, resort to the courtroom will likely become even more undesirable than it is today.

As demand for private services rises, the supply of such services will increase. Already, numerous companies have been established to provide neutral services of all kinds. Perhaps the clearest indicator of the success of ADR is the movement of judges from the bench into private ADR organizations.

In Connecticut, for example, judges now are permitted to act as neutrals, even though they remain on the bench and can have cases referred to them by other judges. This situation seems likely to produce the possibility of conflicts of interest, but it is indicative of the perception of the judiciary of the success of ADR (and, perhaps, the lure of higher compensation). In other states, judges have taken early retirement and moved directly into private judging.

There currently is a demand for retired judges in both binding and non-binding ADR proceedings. It remains to be seen, however, how well judges will adapt to the loss of the power inherent in their previous roles as they transition into new roles as "facilitators. " Already there have been reported instances of former judges "bludgeoning " parties into agreement as part of a mediated settlement process. While such tactics can sometimes produce settlements, it is questionable whether the satisfaction of the parties with the process will be as high and whether the settlements themselves will be as durable. Standards of practice which are directed at these and other problems have been proposed by the American Bar Association.

Kenneth J. Gumbiner received his Bachelor of Science degree in engineering from Purdue University in 1968 and his law degree from the University of Illinois in 1971. He practiced in Chicago between 1971 and 1981 and was a partner in a major Chicago law firm. His focus during that time was complex litigation, frequently in cases which utilized his engineering background. Between 1981 and 1984, Mr. Gumbiner was Group Vice President and General Counsel for three related engineering and construction firms. As such, he oversaw the legal work for all three companies and handled litigation, contract negotiation and technology licensing for various groups within the companies. In 1984, he returned to private practice as a senior partner in the law firm of Foster, Conner, Robson and Gumbiner, which merged with Patton Boggs in early 1988.

Mr. Gumbiner has litigated numerous complex cases in both state and Federal courts throughout the country and has participated as an advocate or neutral in mediations, arbitrations and other forms of alternative dispute resolution. He has been an active member of the American Bar Association Forum Committee on the Construction Industry and the Litigation Section and was the Chair of the Alternative Dispute Resolution Committee 1994 Annual Meeting program. Mr. Gumbiner is also the Secretary of the North Carolina Bar Association Dispute Resolution Section and co-editor of its newsletter. He is licensed to practice in North Carolina, Illinois and Massachusetts.