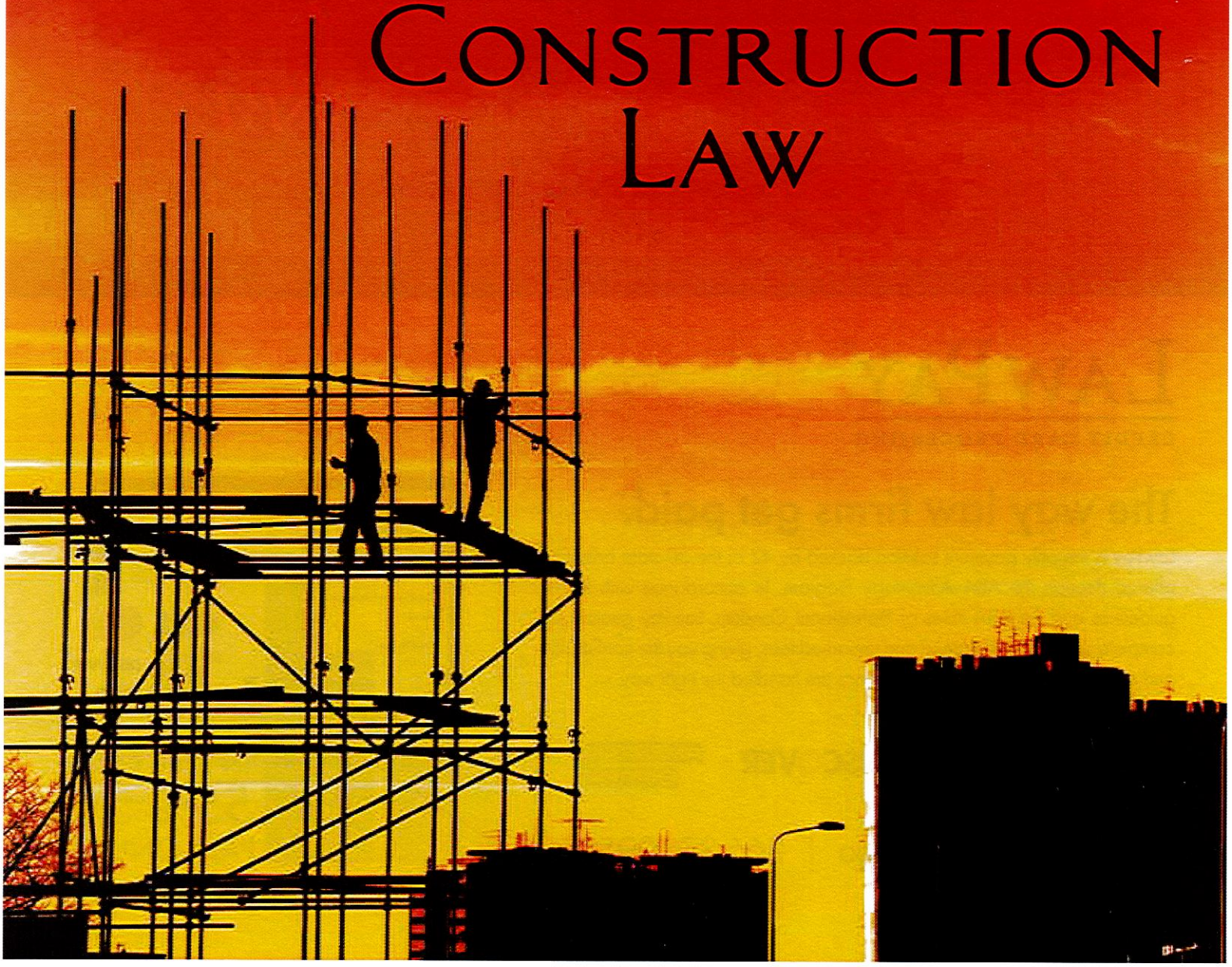
THE MARYLAND BAR JOURNAL

Volume XLIX • Number 1

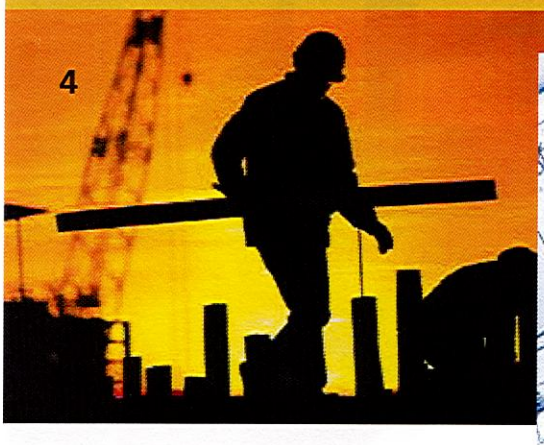
January/February 2016

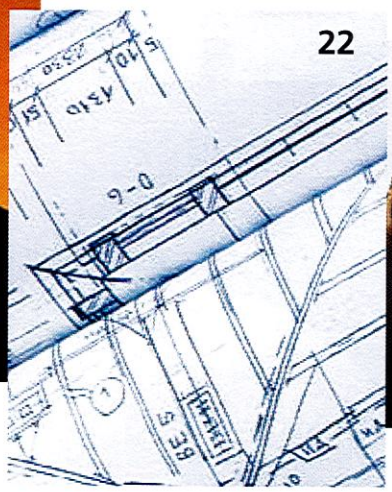
Construction Law



THE MARYLAND BAR JOURNAL

Volume XLIX • Number 1
January/February 2016





"Construction Law"

Features

Departments

Published bimonthly by the Maryland State Bar Association, Inc.
The Maryland Bar Center
520 W. Fayette St.
Baltimore, Maryland 21201
Telephone: (410) 685-7878
(800) 492-1964
Website: www.msba.org
Executive Director: Paul V. Carlin
Editor: W. Patrick Tandy
Assistant to the Editor: Lisa Muscara
Design: Jason Quick
Advertising Sales: Network Media Partners
Subscriptions: MSBA members receive THE MARYLAND BAR JOURNAL as $20 of their dues payment goes to publication. Others, $42 per year.
POSTMASTER: Send address change to THE MARYLAND BAR JOURNAL
520 W. Fayette St.
Baltimore, MD 21201

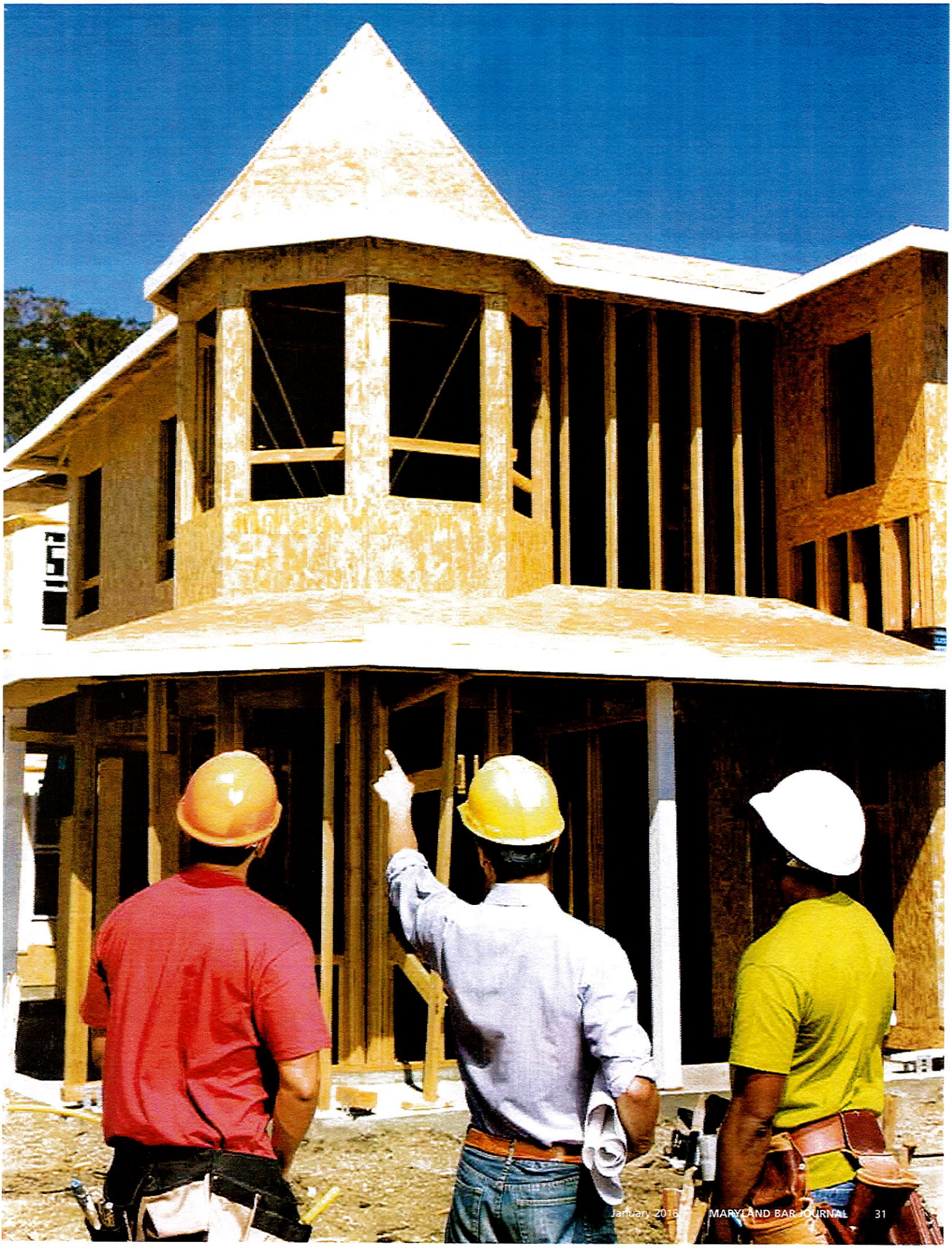
The Maryland Bar Journal welcomes articles on topics of interest to Maryland attorneys. All manuscripts must be original work, submitted for approval by the Special Committee on Editorial Advisory, and must conform to the Journal style guidelines, which are available from the MSBA headquarters. The Special Committee reserves the right to reject any manuscript submitted for publication.

Advertising: Advertising rates will be furnished upon request. All advertising is subject to approval by the Editorial Advisory Board.

Judges Don't Make House Calls

By Kenneth A. Vogel

Judges don't make house calls. Parties come to court. They present their evidence by talking about the issues. The judge does not see, hear or experience first-hand any construction defects or building problems. The judge may not have construction experience or training on the subject matter of the dispute.



Issues in a construction claim often center around poor workmanship, defects, or the completeness of the job. Is the job finished? Are there open punch list items? After the project is finished, is the problem covered by the builder's warranty?

Construction contracts often have mandatory mediation and arbitration requirements. At one time, pre-dispute arbitration clauses were invalid in Maryland. For historical reference, see Maryland Law Review article "Arbitration Under Maryland Law" by James M. Mullin, 2 MD Law Rev. 326 (1938).

Under current Maryland law, except for employee insurance contracts with consumers, mandatory arbitration clauses are enforceable in anticipation of a potential dispute. Courts and Judicial Proceedings Article, §3-206. Parties in a dispute where there is no prior agreement to arbitrate can agree to have their court case referred to arbitration. Maryland Rules Special Proceedings §15-101(a)(2).

A typical arbitration hearing is similar to a court proceeding, but less formal. The parties are sworn. They present their evidence - testimony, documents or pictures. Cross examination is permitted. Rebuttal may be permitted. The rules of evidence are not strictly enforced. There is no jury. Time periods are compressed. Discovery might be more limited than in court. The arbitrator makes his decision and issues a written award.

The arbitration award, the arbitrator's ruling that awards money, is enforceable in court. Md. Code Ann., Cts and Jud. Proc. §3-227. The award is generally not appealable. As far as I know, I have only had one award appealed - to the Montgomery County Circuit Court. The Circuit Court judge issued a written decision affirming my award.

The prevailing party of an arbitration can recover his attorneys' fees in the enforcement of the

award. *Blitz v. Beth Isaac Adas Israel Congregation*, 352 MD 31, 33, 720 A.2d 912, 912-13 (1998), decision clarified (Dec. 14, 1998).

The arbitrator (or arbitration panel if that is what the parties want), makes the decision. A "naked" or unreasoned award simply says that party A wins and party B loses, and how much money is awarded to the winner. A reasoned award has findings of fact, conclusions of law (if appropriate) and an award. Some arbitrators prefer to issue naked awards because they are difficult to second-guess. Nobody knows why the arbitrator found what they found. I disagree with this approach. I prefer to issue reasoned awards. I want the parties to know that I listened to their testimony, that I considered their evidence and that I came to my conclusion in an open, thoughtful and fair manner. I think that reasoned decisions protect the integrity of the process. A naked award without a 100 percent winner or loser gives rise to the suspicion that the arbitrator merely splits the baby, rather than carefully looks at each side's case. I feel that a losing party can better accept their loss if they know the reason for it. This is not without pitfalls. Sometimes I am presented with Motions for Reconsideration. They get the same care and attention as the original matter.

Construction defect claims are unlike other cases. In a typical breach of contract, there is nothing toview. Documents and testimony provide the facts. But if a property owner claims that the windows do not open properly, or that the doors squeak, an arbitrator can go to the building and open the windows. He can listen to the doors. I know. I've done it. It would be unthinkable to expect a judge to visit a job site. The judge therefore is at a disadvantage. He can hear conflicting testimony over sticking windows or squeaky doors, but he does not experience their operation first hand.

The site of the arbitration hearing itself is a different matter. When I do home warranty claims, the arbitration is done on the job site. The issue is not whether or not there is a problem or defect with the house. The arbitrator decides whether or not the problem is covered under the builder's warranty.

According to the MD Office of the Attorney General, Marylanders purchase more than 10,000 new homes each year. The Real Property Article, Title 10, Subtitle 6, requires that builders provide purchasers with new home warranties. The RP statute §10-604 establishes minimum coverage. Builders can always provide their own warranties in excess of the statutory minimum. Typically, the builder provides the first year of coverage "bumper to bumper." Warranty companies state what the builder's repair obligations are for the first year of ownership. They may also backstop the builder on the first year if the builder goes out of business or fails to honor its warranty. Third-party warranties provide limited extended warranties which kick in beginning on the second year. As time progresses, fewer and fewer items are covered by the warranty. Furthermore, the warranty companies have a dollar cap on the amount of claims that they will pay on any one house. The Maryland statute requires a five-year warranty. Most builders fulfill their obligation to the home buyer by purchasing a third-party new home warranty from a company such as 2-10 HBW, RWC Residential Warranty Company or American eBuilder. These third-parties provide declining coverage for up to 10 years. The warranty is transferrable to subsequent buyers.

When a warranty claim comes in, the claims procedure and the dispute resolution process is exclusively dictated by the terms of the policy. The homeowner submits his list of items to be arbitrated in advance. The builder may submit documents as well, but is not required to do so. The arbitration is held at the home. An arbitrator such as myself goes to the home and meets with the homeowner and a representative from the builder. If the parties wish experts to participate, the experts appear at the home at that time. I then go through the arbitration request and look at each item. The builder and any experts give their opinions or response.

Private ADR providers have rules of mediation, rules of arbitration and codes of ethics. Lawyers drafting contracts with ADR provisions should investigate the designated ADR provider's rules and cost before identifying a specific ADR provider in their contract. There is a huge difference in costs, such as administration fees and professional fees, between ADR companies. I encourage parties to ask questions and shop around.

I like arbitrating through an administrator. It's less money for me, but they handle the paperwork, scheduling and collect the fees. Most importantly, it spares me having to hear about the dispute up front. When a potential client initially contacts me, they want to tell me their side of the story. This makes me

uncomfortable. I do not want to hear one side's ex parte advocacy about a case I may then arbitrate. I also sense that they might want to test the waters with me and gauge my sympathy to their cause before recommending me to the opposing party. Letting them tell their tales of woe to the ADR administrator keeps my virtue intact.

Parties with cases heard by a provider should review the ADR company's rules and procedures before the arbitration hearing. If the mediator or arbitrator widely varies from those rules, call it to his or her attention. The American Arbitration Association has a distinct set of rules and procedures, just revised as of July 1, 2015. JAMS has its own rules. Construction Dispute Resolution Services has seven different sets of rules and procedures, depending on the type of dispute. Do not accept an ADR provider who merely "wings it."

I come to a job site arbitration with a camera, a tape measure, a level and, most importantly, an open mind. After the arbitration hearing is over, I write my decision. Decisions on homeowner warranty programs are black and white. Either an alleged problem is covered by the warranty, or it is not covered. The homeowner might have a legitimate problem with the home, but it might not be covered. For example, at one property I saw a thin crack that extended through the foundation wall. Standing in the basement, one could see light peering through the crack. The warranty terms covered catastrophic failures of load-bearing elements of the home which would cause the home to become unsafe, unsanitary or otherwise unliveable. The builder had a structural engineer present who opined that the crack was caused by normal settlement. He further stated that the crack was not catastrophic and did not cause the house to become unliveable. The homeowner said little in rebuttal and had no expert testify to the contrary. On that item I found for the warranty company as a non-covered item. The existence of a problem does not make for a covered claim.

No home is perfect. There are established performance standards in the construction industry. Everything about a house is described and defined. For example, a drywall crack must occur within the first year and must exceed 1/16" to be covered. A basement floor crack up to 1/4" inch in width or up to 3/16" in vertical displacement is considered normal. Cracks in the patio slab and sidewalks have no warranty company coverage.

Some items are difficult to see even with a picture. Only a site visit can reveal them. Nail pops do not appear well in photos unless they break through the paint. Ambient lighting plays a role. Shades might need to be opened or closed in order for the problem to reveal itself.

Job site visits are not always necessary. If subsequent repairs were done, perhaps by another contractor, there is nothing to see. There is no reason to visit the job site. It may also be that one party, normally the builder, objects to an arbitration held at the home of the complaining homeowner. No lawyer wants to give the other side a home field advantage. Home warranty arbitrations are informal and are conducted at the house. More complex cases have an arbitration at a mutually agreeable location outside the job site. This might be at the office of one of the litigant's attorneys, at the arbitrator's office or at a neutral location.

When I have an arbitration that will not be solely based on a site visit, but rather follows with a formal session, I do not hold the site visit on the way to the arbitration. It is too difficult to plan the day. I also find the transition between a walk around visit and a hearing to be awkward if done right away. I need to process what I have seen. The parties need to prepare their cases based on what happens at the site visit.

Site visits should never be ex parte. Both sides must have representatives present to observe and participate. I am careful to never spend time with one side or the other so as to avoid any perception of bias. If I arrive before both sides are there, I will wait outside until all parties are present. It's difficult to keep parties from touting their own good faith and vilifying the other side. I politely listen and discount to zero their extraneous advocacy. I am cordial, but professional. Objectivity must be maintained. I will not hang out afterwards and kibitz.

Parties may submit pre-arbitration statements. They are helpful in larger cases, unnecessary in smaller ones. A pre-arbitration statement outlines the issues, identifies the witnesses and summarizes the arguments. Preparing them costs the parties time and money. Unless they add value, they should not be done.

I require an exchange of documents intended to be introduced as evidence before the hearing. This gives some discovery, and keeps the hearing moving smoothly. Rarely do parties submit post-hearing briefs. I

have never asked a party to submit a pro-forma arbitration award.

For an arbitration hearing, I find that a conference room works well. It is comfortable and less formal than a courtroom. The parties sit around a conference table with the arbitrator at the head of the table. The parties and their counsel sit on opposite sides of the table. Counsel generally prefer to sit next to the arbitrator on either side, but that is by their choice.

Arbitrations are meant to bring speedy resolution, finality due to the inability to appeal and cost efficiency. Arbitrations are not part of the public record. A company's business reputation is preserved. Cost considerations to the litigants are a large factor for me. Going to court means that litigants pay a filing fee and little else. On the other hand, the ADR company charges its administrative fees, and the arbitrator must be paid. If the parties do not save time or money compared to going to court, there may be not much reason to prefer arbitration. The added value that an arbitrator brings to the table is subject matter expertise and a willingness to conduct a site visit.

A construction contract may or may not require ADR. By unanimous consent, parties without an ADR provision in their contract can elect mediation or arbitration after a dispute arises. They can mutually agree to opt out of ADR if both sides wish to go to court. Even the ADR provider is subject to change by the parties' consent. Home warranty companies with standard contracts will not modify their procedures. But in two party disputes - owner vs. general contractor, for example, the parties are free to select whichever forum and to change ADR service providers if they wish.

Judges don't make house calls. Arbitrators do. When a client presents himself with a construction dispute, discuss with your client whether his case might be better understood by a fact finder who knows construction, and who is willing to look first-hand at the alleged defects. Arbitration might also get him a quicker and more cost effective resolution.

Mr. Vogel practices law in Maryland and Washington, D.C. and also holds real estate broker's licenses in Maryland, D.C., and Virginia. He may be reached at KAVogel@MetroLegalSolutions.com.