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Interview with Ralph Stephenson, PE
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re. ADR

Ralph: Any kind of dispute resolution in our business has to include the generic construction group--the programmers/planners, the design team, the constructors, and the owner. If any one of these basic participants are not present, it weakens the entire structure of any kind of dispute resolution.

The secret is to make sure--as I'm writing about right now in my book draft--that people who are in managerial positions understand and be able to perceive the methods by which we can break down the barriers between the various disciplines. Because these barriers have been built up for years and years. It used to be it was fairly easy to break them down because the people were rather reasonable about doing that.

In other words, the structural department head...although he might not care much for the architectural production department head...at least would work with him professionally. We see more and more drifting away from the ability to work together today, for a lot of reasons. So that's one of the most critical things, to get everyone agreeing on the groups that are necessary to alternative dispute resolution.

So I prefer to say that just basically we need construction professionals to be able to use the techniques. That's why the specifications is so acute. We can't just specify that the contractor will use ADR techniques or will use standing neutrals. Because if it's specified as a contractual arrangement between the contractor and the owner, but not a part of the owners contract with the architect, then you've got a party missing in the ADR arrangement.

I'm not even sure that documentation or requirements of the specifications are the answer to alternative dispute resolution--Ron Housmann feels very strongly that they are and as you've probably heard from him, they're writing that into their (WA) contracts right now. So Ron is probably a good source for that. Jerry Shay is on the document committee for the AIA, and he's doing some work on that too.

So my experience with documentation and inclusion in working drawings and contract documents is not necessarily limited, but it perhaps doesn't expand out as far as their's does. I've written a sample spec that I recommend to my owner/clients for inclusion in their subcontracts or in their working drawings, which requires partnering or which states the the owner desires to do partnering. But if you make it a forced part of the contract, you begin to nibble away at the real reason for having partnering and having ADR.

And that's question we get in partnering session, they say

I thought that partnering was supposed to be a voluntary thing where people were allowed to participate and were encouraged without being required to do this by specifications.

Q: A gentleman's agreement, rather than a document?

Ralph: Yeah. And I don't think we need a lot of documentation relative to forcing ADR or partnering on a project. I think that fundamentally the clout the owner normally enjoys is adequate. But that is the one thing we have to remember is that the owner's participation is absolutely essential to successful alternative dispute resolution. I don't think ADR can succeed on any project unless we have the owner involved.

ADR can succeed on sections of projects, if for instance, let's say I'm a junior project manager for Shmina (a general contractor) and let's suppose the job is a $20 million job and there are two other junior project managers and one project manager. And I've been assigned the responsibility of getting the piling in and getting the substructure built. I can conduct within my responsibility patterns work that deals with resolution of disputes that use alternative techniques and I could probably be fairly successful with it. But if I cross a boundry into another junior project manager's area or into the project manager's area, and they don't agree with me, then it's just a wasted motion.

So there has to be some universal agreement that generally

is the handshake or the gentlemen's agreement or the informal work. As I put it in my orientation on charter meetings, I merely tell the people that what we're writing is an ediquitte book for behavior in non-contract construction and design matters. And that's exactly what it is.

Q: It doesn't perse have any teeth in it to force people to do something they are against doing?

Ralph: If I'm an owner or a contractor or an architect or an engineer or a planner or a programmer and I have to force a member of the project team--the glass and glazing contractor or the ceramic tile contractor or whoever it might be--to participate by virtue of a contract requirement, it to a large extent reduces the validity of the concept. I would prefer to do that informally, if at all possible.

The owner can do that in a simple letter to the contractors as the come on board by saying it is our intent to use alternative dispute resolution techniques and partnering techniques to the greatest extent possible on this job, and we would very much appreciate your participation and cooperation with the architect/engineer and the general contractor or whoever the prime contractors are, in making our efforts in this matter effective. A letter like that from a chief operating executive from Ford Motor or GM or wherever, you don't need any contract (provision for ADR).

Q: Because the boss has spoken?

Ralph: That's right. And that's enough of an incentive in most cases. And the people feel much freer to speak up when they don't necessarily agree in the process.

So I feel that ADR processes are essential. We are really faced with a matter of having to do them. I do not think that litigation can be used to solve the problems of conflict in our industry. It has proven to be totally unfair in almost everyplace where it's being used. Litigation where you have a jury trial becomes a matter of emotional warfare. So the cases are not tried on their merits, they're tried on the emotional and moving abilities of the people who present facts, and in many cases distort them.

Q: It's a legal way of having a shoot-out.

Ralph: And the person who is the best actor usually gains the favored prosition. So the jury is faced with evaluating the facts, which they normally are not capable of doing, or a judge is not capable of doing that either, although a bench trial is superior to a jury trial, in my opinion.

In dispute resolution I break the whole thing into two sectors. The left hand sector is what I call non-binding resolution techniques, and right hand where we cross over a dividing line are the binding resolution methods. Here we have binding arbitration or we have litigation, which is either a bench trial or a jury trial. The one that is the absolute worst in construction matters is the jury trial. The next

least desirable is binding arbitration. If we're going to have binding resolution, the bench trial offers best potential for fair decision, because judges still by far and away make an effort to be fair and they are trained to see through smoke screens that a normal jury would fall hook-line-and-sinker for.

Q: A bench trial might be better than a jury trial or binding arbitration?

Ralph: I don't like binding arbitration, but fundimentally I consider binding arbitration is a trial in a courtroom, without a judge. Because most of the arbitrators today are attornys, and they are a pain in the neck. And those who are not attorneys try to be attorneys.

I've been working in arbitration cases since about 1967. When I compare the arbitration we were doing back then with what were doing today, today is far, far worse. And there are three states where binding arbitration is not binding if it deals with state projects. That makes a very treacherous situation, because you may go through what you consider to be binding arbitration and get a decision, and later find out the state legislature will not pay you the judgment. And they have the right to refuse that. I think West Virginia is one of those state and Texas is another and then there is another one.

So basically I say ADR in construction and in design too is imperative if were going to get away from the unfairness of our current legal system in the way that it works. Anything on

the right side of line, before you go to binding settlements where the worst is the jury trial, then next worst is binding arbitration, and next worst is the bench trial.

Back on the left side, you have the non-binding settlements. People in our business are still pretty conscientious, they still have integrity, they still feel that it's important that they abide by their word. I haven't too much of a diminishing of that.

It's awfully hard to be dishonest in construction relative to construction itself. You can be dishonest as a businessman or woman, but the seen things are hard to be dishonest about. And that's what we mostly argue about are the things that can be seen, the things that are visible--the change orders, the defective construction, and stuff like that.

Q: Failure to communicate would be one of the unseen things, wouldn't it?

Ralph: That's right. In my work I've done 15 partnering charters right now and I've kept a record of all the things that people do to others that damage them and all of the things that can be used to correct these--that represents a book that's about 175 pages long. Almost totally do they deal with those things that could be easily corrected if we really put our mind to it. Communications is one of them. It isn't a panasea.

Q: But it is a beginning point at which partnering begins

to work by solving problems at the lowest possible level, isn't it?

Ralph: ADR general does that, although that isn't always the best place to solve them.

Another thing is today in our business we've got a syndrome called the need to know. I've been teaching and preaching a lot lately on the fact that there's too much information being given to too many people who really don't need it. Therefore you cannot separate out what's important from what isn't important. So I have been preaching very heavily that a good manager should keep his staff informed on a need to know basis, only.

I've seen too many companies in recent years run their overhead up by involving everybody in everything. People get confused and they also get very resentful. A good friend of mine in Detroit used to always bring everyone into every meeting on every project. I told him repeatedly that he was merely increasing his overhead, because he was forcing people in project Z to sit through a meeting in which their project A was meanwhile going to hell in a handbasket.

Need to know is important and I've been stressing that in the communications discussions that we have in our partnering meetings.

Q: Before the contract is signed how can members of the project team best prepare to resolve desputes?

Ralph: The best thing the team can do is to become very well acquainted with the (ADR) techniques that are available. And there are a lot of resources on this. I have one and half boxes of information that deal with the varous techniques that are possible to use. But we have to be very careful to remember that the basic technique is very simple, as you said a few minutes ago, you settle your disputes as quickly as possible at the orginating level, if at all possible. And you make sure the people involved understand clearly what the resolution was. And then you go on to something else. Now that's the essential ingredient of every one of the formal techniques that we use in ADR.

A strong acquantenceship with ADR is important. And I think we can do that by teaching ADR in our colleges. I believe that's where it starts. If we don't teach the people who are being educated in the construction disciplines--engineering, architecture and others--then they are going to find it increasingly difficult to learn about it when they get out in the field. It's one of those overhead items that their bosses aren't going to tolerate. So we need to teach it back in the colleges. I'm going to try to make the book I'm writing not only a manual to work from in the business world, but also a teaching book.

The example of this is (please paraphrase) the project was a large highway project (change that to something else) and a

new kind of project for this firm, they had never done this kind of work before although they had participated in these projects.

So we did the network model, and it was a good model and the job is in construction now, in fact. Then they mentioned having a partnering session, so I asked if I could be invited to the session. My client paid my tuition into the session.

What happened it was a team building meeting, it was not a partnering meeting or an ADR meeting. As I told the M-Dot people after that, what they were doing was teaching team building and calling it partnering. It is not partnering. It hasn't any resemblance to partnering, nor to ADR. Team building is just like total quality management, it's something absolutely and totally different than ADR or partnering.

I've since been called several times M-Dot to see if I could reorient their thinking because they have gotten off track in thinking that team building is alternative dispute resolution. That's a very serious error.

Team building is part of ADR, just like total quality management may be a part of partnering and ADR, but it is not the element. Team building and TQM are basically internal disciplines. In the construction industry the quality that a contractor builds into a job is specified. You can't build more or less quality in a project than what is specified and what you proposed on. It's sheer folly to build a job that has

twice the quality of materials than what's specified. All you do is go bankrupt. So you build the quality specified. That's the external TQM. Internally you can improve your methodologies and your practices with good TQM. That's only where it affects your own overhead and your own operations. The same thing with team building, I consider that to be an internal program.

Externally you can build teams, but that's a temporary thing and is generated by the respect you maintain as an architect, engineer, owner or a planner.

So it's important that the engineer, architect or owner paints a picture of ADR to his project team. Here the whole process pivots and revolves around the owner.

Regarding the engineering neutrals, we have just finished a series of four 4-hour orientation sessions for MSPE and out of that I think we have 21 standing neutrals who attended eight hours of education and training. I conducted those courses myself. (Administration of the program is being handled by Jim Cole at MSPE headquarters in Lansing. He will send them resumes of people who are qualified to handle the problem, as described.) This to be a volunteer effort. We're expected to donate two days a year to working as standing neutrals.

Q: You have already performed in that capacity?

Ralph: Yeah I have acted as a standing neutral for quite a while. It usually is somethings that can be performed fairly

quickly.

For example you have a steel fabricator, an erector, a general contractor, an architect, and an owner...and the erector is burning holes in the steel and he has run up a cost of $35,000 by doing this. Whereas the fabricator, the architect/engineer, and the contractor say that the erector merely damaged the structure by burning the holes because he wasn't supposed to. So you've got a problem. Who's going to pay the elector and should he be paid and if he doesn't get paid what's going to happen to the job.

That's a fairly nasty kind of a problem, but it's one you can't afford to let go into court. Because it would cost you an arm and a leg. By the time you got through with something like that, you'd be running up a bill of $600,000 to $700,000.

Q: How is a problem like that resolved?

Ralph: In that case, the way I resolved it is that I listened to all of the six people involved talk. And finally after about three hours of talking, they solved the problem themselves.

The way I started out is by saying if I throw $35,000 on the table, and that's a debt that you all own me--you have to pay me that back by the end of this meeting--how would divide that $35,000 up. First of all we know you will pay it to the person that was apparently damaged. Now how are you going to assign the percentages of how much each of the others of you

have to throw in the kitty, to be fair about it? I said, "Do you want me to do that?" They said, "No, we know." And I said, "Well, what's the problem?" They agreed, "I guess their isn't any." That took about three hours to get to that recognition. By that time they realized the folly of caring this on through. I told them "You can either spend $35,000 now and agree among you who's going to pay for it, or you argue about it and try to reduce it from $35,000 to $30,000 or whatever it might be, or you spend $600,000 and go to court and have it resolved two years from now."

Most of the lawsuits and binding arbitration I've seen, start when someone gets angry and makes a foolish statement. Like "I'll see you in court!" or "My attorneys will call you!" or some dumb thing like that. Once you go that far, then you're in trouble. So the standing neutral helps pull the teeth on that situation by sitting and listening. Usually it ends up being that you offer your opinion as to what will happen if we don't resolve the matter here in this room.

We have to keep the standing neutral concept outside the attorney's perview.

Q: Is there going to be any inclusion in the AGC or AIA contracts of ADR or the standing neutral clause?

Ralph: I think it's bound to come. Where it has been included it works very well. I'd rather see it come about by way of a mutual understanding rather than by a contract

requirement. But worked where it was a contract requirement at the Minneapolis airport. I wrote the spec section that the architect/engineer and owner put in on the second expansion phase. It defined partnering on the job and that all the contractors were required to allocate a specified number of days for partnering and include that with the cost of their proposal, and they and their key staff members would be expected to attend the meetings.

Q: A handshake that genuine is good, but a forced handshake is of very little value?

Ralph: That's right. It may help because in the forcing it might bring someone to the conclusion and the understanding that maybe ADR and partnering is something that's good. But it's a shame that we have to bring it about that way, and I would prefer not to. But on the other hand, if it gets people there who wouldn't normally come, then fine.

You'd be surprized, Dewey, the peer pressure is enormous. I had a fellow in my class at the University of Wisconsin last November, who told a story about an electrical contractor who did not attend a partnering meeting. And he forbid his superintendent from going to the meeting. So anyway the partnering meeting was held and the charter was written and all the people on the job signed the charter with the exception of the electrical contractor. A week or so later the electrical contractor came into the general's office and the

superintendent said he had to find some way by which he could become part of that charter. He said that he was exiled all of sudden, no one on the job would even talk to him. He asked if there wasn't someway he could get his signature on the charter. But there wasn't. Once it's signed, it's signed. But what they did do is that the general contractor said in about three months we're going to open the charter up and review it once again and we will ask for any changes we feel are necessary and at the point in time you'll have a chance to sign it, if you want to. That happened and it turned the whole thing around for that electrical contractor. This shows the tremendous amount of peer pressure on a job. This was related to me by an owner.

We've had only about five people who have not signed the charter in the 15 that I've given. That means there have been about 400 to 500 people and only about 5 of them have not signed. Three of them were in one meeting.

This was because they were state jobs, and the attorney general in Michigan has ruled that no state employee is allowed to sign a charter without prior approval of his superiors. So all three of the department of management and budget people participated in the meeting and were there all day and helped write the charter. But were not allowed to sign the charter.

The other two cases, oddly enough, were electrical contractors who felt they did not have to attend the meeting.

Of course the immediately fell into disfavor with the general contractor. The electrical contractors probably will re-think their position before the next project comes along, particularly with this general contractor. It's embarressing to him of one of his subs doesn't show up.

The general contractors who are the most outspoken, most abrassive, and oddly enough the most competent, are the one who embrace ADR and partnering the most. They really do like it because it gives them a vehicle and a method by which they can impose their management styles in a democratic way.

Q: What determines the type of ADR process would be most successful in resolving disputes?

Ralph: There is an infinite set of specifications on that. One of the best I think is Herb Spence's idea of establishing a job task force from what we call the stake holders, the charter signers. The task force would review any disputes that people on the job wish to bring to their attention.

That task force then would be a requirement, or a least an understood condition, that all disputes that go up from the orignating level have to be reviewed by that task force before they are sent on up. So what happens here is you get a peer review and that tends to cut through a lot of the red tape, because the peer review gets very blunt. If I'm a mechanical contractor and you're an electrical contractor, and the general

has an argument with the glazing contractor... and the two of us and about five others are on this task force. We take a look at this problem and we render an opinion as to what should be done and if it isn't done, what will happen. That has a fair impact on the people involved.

That's one of the ADR processes that I like the best. From their you can go to the standing neutral. But my own feelings are you should always exhaust the job staff and the stake holders' resources before you go outside.

And that's one thing that Don Smith has done down at the VA Hospital, pretty well. An interesting case there is I went through a revisiting of their charter with them about four months ago and they had been consistently giving low ratings to the use of ADR techniques on the job. So in the meeting--there were about 40 people there--I said why are these ratings so low. An one of the people said, "I've given it a low rating every month because it hasn't been tested yet." And someone else said, "Yeah. We haven't seen it working so we don't know if it will work or not." And I said doesn't that perhaps indicate that it's work extremely well. Because if the ADR process is not being used, but there are no outstanding issues, that tells me they are resolving those issues somewhere. And therefore, it's working.

Q: The fact the ADR is there has caused them to solve their problems without using it?

Ralph: They get embarrassed to bring stuff up that isn't meaningful or important. Peer pressure is still enormously important in implementing any kind of ADR or partnering effort.

Q: Where does dispute resolution begin on a construction project?

Ralph: I think it begins basically when the design program has been written. Like the Indian reservation up here, were just bringing our project team on board now. I'm recommending to the parties involved that we begin an ADR and partnering effort just as soon as we get major upfront management team on board.

So it begins the minute you sign your first contract with any of the participants. The participants are always the architect/engineer, the planner, the programmer, the construction advisor or the construction manager or the general contractor.

Q: What example might show how ADR has been successful in terms of minimum overall costs?

Ralph: I asked Don Smith how they think they've saved at the VA hospital because of early dispute resolution. That's a hard question to answer there aren't any comparison. But he estimates that it has saved him literally hundreds of times its cost. In other words if the total cost of an ADR and partnering system has been $50,000 on a job, in his opinion, he has saved perhaps as much as $2 million to $6 million in

additional costs. Now that's on a $350 million job.

Over at Christman, you might want to talk to Phil Fredrickson. Also Jay Hendrick at R.J. Hendrick & Son, in Saginaw, I done two partnering charters with them, two with Herb Spence and two with Christman. There some others among the 15 charters I've been involved with.

Q: What role should the legal profession play?

Ralph: The legal professional has a powerful role in developing the legal agreements. In binding arbitration, we also need legal advice. Before contracts are negotiated and executed, you need attorneys.

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