THE MARYLAND BAR JOURNAL

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Mediation and Dispute Resolution

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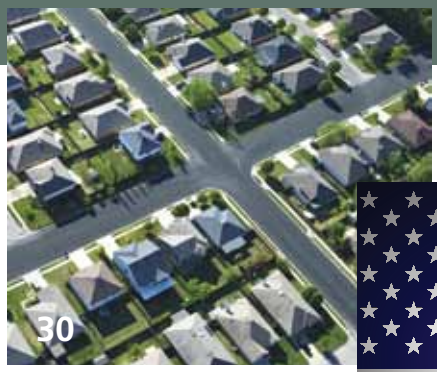

Mediation and Dispute Resolution

Features

Go! **4 Advocacy within the Collaborative Process: A Comparative Case Study**
By Suzy Eckstein and Annemarie Wall

Go! **12 Improving Healthcare Access for People with Disabilities: A Call to Maryland's Leaders**
By Debra T. Berube and Gary C. Norman

Go! **18 Alternative ADR for Construction Disputes: A Litigator's Perspective**
By Kenneth A. Vogel

Go! **24 Resolving Patent Disputes Via Mediation: The Federal Circuit and the ITC Find Success**
By David E. Sosnowski

Go! **30 Building More Peaceful Communities Through Community Mediation**
By Cynthia M. Jurrius

Go! **38 Civil, Collaborative Discourse on Public Policy**
By Craig Tipton Distelhorst

Go! **44 Mediation at Maryland's Court of Special Appeals**
By Mala Malhotra-Ortiz

Go! **48 Why ADR Works**
By Linda Sorg Ostovitz

Go! **54 Adapting Mediation to What Users Want**
By John Bickerman

Departments

Go! **58 Ethics Docket**
Does an Attorney's Agreement that He or She Will Only be Compensated if Fees are Awarded By a Court Under a Fee Shifting Statute Constitute a "Contingent Fee" that Must be in Writing?

Go! **60 Attorney Grievance Commission**
Work For Free?

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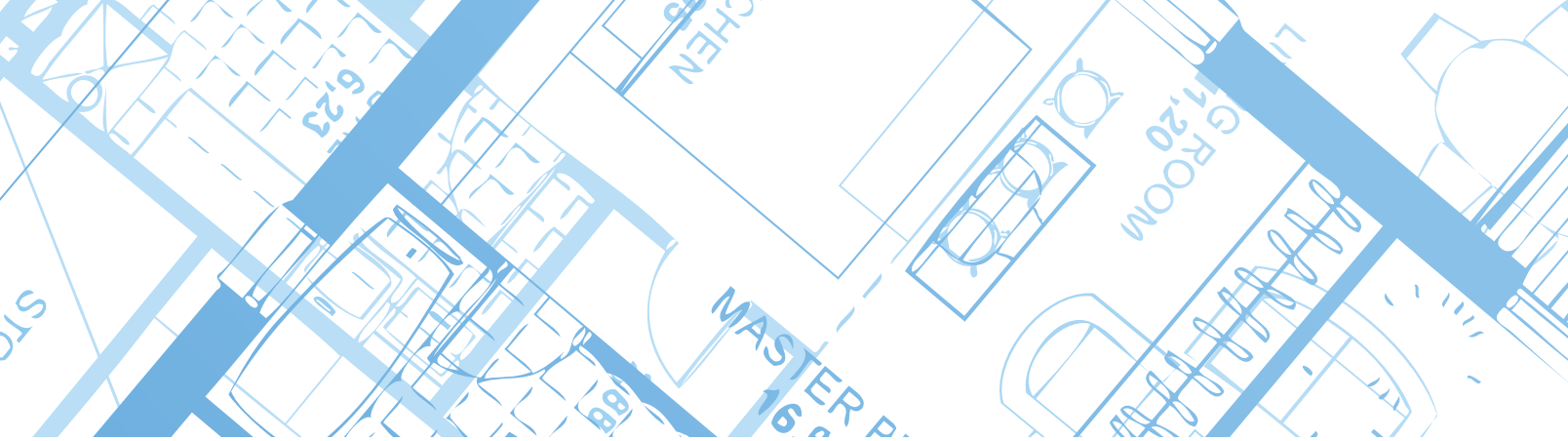
Alternative ADR for Construction Disputes: A Litigator's Perspective

By Kenneth A. Vogel

Alternative Alternative Dispute Resolution? It sounds like a typo! But it's not. No building project ever goes exactly according to plan. There are always change orders. Changes can result from inaccurate, ambiguous, or otherwise incomplete plans and specifications. Changes can result from unforeseen site conditions which are discovered in the field. Unavailable or escalating costs of certain materials can also create changes. An owner's changing his mind about the scope of the work or the sequence of the project can affect the cost and the budget, resulting in change orders. To adjust to this reality, the construction industry was an early adopter of ADR, particularly arbitration. With years of experience, some good and some disappointing, the building industry is adopting new techniques to improve the process. The beauty of using ADR in construction disputes is that ADR can be fashioned to meet the needs of the parties.



Mediation

Mediation is the preferred first step towards issue resolution. The parties have an opportunity to work out their differences themselves with the assistance of a trained mediator. They avoid having a final decision imposed on them. The clients are in control of whether they settle their dispute on mutually acceptable terms.

Mediation is also good for attorney advocates. As a litigator, I don't mind a court battle. But litigation is very expensive. Trial preparation is a "damned if you do and damned if you don't" dilemma for lawyers and their clients. In small and mid-size disputes, clients do not want to pay for the large amount of trial preparation necessary to do a thorough job. Saving clients' money by not taking that last deposition or by not hiring that expert can later become a problem. When I cede to client wishes and do abbreviated discovery, perhaps in the expectation that the case will settle, if it does not settle I regret not having gone full bore on the trial preparation. Similarly, we've all had trials that settle on the day of trial or had trials postponed due to over-scheduled court calendars. A full trial preparation that turns out to be a dry run is expensive and frustrating for the lawyers and the parties.

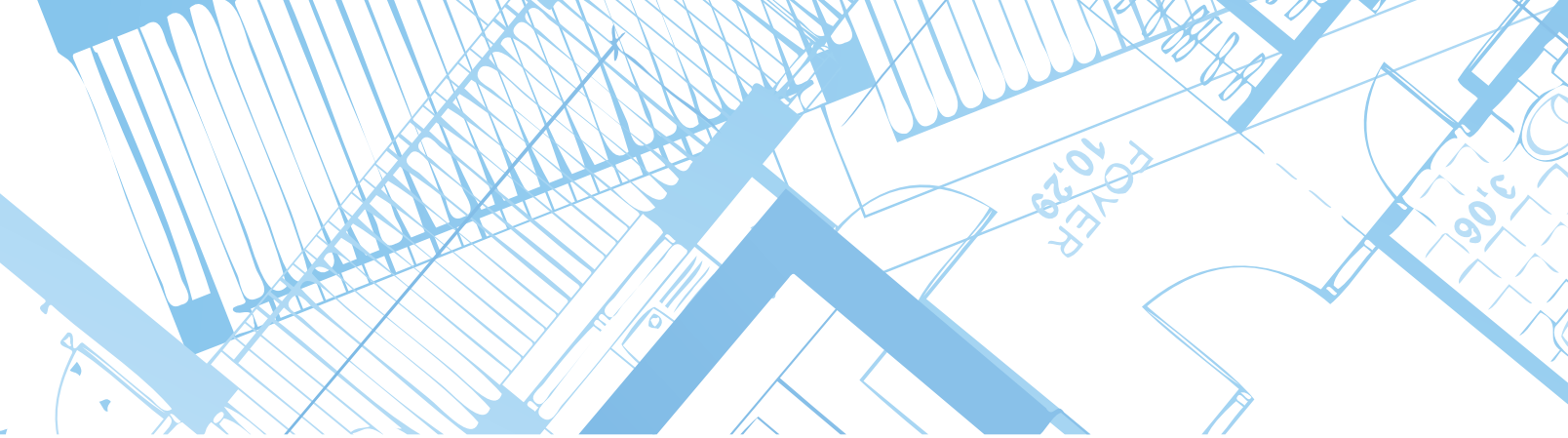
A skilled mediator can help the parties resolve their dispute in a way that the attorneys, negotiating between themselves, cannot. As advocates, we set forth our clients' positions and concede little. We do not want to look weak in front of our clients by being less than zealous in advocating for them. There is nothing worse than a client's wishing that he or she had hired the other side's lawyer. A neutral mediator can act as the voice of reason. He can speak to the attorneys and clients and present offers and negotiations in a way that the lawyers themselves dare not.

Mediation, therefore, provides clients with a way to settle their cases without the considerable expense and risk of litigation. For the attorney, a mediated settlement avoids the risk of an unhappy client, either because of the large attorney fees generated or because of an unsatisfactory trial outcome. Clients rarely remember their instruction to their attorney to pull out all the stops in fighting their case when it comes time for them to pay their bill.

Arbitration

Arbitration involves the parties' selecting an individual to decide their case outside of the court system. The parties choose an arbitrator, or a panel of arbitrators in larger-dollar complex cases, and the arbitrator acts as the judge. The advantages are that the parties can agree on the rules of the game, such as how much discovery to permit; the rules of evidence are generally relaxed during the arbitration hearing; and, most importantly, the parties choose their arbitrator. In court, a judge randomly assigned to hear the case may or may not have subject-matter expertise related to the issues in dispute. And juries are the ultimate wild card. In my opinion, parties should avoid jury demands [Is "demands" the right word choice here?] in complex construction disputes. A judge or jury might not know the difference between a rebar and a Hershey® bar. Words are terms of art. Practices and procedures differ between industries, especially in the roles played by the various players — owners, architects, engineers, general contractors, subcontractors. An arbitrator can be anybody that the parties select, including non-lawyers. For example, if the dispute relates to a structural failure, the parties can select a structural engineer to act as the arbitrator. I caution that the arbitrator should not be selected based solely on subject-matter expertise. There is much more to being as an arbitrator than merely showing up and listening to the parties. He or she should be properly trained as an arbitrator and operate under a set of arbitration rules and procedures. Construction Dispute Resolution Services, LLC, for example, conducts regular training programs for construction-industry professionals and lawyers on how to mediate or arbitrate a case. We also have a complete set of mediation and arbitration rules, forms, and professional standards, as well as a code of ethics. I personally think it makes sense to select a mediator or an arbitrator who belongs to a reputable panel, rather than using a free-lance person who flies by the seat of his or her pants.

However, arbitration has been



a disappointment to many participants. It promises to be quicker and cheaper than litigation. The parties select their hearing date with general confidence that the hearing will really occur on that day. Plus, arbitration awards have finality. As a general rule, arbitration awards cannot be appealed. Arbitration awards are binding. Courts will enforce them. But for many, arbitration falls short of its promises. In court, the government pays for the judge. In arbitration, the parties pay. There is a huge disparity in pricing between arbitration providers, both in administrative fees and in arbitrator costs. Even the most reasonable ADR associations cost the litigants more in fees than they would otherwise pay in court costs.

Arbitration for construction disputes is best used where litigation would provide a risk to an ongoing construction project or where the parties seek relief that the court may not be able to provide.

Ongoing Projects

Assume that a project is under construction. The owner and the general contractor have a disagreement about whether some work is included in the contract or whether it is an extra. Unless the work is done, the project grinds to a halt. The contractor refuses to do the work unless the owner signs an extra-cost change order. The owner feels that the contractor is blackmailing him. The contractor is afraid that he'll do the work and then the owner will refuse to pay for it. But, if the parties agree on arbitration, particularly if it is in their construction contract up front, an arbitrator can do a site visit, meet with the parties and the consultants, and then decide the matter quickly. Dispute resolved; project moves forward.

Alternative ADR means that the parties have flexibility. They can structure their arbitration however they wish. Some possibilities that a court system could never offer are:

Non-binding Arbitration

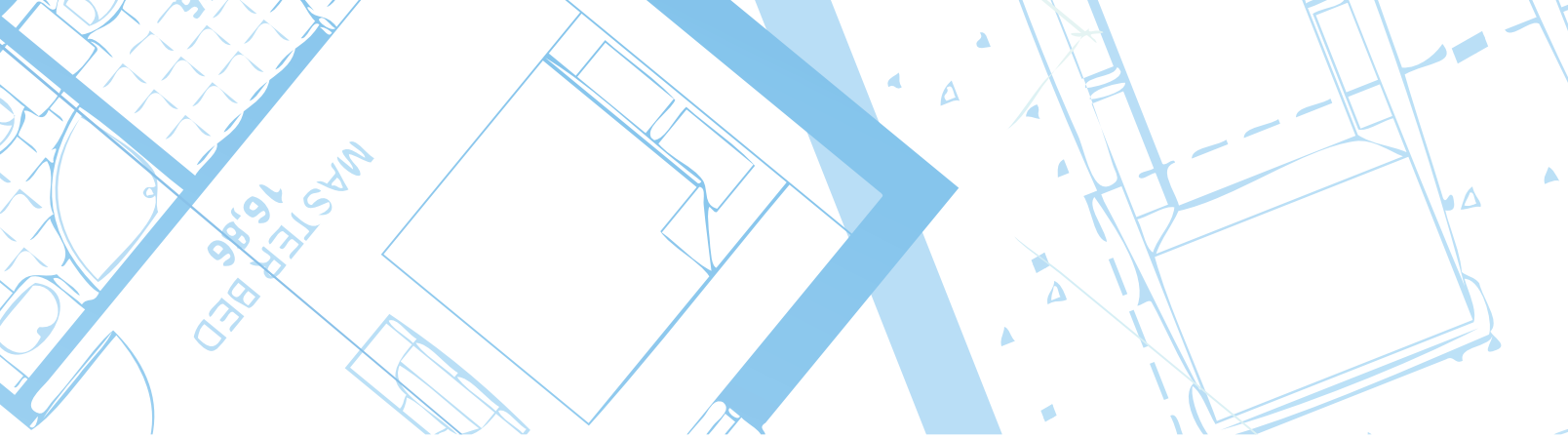
The parties have an abbreviated arbitration hearing. The arbitrator makes a non-binding ruling based on the evidence presented. This process provides a reality check to the litigants, especially the one who might not receive the favorable ruling. A settlement agreement might follow. Or, the parties can agree to treat a non-binding arbitration award as if it is an Offer of Judgment, similar to that found in Federal Rule of Civil Procedure 68(d):

> Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

Under a non-binding arbitration, if the parties agree to use a Rule 68(d) model, either party can refuse to accept the arbitrator's non-binding award. A fee shifting occurs such that the party who refuses might end up paying the other side's attorney fees or other costs if he fares worse under a subsequent binding arbitration (which, of course, would use a different arbitrator).

Hybrid ADR

Hybrid ADR is a blurring of mediation and arbitration. Hybrid ADR is very controversial. Not everyone in the ADR community agrees with it or offers it. Hybrid ADR typically starts out as a mediation. If the parties are able to resolve their dispute though the mediation, their agreement is memorialized in the settlement agreement. If the parties are unable to agree on some or all items, they then move to binding mediation or to Med-Arb. In binding mediation, the parties empower the mediator to decide the remaining issues based on his or her knowledge of the issues developed through the mediation process and perhaps additional discussion between the parties. With Med-Arb, if the parties reach an impasse, the mediation stops. The mediator then becomes an arbitrator. Either an arbitration hearing is held immediately or the parties will reconvene on another scheduled date when the mediator-now-arbitrator will conduct a formal arbitration hearing on the unresolved issues. Using the change-order example in our construction context, perhaps there are five different items for which the contractor is claiming extra-charge change



orders. The owner disputes all five. The parties mediate and agree on three items. Assuming that they have confidence in the mediator, they empower the mediator to decide the other two items. The mediator then switches hats and becomes an arbitrator as to those remaining two items. The advantage? The parties go through one process and at the end resolve all open disputes. A person with whom they have developed some trust, and who has become familiar with the issues, is making the decision. They do not have to start over with somebody else. It is time and cost efficient because, at the conclusion of the process, the parties are done. Disadvantages? When the mediator switches roles and becomes an arbitrator, his or her new role might be confusing to the parties. Also, the parties might have disclosed something in candor to the mediator that they would not have disclosed to an arbitrator.

The parties are not limited to having the mediator act as the arbitrator. The flexibility in the process allows them to select someone else to act as the arbitrator. The parties may opt for binding mediation or Med-Arb either before the mediation begins or at the conclusion of an unsuccessful mediation. By unsuccessful, I mean that not all outstanding issues have been settled.

A topic of controversy in the ADR-practitioner community is whether it is proper for a mediator or an arbitrator to switch roles. Also, once the roles are switched, should it be a one-way street, or can the mediator or arbitrator ever return to his or her original role? I will not argue either point of view here. I am just making the reader aware of the debate in case the reader is given the option of binding mediation or Med-Arb during a mediation session.

Arb-Med is another option. We've all tried cases that have settled while the jury was still deliberating. With Arb-Med, the parties go through the arbitration hearing. They present their case and hear the other side's case. They know their own case's strengths and weaknesses. They then have the option to sit down with a trained mediator, who is not the arbitrator, to try to resolve their dispute. If the parties settle, wonderful! If not, the arbitrator issues his award.

Dispute Review Boards (DRBs) provide an excellent way to keep projects moving. As I wrote at the outset, no building project ever goes exactly according to plan. In recognition of this, and the desire of the parties to keep the project moving rather than suspend work while the ADR process begins and proceeds, a DRB is established at the outset. The mediator or arbitrator meets with the parties on a regularly scheduled basis, or on an as-needed basis, in order to resolve field and contractual disputes and issues on the spot. The ADR specialist is familiar with the project, giving consistency and competence. This also frees the architect from having to be the arbitrator of disputes, as is otherwise the case. The administrative cost to set up a DRB in advance of the construction of a large project is negligible.

Co-Mediation/Arbitration or Multiple Mediation/Arbitration is available under any mediation scenario, including the use of a DRB. Generally used in more sophisticated projects, these options permit the parties to select mediators or arbitrators with different expertise to review their claims. For example, the parties might decide on someone with expertise in engineering or in calculating damages for delay. These options cost the parties more than using a single ADR professional, but the technical qualitative improvement in the process might make their money well spent.

In summary, the building industry has many different options to tailor its ADR process to meet the needs of projects of different size and scope. ADR is at its best when it is flexible in meeting the needs of the parties. The ideal time for contracting parties to consult with an ADR professional is before the first shovel hits the dirt. Before there is a dispute, when the general- and sub-contracts are being negotiated, the owner and general contractor can devise a plan that will anticipate the expected and the unexpected change orders between themselves and their subcontractors and suppliers. They can work out the mechanism for a speedy resolution of claims and disputes such that the construction project will continue to move forward without interruption.

Mr. Vogel is a partner in Metro Legal Solutions and the Maryland and DC State Director for Construction Dispute Resolution Services, LLC. He may be reached

Return to Menu