



American Society of  
Professional Estimators

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92:38

August 13, 1992



Mr. Ralph J. Stephenson, PE, PC  
323 Hiawatha Drive  
Mt. Pleasant, MI 48858

Dear Ralph:

Confirming your attendance at our October 14, 1992 meeting for dinner and presentation to the American Society of Professional Estimators. Our meeting will be at Duba's Restaurant, 420 E. Beltline N.E., Grand Rapids at 7:00 p.m. Your presentation on Alternative Dispute Resolution (ADR) should be most interesting to our members.

I would be happy to run off any handouts you wish to distribute and can provide AV Equipment, if you let me know. You are most welcome to bring your wife along for the evening, as our guest, if you wish.

Thank you for offering to speak to our Association again. We are looking forward to your presentation.

Sincerely,

ASPE

Mark Ryan  
Vice President

Jim Buikema  
Executive Director

Be there  
6:15



III. **General thoughts about adr**

A. **√10 From CPR DART publication - Preventing & Resolving Construction Disputes - CPR DART - Center for Public Resources, Dispute avoidance and resolution.**

1. **√Subjects of interest in dispute resolution - DART**

- a) Dispute resolution
- b) Jobsite dispute resolution
- c) Non-binding dispute resolution
- d) Binding dispute resolution
- e) Risk allocation
- f) Incentives & bonuses
- g) Partnering

2. **√“The earlier in the course of the project the participants employ dispute resolution techniques, the more beneficial those techniques will be to the success of the project.”**

3. **√ADR guidelines for a successful construction project**

- a) Even when problems turn into disputes, litigation should not be the method used to resolve them.
- b) If participants commit in advance to use dispute resolution techniques when problems arise, they create an atmosphere conducive to solving problems.
- c) Many problem-prevention and litigation avoidance approaches exist: these techniques are most effective when applied early in the project.
- d) Establishing a cooperative project environment prevents disputes.
- e) Job site dispute resolution techniques help to dispose of problems as they arise.
- f) Mediation or another non-binding dispute resolution technique should be attempted before resorting to conventional arbitration.
- g) Conventional arbitration proceedings should be conducted expertly and efficiently.

B. **√09 What value is added to a project by using alternative dispute resolution methods? (note: the comparisons are against conventional methods)**

- 1. **Lowered cost of resolution.**
- 2. **Increased assurance of expert technical judgements being used.**
- 3. **Lessened time to resolve.**
- 4. **Those involved closer to the resolution process.**
- 5. **Those involved closer have heavier influence on decisions.**
- 6. **Lessened probability of appeal.**

7. **Greater privacy in the resolution process.**
8. **Timely discussion and resolution of problems often increases probability of better (define?) decisions and resolutions.**
- C. **√09 Why is alternative dispute resolution needed?**
  1. **The legal process has gotten out of the control of those affected.**
- D. **√09 What are the various methods of resolving disputes?**
  1. **Conventional**
    - a) **Litigation**
      - (1) **Plusses**
        - (a) Legal protection given by law and judge.
        - (b) Process fairly well set by precedent and rules.
      - (2) **Minuses**
        - (a) Trial schedules are set at the whim of the court.
        - (b) Difficult to effectively prove technically based damages to laymen.
        - (c) Judge's technical qualifications often inadequate decide construction claims.
        - (d) Process is formal, long, and composed of many redundant steps.
        - (e) Process is overly dependent on unrelated qualities and abilities of the attorneys.
        - (f) Change of legal counsel is difficult.
        - (g) Work product is often not protected.
        - (h) Too many legal authorities involved - blur basic understanding of applicable law.
        - (i) Legal obligation hierarchy is antithetical to that of the design and construction professional.
      - (3) **Process - see ho 320**
    - b) **Arbitration**
      - (1) **Plusses**
        - (a) Lets industry practitioners decide disputes
        - (b) Eliminates needless formalities of trials
        - (c) Minimizes bulky evidentiary needs
        - (d) Eliminates extensive pretrial discovery
        - (e) Less expensive than litigation
        - (f) Less time consuming than litigation
        - (g) More private than litigation
      - (2) **Minuses**
        - (a) Increasing influx of attorneys as arbitrators - becomes a courtroom without a judge.

- (b) For large claims approaches litigation in all characteristics while retaining the minuses.
- (c) Few, if any legal safeguards
- (d) Lack of appeal opportunity
- (e) Increasingly complex arbitration rules
- (f) High cost of administrative services of AAA
- (3) Process
- c) Mediation
  - An informal process where neutral parties assist the parties to settle the case. See glossary for additional information.
  - (1) Plusses
    - (a) Lets industry practitioners decide disputes
    - (b) Eliminates needless formalities of trials
    - (c) Minimizes bulky evidentiary needs
    - (d) Eliminates extensive pretrial discovery
    - (e) Less expensive than litigation or mediation
    - (f) Less time consuming than litigation or mediation
    - (g) More private than litigation
  - (2) Minuses
    - (a) Demands high quality people for mediators - not readily available
      - i) Qualities needed
        - (1) Management abilities
        - (2) Personal discretion
        - (3) Listening abilities
        - (4) Capacity to understand complex issues
        - (5) Patience
        - (6) Creativity
  - (3) Process

## 2. **Alternative**

ADR tends to bring the managers and executives into early dispute resolution in the interest of those adversely affected. ADR empowers them to have substantial input to dispute resolution decision making.

### a) **Minitrials**

A private process where opposing parties present condensed versions of their cases both to designated executive representatives, and to an impartial advisor, and then negotiate.

The executives hear both sides, thus gaining a first hand perspective of

the parties positions. The impartial advisor then points out possible outcomes and helps the parties to settle, if possible.

- (1) Plusses
- (2) Minuses
- (3) Process

b) Dispute resolution board

A method of dispute resolution where project participants establish procedures, by contract, to proactively settle disputes as they arise during the course of the project.

drb's seek to anticipate problems and get the parties to resolve them before the problems harden into formal claims.

(1) General

- (a) Usually require the parties to come before a board to discuss on-going problems, explore ways to solve the problems and resolve disputes.
- (b) Have a long history of application on heavy civil projects.
- (c) Being used often now in building projects.

- (2) Plusses
- (3) Minuses
- (4) Process

c) Administrative resolution

A resolution of a dispute through discussion between the disputing parties and agreement upon a mutually satisfactory settlement.

- (1) Plusses
- (2) Minuses
- (3) Process

d) Retired judges system

**E. 09 Issue resolution in the partnering process relative to adr - from VAMC - Policy statement & Detroit evaluation meeting - 10/28/92**

**1. Policy**

"It is the goal of the participants of this project to first and foremost avoid unnecessary conflict. To achieve this, we will maintain open lines of communications as stated in the Partnering Charter. Further, it is our goal to resolve an issue at the level at which it arose. If this is not possible the issue will be referred promptly to the next highest level for resolution.

In all cases, individuals who are involved in a difference should be businesslike and not resort to personal attack. The principles outlined in the Partnering Charter objectives should be followed at all times in resolving

differences.

Upon request, site meetings will be used to discuss any unresolved issue in an attempt to reach resolution. Any issue presented should be clearly defined and alternative solutions considered. The resolution process is to work through open communication and looking at the other side's point of view. In addition, issues are to be kept in the forefront to ensure resolution in a timely manner. A log of unresolved issues will be maintained from meeting to meeting.

If resolution cannot be reached at the jobsite, the principals of the involved firms or agencies should attempt to reach resolution through informal discussion before the formal process outlined in the contract documents is used.

In seeking resolution to an issue, involved parties will attempt to:

- Thoroughly understand the issue.
- Maintain empathy for the other point of view.
- Communicated thoughts openly and clearly.
- Clearly document resolution."

**2. Methodology - restatement of policy provisions**

- a) Goal - to encourage and provide a forum for resolution of issues at the lowest possible level, but to provide a mechanism to elevate the issue if needed
- b) If resolution is not achieved at the lowest level forum, the principals in the firm in conflict will attempt to reach resolution through informal discussion.

**F. √08 Where does adr fit in the hierarchy of management?**

1. **√Focuses upon ways to get the parties to settle, rather than have decisions imposed on them as in arbitration and litigation.**

**G. √08 Might be able to work the subject into a project delivery format.**

**H. √07 Why should you as a planning, design and construction professional be concerned about disputes and their resolution?**

**I. √07 What are the obligation priorities of the technical professions?**

**J. √07 What are the obligation priorities of the legal professional?**

**K. 07 Reasons for adr - from MDC Advisor - author Mark D Cipollini, P. E. - MDC Vice President**

1. **Economy - To minimize prohibitive litigation costs for attorneys, experts, reproductions, court expenses, etc.**

2. **Expediency - To resolve disputes more quickly**
3. **Privacy - To avoid dragging disputes into the public arena.**
4. **Control - To let the parties settle the disputes rather than an unfavorable award being imposed by the court.**
5. **Relations - To allow the parties to continue business despite a dispute.**
- L. **√06 The role of habit in conflict.**
- M. **√06 History of conflict in the planning, design, and construction professions.**
- N. **√05 Might review some case studies of rjs experience as applicable to adr.**
  1. **B & B stair well - expert - Federal and military litigation**
  2. **THI Princeton precipitator - expert - bench trial**
  3. **University of Michigan UCEN - mediator - informal mediation**
  4. **University of Michigan Dearborn gym - expert - formal arbitration**
  5. **City of Flint DPW - arbitrator - formal arbitration**
  6. **Stouffers Northland precast - arbitrator - formal arbitration**
  7. **Ann Arbor Waste Treatment Plant - witness - formal arbitration**
  8. **B & B Our Lady of the Lakes dismissal - expert - jury trial**
- O. **√05 What are the conventional methods of resolving disputes?**
- P. **√04 Definition of destructive conflict.**
- Q. **√03 What is the attitude of the regulatory agencies toward adr?**
- R. **√03 Examples of destructive conflict.**