Searching for Balance in Conflict Management: The Contractor's Perspective

BY RICHARD FULLERTON

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This article is an outgrowth of the author's graduate thesis in dispute resolution. With the support of the Association of General Contractors of Colorado, the author interviewed 20 commercial building contractors (including general contractors and subcontractors) along Colorado's Front Range to ascertain their perspectives on conflict resolution in the construction industry.Contractors are intimidated by the prospect of litigation, fearing that they will become mired in a legal battle that could threaten their business with financial ruin. While contractors largely accept arbitration and its promise of lower costs and shorter duration, they are concerned about its increasing emulation of litigation. Nevertheless, contractors seem reluctant to embrace mediation wholeheartedly. This article assesses contractors' attitudes toward the most-used ADR methods, summarizing the perceived strengths and limitations of each.

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Until the 1970s, the construction industry tended to settle disputes the old-fashioned way—in court. Reliance on litigation began to erode in the 1970s when court dockets became backlogged with a growing number of cases, and the cost of litigation increased dramatically. In the 1980s, the U.S. Supreme Court issued a series of pro-arbitration rulings that encouraged commercial parties to provide for arbitration of disputes in their contractual arrangements. The construction industry has been in the vanguard of using many different types of alternative dispute avoidance and resolution options over the years—arbitration, mediation, partnering, and dispute review boards among them. In their search for reliable alternatives, contractors have largely accepted arbitration yet remain reserved toward mediation and other forms of alternative dispute resolution (ADR).

This article discusses the attitudes and experiences of Colorado contractors toward litigation, arbitration, mediation and negotiation. For this article, I conducted face-to-face interviews with 20 commercial building contractors and subcontractors along the Front Range of Colorado, whose annual volume ranged from $5 million to over $2 billion.

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I. Attitudes Toward Litigation

Litigation remains the benchmark for resolving conflict in the construction industry. It is still considered the most powerful option, though not used as broadly as in the past. By 1997, one commentator said, "The percentage of routine construction projects going to litigation is more like one in 20 today. With major construction projects, it's more like one in eight to 10, nothing like the one in three of a decade ago."[1]

A significant majority (85%) of the contractors I interviewed had at least one experience with litigation, 25% had multiple litigation experiences, and 35% had pursued a case to trial. All said that they attempt to avoid using litigation as their primary method of dispute resolution. Their aversion to litigation, listed in order of expressed concern, were based on the following: (1) its financial cost, (2) the time commitment involved, (3) the inability to pursue new work, (4) mental anguish, and (5) potential damage to relationships.

A. Financial Cost of Litigation

In line with national studies, each contractor I interviewed voiced frustration with the cost of the legal process. This frustration was based on their personal experience or a negative perception of litigation generally.

On average, their litigation expenses approached $100,000. Two large contractors reported legal costs in excess of $1 million in complex cases. Attorneys' fees made up the greatest expense, ranging from $200 to $400 per hour.

Researchers have commented on the high cost of litigation, noting that "on average, 98% of civil litigation expenses are attorneys' fees."[2] Much attorney time is spent on discovery. One contractor rhetorically paraphrased the attorney need for oral depositions as, "Why wouldn't I want to depose everybody? … I don't want them to get on the stand and not … know what they are going to say."

Also adding to the high cost of construction litigation is the use of expert witnesses. Because the average juror or judge is not familiar with construction terminology, specialists (such as scheduling and claims consultants) are frequently called upon to clarify issues for the fact finder. In addition to testifying in court, experts often meet with counsel, review case documents, and prepare written reports, adding to the expense of their involvement. Other litigation expenses include court fees, transcription costs, and graphic exhibits to show to the jury, such as aerial photography depicting the state of completion of a project. One contractor reported spending more than $70,000 for presentation boards to display evidence. Each case can have its own unique expenses.

A few contractors questioned whether attorneys drive up the cost of litigation purely out of self-interest. Most had confidence in their lawyers and believed in their integrity but were quick to ascribe profit motives to opposing counsel.

It is easy to blame attorneys for the high cost of litigation, but to be fair, it is the judicial system that is the root cause. Since that system allows for disclosure of all relevant evidence, attorneys seek the maximum amount of disclosure. Therefore, expenses escalate in the search for potential evidence. A legal author outlined the judicial model in these terms:

> All legal systems strive for decision making that is impartial and fully informed. Proponents of an adversary system believe that this is best achieved (1) where the decision maker is neutral and passive, and is charged solely with

the responsibility of deciding the case; (2) the parties themselves develop and present the evidence and arguments on which the decision will be based; (3) the proceeding is concentrated, uninterrupted and otherwise designed to emphasize the clash of opposing evidence and arguments presented by the parties; and (4) the parties have equal opportunities to present and argue their cases to the decision maker.[3]

Thus, the charter of litigation provides an inherent incentive to expand the scope of document discovery, take lots of depositions, and put on many witnesses. Attorneys may actually be remiss in not investigating every possible lead.

Some contractors seemed to believe that they could reduce litigation costs by contractually assigning legal expenses to the losing party. However, having a "loser pays" clause may have little effect, since a great percentage of litigation settles before actual trial.[4] A recent study of litigation trends across the country showed that the percentage of cases making it to court has continued to decline precipitously, with fully 98.2% of civil cases settling or being dismissed before trial.[4] In cases that settle, legal expenses become a negotiable part of the settlement and are often absorbed by the parties who incurred them.

B. Time Commitment of Litigation

Contractors expressed deep frustration with the time commitment that litigation requires. Their concern focused on the amount of time business leaders and project teams spent in meetings to develop a case strategy, compile evidence, and coordinate efforts with the attorneys. Contractors were rarely able to shield their employees from the distraction of litigation. The legal process engulfed their project teams, which sometimes spent more time litigating a dispute than constructing the project. As one subcontractor put it, "You look at the time that you have to take away from running your business managing litigation, then you have to start asking yourself, 'Am I in litigation or am I in construction? Where should I be spending my time?'" He noted, however, that "attorneys can't represent you any better than the time you give them to tell them the real story."

C. Lost Opportunities

A related concern expressed by contractors was the inability to pursue new business development (or even take on new business) because the litigation absorbed so much time. Contractors said they saw opportunities passing them by because key personnel were ensnared in preparing for litigation, and their project teams were too busy "fighting fires." While not a direct cost of litigation, the loss of potential income from new business is poorly appreciated and a significant consequence of litigation. For contractors who have experienced litigation, lost opportunity carried a distinct ring of futility.

D. Mental Anguish of Litigation

Contractors decried the emotional aggravation of litigation, even litigation they commenced. Most referred to the emotional toll as "brain damage." One general contractor experienced it this way.

> It grows beyond the parties, … the thing that I wake up with and the thing that I go to bed with is the dispute. Something is not right,… I just can't get rid of it … it is a constant annoyance, and it takes away the enjoyment of life.

One firm that was sued tried to protect employees from the aggravation of litigation by assigning responsibility for the defense exclusively to the CEO. "It made him a wreck because he would go to the depositions and they would attack him personally."

Another contractor called the experience "very frustrating.... Instead of making money, you are trying to mitigate how much money you are going to lose."

E. Potential Damage to Relationships

Contractors on many construction projects have long-standing relationships with project owners, architects, engineers, other contractors, and suppliers. These important alliances are at risk when disputes arise, and litigation jeopardizes them more than other forms of dispute resolution. Because litigation commonly commences after a project is substantially complete, it forces the disputing participants to tolerate discord at the job site until the issues are settled or resolved in court. The protracted nature of the legal process effectively prevents the parties from reaching an amicable resolution. Then, when the judicial process eventually runs its course, it renders a winner and a loser, a result that usually extinguishes the parties' relationship.

Contractors who regularly resort to litigation could find themselves not getting the work they would like. A staff attorney for a large general contractor said, "We tend not to overestimate the relative merits of our case because we don't want to be bogged down in litigation. You get a certain reputation when you do that … from an owner perspective. [Owners think,] 'You don't want to hire those guys.'"

Despite the problems associated with the judicial system, contractors who want a ruling on who is right still resort to litigation precisely because it promises an unambiguous decision in favor of one side or another, using strict rules that are perceived to be procedurally fair and a framework for deciding cases based on the law and legal precedent. Arbitration also offers a procedurally fair process and a final and binding award, but it is more informal and does not require application of law and *stare decisis* unless the parties provide for it in their contract.[5]

F. Shortcomings of Litigation Decisions

There are limits to the reliability of jury verdicts and judicial decisions in complex or technical cases. Construction contractors employ dozens of complicated agreements, each tied back to the primary contract between the general contractor and the owner and subject to standard "general conditions." These agreements create a web of contractual relationships. Many of the issues in construction cases, which could involve sophisticated technical installations, trade boundaries, clashes between union and open-shop contractor, and claims of delay damages, are difficult even for an experienced judge. Courts assign judges to cases without input from the parties or counsel, and there is little apparent consideration for their experience and knowledge about the subject matter of the case. Therefore, parties to a construction dispute have no assurance that the judge presiding over the case will have knowledge of the construction trades or construction law. This increases the risk of an erroneous judgment on the part of a judge struggling to comprehend the complex practices of the industry.

Juries on construction cases raise greater concerns. Most jurors are not construction experts, and they invariably need to be educated about construction practices. Said one contractor, "The issues that we typically have in the construction setting are probably for most juries a little beyond their comprehension….I can't imagine that a jury could pick it up in a two- or three-week trial…. The jury adds a lot of expense, and it makes it a crap shoot." There is also a risk that one or more jurors may have had a bad experience with a home renovation or other consumer construction project, which could allow a bias in favor of one side.

There is a perception among contractors I interviewed that jurors tend to favor the weaker party, allowing, for example, a subcontractor to prevail over a large general contractor regardless of the facts. These problems make many contractors reluctant to rely on litigation.

Many people inside and outside the American legal system believe ours to be the most reliable legal system in the world. This probably is true. Nonetheless, the contractors I spoke to considered the outcome of litigation to be too unpredictable—especially after considering the financial and emotional burden—to be trustworthy.

II. Attitudes Toward Arbitration

Over the last 20 years, arbitration has become used so widely in construction that many consider it the primary, rather than an alternative, method of dispute resolution. Construction has been a forerunner in the use of ADR. As Hinchey and Shor pointed out, "Since colonial times, the industry has referred disputes to private adjudication by panels of experts."[6] However, courts maintained a long-standing hostility to arbitration, which they viewed as an infringement on their jurisdiction."[7]

The most significant development promoting the use of arbitration was a series of U.S. Supreme Court opinions, the first issued in 1983, which recognized the enforceability of contractual agreements to arbitrate commercial disputes to a final and binding outcome.[8]

The contractors I interviewed acknowledged that the construction industry largely favors arbitration. Fifty-five percent had experience with one arbitration, and 30% had participated in multiple arbitrations. Asked to choose between arbitration and litigation, 85% said they preferred arbitration.

A. Financial Costs of Arbitration

Most contractors I spoke to believed that arbitration was less costly than litigation, both in terms of dollars expended and personnel commitment. The cost of arbitration was closely tied to the amount of discovery allowed by the arbitrator and the procedures followed in the arbitration.

Commentators have pointed out that despite the advantages of arbitration over litigation, arbitration does not eliminate all document discovery.[9] However, an experienced construction arbitrator with good management skills can expedite discovery (referred to as the pre-hearing exchange of information in the AAA Construction Industry Arbitration Procedures),[10] limit (or eliminate) depositions, restrict the number of expert witnesses, and keep pre-hearing motions to a minimum. As the arbitration process is abridged, costs are reduced.

While one experienced contractor I interviewed considered arbitration a relative bargain, saying that it "should cut 60% of your costs," a large general contractor disagreed. "It is our experience that

if you arbitrate a case, the costs are not necessarily that much less expensive," he said. Another said it still costs "tens of thousands" because "even with arbitration … you still have to present … a case. You still have to go through discovery. You are still doing a lot of the preparatory steps that you would do for formal litigation anyway."

B. A Question of Efficiency

Some contractors complained that arbitration has evolved to the point where it is no longer more efficient than litigation. As early as 1994, some commentators observed that the practice of arbitration often seems like "a private judicial system that looks and costs like litigation…." with excess baggage in the form of motions, briefs, discovery, depositions, judges, lawyers, court reporters, expert witnesses, publicity, and damage awards beyond reason (and beyond contractual limits).[11]

C. Reliability of the Arbitration Award

Proponents of litigation argue that because arbitration is a more abbreviated procedure, arbitration decisions do not adhere to the same strict legal standards. They consider the reliability of arbitral awards to be compromised for the sake of expediency. On the other hand, advocates of arbitration counter that its simplified structure allows for common sense decisions. For example, arbitrators are allowed to interpret the parties' agreement based on industry standards, whether or not specifically referenced in the construction agreement.

D. Ability to Select a Qualified Neutral

The contractors I interviewed recognized a clear advantage of arbitration—the ability to select the neutral who will decide the dispute. Arbitration allows the parties to select a qualified person with particular skills and knowledge. Thus, construction parties can select an arbitrator with knowledge of, or experience in, construction, or the law, or both. Having an informed arbitrator is seen as a clear improvement over a judge with no particular knowledge of construction. Said one general contractor.

> I think that in arbitration, you have a neutral who is even more skilled in your particular line of work. Where a judge is going to hear general civil cases, manufacturers, retailers, service providers, all sorts of different commercial enterprises … if you go to the construction industry forum for AAA ... or another group like that, you would have someone who is an engineer, a lawyer, but skilled and understanding with the knowledge of the construction process and construction claims, and I think that to the extent that your neutral is able to understand the issues and the equity in the issues, the better off you are.

In arbitration, the parties have the opportunity to choose an arbitrator who knows how to manage the proceedings efficiently, and who will keep out repetitive and irrelevant evidence and allow only the evidence necessary to make an informed award. Therefore, it is up to the parties and their counsel to choose an arbitrator wisely in order to limit discovery, depositions, and the duration of the proceedings. Doing so will have a direct bearing on the ultimate expense and duration of the process.

E. Misperception of Split Arbitration Awards

Twenty percent of the contractors interviewed complained about a practice they referred to as "splitting the baby." This phrase refers to an arbitration award that partially rules in favor of each party, rather than ruling exclusively in favor of one side. The belief that arbitrators split awards has never been established, although some people believe it to be true. Researchers at the Global Center for Dispute Resolution Research have looked into this issue.[12] Their review of AAA international awards issued during the years 1995-2000 revealed that the majority were outright wins or losses. The remainder of cases produced awards from 10-90% of the amount claimed. The researchers inferred from this that arbitrators "as a rule, make decisive awards and do not split the baby."

F. An Accommodating Process

Overall, contractors seemed comfortable with arbitration as a more accommodating process even though it sometimes resembles litigation. The fact that an overwhelming majority of contractors preferred arbitration to litigation indicates that the advantages of arbitration are perceived to be legitimate. As one general contractor said, "It is going to be a more balanced approach," meaning balanced in terms of expense, duration, and less stress.

III. Attitudes Toward Mediation

When mediation first came into use in the construction industry in 1985, the courts and construction attorneys showed little interest.[13] However, the process achieved greater respect in 1997 when mediation was incorporated into the dispute resolution provisions of the American Institute of Architects standard contract documents as a condition precedent to arbitration.[14] The current language in the AIA A201 General

Conditions provides for mediation employing the AAA Construction Mediation Rules and mediators on the AAA panel.

Mediation is unlike adversarial litigation and arbitration models. A neutral third-party mediator acts as a facilitator to help the parties resolve their dispute.[15] Mediators can play many roles: setting the agenda, getting participants to talk to each other, helping them understand their problems, and suggesting possible solutions.[16] One thing the mediator does not do is decide the dispute.

The parties to mediation select the mediator. Construction mediators usually have a background in construction, architecture, engineering, law, or other fields where their experience and professional skill may make the difference in helping the parties resolve an impasse. The mediator's role can vary depending on the personalities and wishes of the parties, the nature of the issues, and the style and skills of the mediator.

Mediation is becoming more acceptable as it is usually considered less expensive and less time-consuming than either litigation or arbitration. More importantly, because it does not impose a solution, mediation is more likely to preserve the parties' relationship.

Of the contractors I interviewed, 75% had been involved in mediation, and 50% had participated in multiple mediations. This level of participation is close to the national average found by a Deloitte & Touche survey in 2000.[17]

The popularity of mediation is due to a belief in its high success rate. One large construction company that regularly uses mediation reported a 100% success rate. Not all cases settled at the mediation table, but all reached agreement eventually without going to arbitration or litigation. National studies report rates of agreement between 80% and 85%.[18]

A. Differences in Procedure

Mediation is not considered to be an adversarial procedure because the ultimate goal is not to "win" but to find solutions acceptable to all sides. Parties mediate voluntarily and need not agree to a settlement that they consider unsatisfactory. This is true even when the parties are required to mediate by contract or referred to mediation by the court.

Mediation is largely unstructured, relying on the mediator to determine how the session will proceed. It is considered less stressful than adversarial processes, but it is no "walk in the park." Opposing parties usually present their positions to each other, allowing them to tell their story and feel that they have been heard. The mediator may raise questions to obtain additional information, clarify facts and issues, and engage in reality testing by helping the parties see the strengths and weaknesses of their respective positions. During private caucuses, the mediator usually asks each party to assess the cost of not settling the dispute and the likelihood of losing in court or arbitration. The parties may also be asked to consider the possibility of shifting positions in the interest of saving money and time and getting on with business.

One general contractor stated, "Our philosophy is to not let these disputes fester, not let them get out of control, to get in early either through ADR or some other means to get these issues resolved as early as possible."

Mediation is most successful when the parties are motivated to reach an agreement in order to avoid the uncertainty of a trial or arbitration. The search for justice is not a goal of mediation—the goal is an acceptable outcome. If the parties cannot get to that point, they are free to withdraw from the mediation.

B. Financial Cost of Mediation

One general contractor I spoke with estimated his savings from mediation at 80% of what he spends in litigation. The earlier that mediation is used, the greater the potential savings. Mediation can be used before a lawsuit or arbitration is commenced. If implemented after a lawsuit is filed, litigation costs can continue to be incurred, usually attributable to discovery. Some discovery is usually necessary in a construction mediation. However, discovery need not be completed in order to mediate. Early mediation can reduce discovery costs.

An experienced construction mediator will work with the parties to determine that point in the conflict when sufficient information is available for a thorough understanding of the issues without incurring unnecessary legal expense, so that mediation can take place. A mediator who pushes the parties toward agreement without sufficient information is merely asking for compromise.

Even if the parties do not reach a settlement, mediation frequently has a positive influence on

the eventual outcome. It can lead to agreement on some disputed facts or issues. It can also lead to a subsequent agreement. For example, two contractors I interviewed complained about failed mediations but acknowledged that mediation paved the way to later settlements without becoming adversarial. In complaining that mediation was a waste of time, they failed to appreciate the contribution that mediation had made to the later resolution of those disputes.

C. Preservation of Relationships

When it comes to preserving important business relationships, mediation outshines both litigation and arbitration. It is generally acknowledged that when "a continuing relationship is a key element in the management of business," mediation is far superior to litigation.[19] One subcontractor expressed the significance to his company, "Relationships are an important key. You don't get everything in life, but you don't get hardly anything if you make enemies… It is a small community, so we are very cognizant that we have to continue business."

In mediation, the neutral attempts "to satisfy the aspirations of the parties by coming up with a 'win-win' settlement."[20] A general contractor summarized the added role of the mediator:

> A very good mediator is … one that analyzes the risk of each party and goes in depth and tells each party what their risks are if they go on to arbitration or litigation and really tries to sort out the risk analysis…. (G)ood mediators… started coming up with some creative ideas and showing…where the risk potential was….It goes to show how good a negotiator the mediator is.

An international general contractor I interviewed said he found mediation most effective in very complex cases. Believing the parties to be the ones best able to sort out the complicated issues, he felt that by working with an experienced mediator, they could determine a just solution, avoiding the uncertainty and expense of an arbitrated or litigated decision.

D. The Value of Early Mediation

Contractors seem to struggle with disputes that erupt in the early phases of a project and severely disrupt the flow of work. Left unresolved, such conflict can jeopardize the success of the entire project. If unsuccessful in negotiating a solution, many contractors resign themselves to tolerating the discomfort until claims are filed upon project completion.

Several contractors I spoke to have learned that by commencing mediation early in the dispute, they can prevent escalation and the hardening of positions, allowing the parties to work out their problems with the aid of a mediator. One general contractor learned through trial and error to tackle such problems immediately, stating, "Our philosophy is to not let these disputes fester, not let them get out of control, to get in early either through ADR or some other means to get these issues resolved as early as possible."

Construction disputes often involve change orders, payment delays, and quality of work issues, rather than legal issues. Such disputes do not necessitate an exhaustive legal battle. More often, the questions at hand are matters of fairness or equity. They have been characterized as "requests for equitable adjustment" and the actual disagreement is usually over what is equitable (not what is legally correct).[21]

Mediators Rick Flake and Susan Perin say that undertaking early mediation while the project is underway has several advantages:

> [T]here is a greater likelihood of finding a business resolution. Moreover, the parties will be able to control many more issues and be able to "horse-trade" their claims. Additionally, early in the dispute, feelings may not have hardened beyond repair. If the parties still need each other (for example, for completion of certain work items), they may see the benefit of maintaining their business relationship, and agreeing to a business resolution of their dispute.[22]

E. Need for More Education

While the majority of contractors I spoke with have participated in mediation, a number were nonetheless unclear about the process and strategies for improving the mediation experience. Thirty-five percent were unfamiliar with some basic practices of mediation, and 30% didn't know whether their construction agreements allowed for mediation. Every contractor should know that, even if a contract does not expressly provide for mediation, the parties can always agree to mediate after a dispute arises.

Several contractors reported that they "mediate in-house" without the use of a neutral mediator. This showed that they were unfamiliar with the differences between mediation and direct discussions between the parties. The term "negotiation" better describes the latter practice; the involvement of a third-party neutral is a defining requirement of mediation.

Some contractors worried that by agreeing to mediate, they would tacitly indicate weakness and a willingness to concede their position. Some

believe the mediator acts as a force for compromise in disputes where a settlement seems out of reach.

Others were more concerned that mediation does not guarantee results. They feared spending several weeks and thousands of dollars preparing for and participating in mediation, and then not reaching agreement. True, mediation cannot resolve every conflict. As several contractors noted, "you need to have two reasonable people to mediate." Cases exist where the parties are simply too polarized for mediation to be effective. Whether a settlement can be reached depends on the good faith willingness of both parties to listen to each other's views and take a hard look at their own positions. Mediation allows the parties to play a key role in structuring a resolution of their own dispute. If any secret exists for the success of mediation, it lies in the creativity of the mediator and the motivation of the parties to find agreement.

One general contractor said that as a result of mediation, "a huge gloom had been lifted."

One general contractor said that as a result of mediation, "a huge gloom had been lifted." That, along with the unique benefit of preserving valuable relationships, makes mediation a process that every contractor should consider when a dispute arises. More importantly, even if initially unsuccessful, mediation has the potential to narrow the issues and leave the door open for subsequent resolution of the issues that remain.

IV. Attitudes Toward Negotiation

Eighty-five percent of the contractors said they attempted negotiation regularly to resolve disputes. While negotiation was not an intended focus of the interviews, it became clear that contractors routinely negotiate contract language, change orders, and field disagreements in the course of projects. Thus, the subject demands greater scrutiny.

Negotiation offers the parties the opportunity to resolve disputes at almost no cost. Contractors typically conduct negotiations informally, requiring little beyond the time of the person conducting the negotiations. Thus, other key personnel are not diverted from work to dispute resolution functions. Negotiations are less stressful than other forms of dispute resolution and when successful, they clarify misunderstandings, keeping them from becoming disputes and disputes from becoming claims. The aggravation avoided is immeasurable.

What contractors may not realize is that private negotiations can take place even in the midst of an escalating arbitration or litigation case. A well-timed offer to negotiate may provide a breakthrough to resolution, before positions become fixed.

Negotiation is a skill and does not require knowledge of the law. Many contractors seem to pride themselves on their innate negotiation skills. The personal styles of good negotiators vary considerably. Two subcontractors provided distinct examples of effective negotiation styles.

In the first example, the CEO of a large firm single-handedly negotiated complex, acrimonious disputes, without involving counsel. He felt comfortable accepting responsibility for mistakes his company made but held firm on the liability he would accept. His direct interactive style headed off expensive problems and minimized the company's exposure from more adversarial resolution methods.

In the second example, the CEO called for strategic negotiations to be used throughout his organization. He saw that workers and managers at each level were trained in sound negotiating techniques. Staff met regularly to discuss unresolved issues, which were often passed on to senior employees. The CEO kept a close watch on problems and remained available to prevent issues from becoming claims. Through this disciplined effort, the company has avoided any involvement in litigation, arbitration, or even mediation over its 33-year history.

Traditionally, the construction industry used what is called "positional bargaining" during negotiations. In this type of negotiation, each party is strongly committed to a particular outcome usually at opposite ends of the spectrum from each other. Over time, positional bargaining has yielded to "interest-based" negotiation, which involves greater openness, a willingness to listen to the other side, the ability to acknowledge some responsibility for the conflict, and the will to achieve a resolution acceptable to both sides. But many contractors still use a "take-it-or-leave-it" (i.e., a positional bargaining) approach that can cause negotiations to fail.

Conflict Management Teams

Another approach that is gaining acceptance involves the formation of a conflict management team to evaluate disputes, propose solutions, and formulate the company's responses. The team helps identify who is best qualified to participate

in negotiations, when to implement mediation, and at what point to involve an attorney.

"Step Negotiation"

A few contractors use what is sometimes called "step negotiation." Two construction lawyers described the process in the following terms:

> One of the most important skills in dispute resolution is recognizing when a dispute cannot be resolved at a particular level and must be brought up the management chain. In step negotiation training, decision makers at all levels are taught to hone their listening and communication skills. Next, they learn to recognize the urgency of resolving disputes as they arise as well as determine when the resolution is beyond their capability or authority. Finally, they are encouraged to seek the participation of the next level of management. Under step negotiation, disputes are constantly monitored by increasingly senior levels of management for as long as the dispute remains unresolved.[23]

Step negotiation in the construction industry begins with the trade worker who first encounters a disagreement. If this employee is unsuccessful in settling the disagreement, the problem can pass to the foreman or project superintendent. Next in line might be the project manager, then the construction executives, and ultimately the company CEO. This takes place without the need to file a claim or involve an attorney. All levels of the organization share in the responsibility for developing an effective negotiation response.

"Step ADR"—Providing for an Immediate and Graduated Response

Disputes have the effect of breaking down trust, which can taint any relationship. For this reason, dealing immediately with a construction dispute while the project is ongoing is the best deterrent to an escalation of the conflict. Negotiation is the first step. Negotiation is so powerful a step that it has the potential to stop the dispute in its tracks. Several contractors I spoke with found improved results from listening to the other party's side of the story and participating in the search for common solutions to problems on the project. Most important was the ability of both parties to accept responsibility for real and perceived problems caused by their respective companies.

When negotiations are unproductive, the parties can mediate while the project is still under construction. This provides another opportunity to resolve the dispute before an arbitration claim is made or a lawsuit commenced. A mediator can provide the necessary neutral "third-party view" to help the parties diffuse their escalating disagreement. Disagreements that are not immediately resolved often lead the parties into more entrenched positions at the end of the project. Mediation may be the most effective response before resorting to arbitration or litigation.

Using ADR successfully requires good timing, sufficient information, and a commitment to resolution on the part of both parties. It helps when the representatives have the freedom to engage in creative problem solving and the authority to make final and binding decisions.

When All Options Seem Exhausted

Even when initial ADR efforts appear to be unsuccessful, the door to resolution may not be completely closed. The parties may narrow some issues, which will help them negotiate or mediate the remaining issues at a later time. Attorneys sometimes hesitate to suggest negotiating with an adversary during arbitration or trial preparation out of concern that these discussions could jeopardize the client's legal position. However, contractors are business people, and their attorneys need to be alert to opportunities to resolve disputes before costs escalate and agreement becomes impossible. Both sides have a responsibility to remain open to alternative possibilities instead of marching silently into battle.

Conclusion

Litigation can resolve claims but at a price contractors find unacceptably high. Many struggle to find a more efficient dispute resolution strategy. My informal survey of contractors suggests that a continuum of different ADR options —such as first negotiating directly with the opposing party, then mediating if negotiations fail, and finally arbitrating if mediation is unsuccessful—rather than the use of any single ADR resolution method—is more likely to reduce the use of litigation. Businesses adopting this multimethod approach seem to be successful in defusing the destructive cycle of conflict and thereby avoiding the need to engage in litigation. Contractors who wish to stay out of court might do well to follow their lead. ■

ENDNOTES

[1] Barbara A. Phillips, "Mediation: Did We Get It Wrong?," *Willamette L. Rev*. 649 (1997) discussing the construction industry's experience with mediation). Available at www.mediate.com/articles/Phillips2.cfm.

[2] J.P. Meyer, "The Pros and Cons of Mediation," 52 (2) *Disp. Resol. J*. 12 (Summer 1997).

[3] W. Burnham, *Introduction to the Law and Legal System of the United States* 78 (West Group 2nd ed. 1999).

[4] M.Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," *J. Empirical Studies* 1 (Nov. 2004). In 1999, Burnham reported that "in the state courts of the 75 most populous counties in the U.S. in 1992, about 75% of civil cases were disposed of by agreed settlement or dismissal, while only 3% went to trial." Burnham, *supra* n. 3, at 242.

5 Burnham explained *stare decisis* as follows:

> [C]ourt decisions not only resolve past controversies; a decision of a case is considered to be a "precedent" that has legal effect in the future. This effect comes from the principle of *stare decisis*—the idea that future cases should be decided the same way as past cases.

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[6] J.W. Hinchey, & L. Schor, "The Quest for the Right Questions in the Construction Industry," 57 (3) *Disp. Resol. J*. 8, 13 (Aug./Oct. 2002).

[7] *Id.*

[8] Stephen L. Hayford, "Alternative Dispute Resolution," 43 *Bus. Horizons*, 2-4 (Jan./Feb. 2000).

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[13] Phillips, *supra* n. 1.

[14] "New AIA Contract Stresses Mediation," 52 (3) *Disp. Resol. J*. 5 (Fall 1997).

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[16] *Id.*

[17] Deloitte & Touche, "Insights in Construction: Fourth Report on the Nation's Leading Construction Companies," 34-35 (2000) (pamphlet) (reporting that 66% of contractors in the Western United States have attempted mediation; the results for the country as a whole were slightly lower).

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