

Using Innovative Non-Binding ADR To Eliminate And Resolve Construction Disputes: Project Advocates For The Construction Industry

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Members of the design profession and the construction industry have invested a great deal of time, effort and money trying to develop effective alternatives to construction contract litigation in court. Arbitration, mediation, mini-trial, and summary jury are all techniques which are used to varying degrees of success. What these methods have in common is that the parties embark upon these solutions toward the end of the project to resolve disputes which have developed over a period of years. Each of these methods is "interest based" and each party is represented by counsel.

The ADR technique called "Project Advocates for the Construction Industry" is a method under which the project engages a panel (representing the project) "advocating what is in the best interest of the project," called the Project Advocacy Team.

What Is The Project Advocacy Team And How Does It Work?

1. Based on the complexity of the construction process, the parties agree to the appointment of the Project Advocacy Team to monitor all aspects of the project, including, but not limited to, the progress, quality and financial status of the project and to maintain continuous communication among all participants on the project.

2. The Project Advocacy Team makes no binding decisions and acts in an advisory capacity only.

3. The Project Advocacy Team is comprised of (1) an attorney; (2) an engineer or architect; and (3) an individual with dispute resolution training and experience.

4. The Project Advocacy Team is wholly independent and chosen by the owner, architect, and construction manager (or general contractor), based on proposals submitted.

5. The cost of the Project Advocacy Team is paid by the owner as a project expense.

6. Each of the design and construction contracts on the project contains a clause under which the parties agree that all project disputes will be resolved through decisions reached by the parties

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in conjunction with and on the advice of the Project Advocacy Team.

7. Information and recordkeeping of the Project Advocacy Team is available to all project participants and confidentiality and privilege do not limit access to the records.

8. In the event that a dispute is not resolved within thirty days, a mediation is conducted with the affected parties under the auspices of the Project Advocacy Team.

9. In the event that disputes are not resolved through mediation, any party to the dispute is entitled to commence an action in the court of original jurisdiction in the county in which the project is located.

10. Even after the inception of litigation, the Project Advocacy Team will remain available to meet with the parties to discuss the resolution of all or some of the disputes.

The Project Advocacy Team Sets A Tone For The Project From The Outset

"The term 'dispute resolution' assumes that the project went off track, there is a dispute and now 'resolution' of the dispute is needed. What really needs to happen is to set a context in which the project does not get off track in the first place," says experienced litigator and John E. Osborn PC counsel Clare Connaughton, whose practice now concentrates in acting as a mediator and as a trainer of businesses on "Dispute Avoidance Techniques."

"From my broader view of what makes for a dispute in the first place, and how disputes may be avoided, construction industry disputes are not unique," Ms. Connaughton observes. "It is simply that the stakes are often higher than in other types of disputes, there are more participants (numerous design professionals, contractors and owner representatives) and there are often complex design and constructability issues. Appointment of a Project Advocacy Team can certainly head off costly disputes, the way that dispute avoidance training has helped businesses significantly reduce litigation due to in-house disputes."

Construction Industry Resistance To New Ideas

Although the construction industry is often resistant to new ideas, it is clearly well advised to change the status quo by adopting a non-binding ADR procedure at the very inception of a construction project. By doing so, the existing pattern of waiting until the end of a project to resolve disputes – after the damage has already been done – can be changed.

Law Suits Are Inimical To The Basic Nature And Goal Of The Construction Industry

A February 11, 1991, Engineering News Record editorial provides a vivid description of the issue at hand:

"When we choose to live by the spirit rather than the letter of the law – offering our hand and word as our bond – we distinguish ourselves. When we don't, we give up treasured values and mirror the dark side of construction.

"Lawsuits are inimical to the basic nature and goal of the industry. Construction is not an individual endeavor like long-distance running, but rather a business of team building. The fabric of the industry depends on strong weaving of owner, architect, engineer and contractor into a team. Successful teams are built on the strengths of each member, while successful lawsuits are founded on capitalizing on the weaknesses of team members..."

As managers of your future – individual and corporate – you have a duty to take advantage of the opportunities uniquely available to not only achieve sensible resolutions of disputes, but also to avoid the conflicts in the first place."

Industry Tools Can Be Used To Avoid Conflicts In The First Place

Although not in as comprehensive a manner as suggested by appointing a Project Advocacy Team, the construction industry has used techniques to avoid conflicts in the first place through better executive training and better industry communication procedures.

• Mediation Training and Dispute Avoidance Techniques

Mediation and dispute avoidance training is effective in teaching industry participants to be collaborative and to see the whole picture in resolving a dispute. "You would be surprised how effective this type of training is in almost any context; first, many successful executive level personnel simply have not developed effective listening skills until they take this type of training; second, before training, these same executives have not developed an ability to discern the 'needs' of the parties with whom they are bargaining, and, lastly, what is often lost is that an adversary party may simply not be looking for a favorable monetary settlement, but may instead be looking to be listened to or to be respected. Conducting this type of training has been an eye opener for me," offers Clare Connaughton.

• Partnering

John E. Osborn PC teaches a semester-long course on "Dispute Resolution" for construction executives as part of the Exec 21 program at Brooklyn Polytech-

nic Institute, and one of the innovations we have discussed is partnering. It is clear that where partnering has been introduced on construction projects, it has facilitated more collaborative relationships. I see the appointment of a Project Advocacy Team as taking partnering a step further. It is clear that the Project Advocacy Team approach adopts many partnering techniques.

• Executive Coaching

Another innovation which has a lot to commend it is executive coaching. By use of this technique, executive level personnel are provided with one-on-one training on how to more effectively communicate, team build, and set contexts wherein disputes can be eliminated or resolved. In New York's competitive and "bottom line" commercial real estate industry, Kathleen Murphy, Senior Portfolio Manager for Cushman & Wakefield, is a strong advocate of executive coaching. "In working toward being trained as an executive coach, I have realized the value of an executive being provided additional insights into his or her own day-to-day coping strategy. Let's face it, many executives are in a competitive environment in which they simply don't solicit or receive constructive criticism or fresh insights," offers Kathleen Murphy.

Being Prepared For Litigation Often Avoids It

There is no doubt that being ready to litigate often obviates the need to do so. See "Getting To Verdict: Being Cost Effective and Winning – The Essential Role of the Trial Swat Team," by John E. Osborn and Kieran P. Holohan, counsel to John E. Osborn PC and a partner in Gonzalez, Oberlander and Holohan, LLP, May 2006, *The Metropolitan Corporate Counsel*. Attorneys with a strong trial track record are not afraid of trying a case and therefore have the confidence to make a realistic and attainable demand which gets accepted. Correlatively, the Trial Advocacy Team member who has a strong trial track record, can be expected to facilitate a realistic and candid settlement discussion.

Avoiding The 10 Most Deadly Construction Sins

In May 1999, in *The Metropolitan Corporate Counsel*, John E. Osborn PC introduced "The Ten Most Deadly Construction Sins" as the 10 most prevalent indicators of project failure which most frequently lead to litigation. A Project Advocacy Team appointed at project inception can obviate the impact of each and every one of the 10 most deadly construction sins: (1) lack of focus up front; (2) failure to choose the most appropriate project delivery method; (3) failure to assemble the right project team; (4) failure to coordinate the project team and work scope; (5) lack of a workable change order process; (6) failure to truly understand local conditions; (7) inaccurate or too elaborate schedules; failure to update; (8) no periodic job meeting minutes or a failure to keep minutes; (9) no vision on dispute resolution; and (10) failure to recognize that quality wins the day.

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