How Neutrals Can Provide Early Case Management of Construction Disputes

John Lande

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By **JOHN LANDE, ESQ.**

This article describes how neutrals can provide early case management and resolution services to help parties in construction disputes resolve them more efficiently.

In an all-too-common pattern in litigation-as-usual, settlement comes only after the lawyers engage in adversarial posturing, the litigation process escalates the original conflict, the parties' relationship deteriorates, the process takes a long time and a lot of money and none of the parties is particularly happy with the settlement. Almost any disagreement can lead to an escalation of the conflict that diverts energy away from the critical tasks needed to resolve disputes efficiently.

Although some lawyers enjoy this process and make a good living from it, many would prefer to use a more constructive and efficient process. They know that most cases will eventually settle—often only after a process that takes too long and costs too much—but they often feel powerless to steer clients toward a more productive path.

They are often trapped in a "prison of fear" which locks them into unnecessarily long and expensive litigation. They fear that the other side would interpret the mere suggestion of negotiation as a sign of weakness and an invitation to take advantage of their clients. Logically, this is absurd because even lawyers with strong cases should have an interest in an early settlement under favorable terms. But this fear grips much of the legal profession, nonetheless.

Lawyers sometimes do escape from their prison of fear. They help clients assess the benefits and risks of negotiation, let the other side know of their interest in negotiation (but willingness to litigate if necessary), and cooperate with the other side in a constructive early negotiation. Even when they aren't sure that they can trust the other side, they may decide that trying early negotiation is better than the alternatives, such as litigation-as-usual or capitulation.

Early negotiation can be particularly helpful in construction disputes, where there are often multiple parties, numerous claims and counterclaims and complex technical issues. Without a lot of cooperation, it is easy for everyone to get caught up in an escalating conflict that gets resolved only after lengthy, bitter and expensive litigation.

Although lawyers can sometimes initiate early negotiation without engaging a third party to manage the process, sometimes a neutral may be necessary or extremely helpful.

Laying the Foundation for Dispute Resolution

How can neutrals help parties[1] build an escape hatch from the prison of fear? Neutrals can help them plan and manage the dispute resolution process and can keep it "on track" by effectively dealing with adversarial exchanges that threaten to derail it. Providing confidence in the process can be particularly helpful at the outset, when the parties may be especially afraid and distrustful.

Neutrals can provide additional confidence by reassuring parties that they can leave the process at any time they believe it is no longer in their interest to continue. If parties do end the process and proceed in litigation, they probably will not have lost very much considering that most of the information they will provide is probably legally discoverable. Indeed, even if an early case management or mediation process does not result in agreement, it can help the parties focus on the key issues and avoid wasteful procedures when they do litigate.

Professor Lande is Director of the LL.M. Program in Dispute Resolution and Isidor Loeb Professor at the University of Missouri School of Law. E-mail him at landej@missouri.edu or view his website at http://www.law.missouri.edu/lande/.

Early in the case, neutrals can arrange meetings with counsel to identify the information that each side needs to reasonably evaluate the matter. Neutrals can emphasize that by voluntarily sharing information, parties signal that they have a high degree of confidence in their case and an interest in negotiating a fair agreement.

Neutrals can manage the process of exchanging information to minimize the risk of exploitation that parties may fear. For example, neutrals can arrange for each side to begin by exchanging basic information that is clearly necessary and discoverable. Following initial exchanges, they can decide what specific additional information would be necessary. Neutrals can serve as "discovery escrow agents" to protect each side with simultaneous exchanges of information if this would help build confidence.

Neutrals can also help arrange assurances about the accuracy and completeness of information. If desired, each side can provide information under penalty of perjury, providing similar assurances as in formal discovery. Moreover, neutrals can help lawyers agree to limited formal discovery to obtain information from people who are not parties in the dispute. If the parties settle a dispute, neutrals can ask if parties want language in settlement agreements making representations about material facts that could be the basis for remedies for fraud.

Sometimes, the critical information needed to promote settlement involves facts that are not legally discoverable such as the parties' key interests, settlement priorities, business plans and expectations about the future. If the parties mediate, each side can provide such information confidentially to the mediator, with assurances that it will be used carefully to promote settlement without disclosure except as authorized.

In construction disputes, experts' analyses are often critical elements in negotiation and litigation strategies. Neutrals can help parties avoid expensive and risky "battles of the experts" by helping parties hire joint neutral experts. This substantially reduces the cost and risk of using separate partisan experts for each side. Neutrals can manage the process of selecting and hiring the neutral experts. This includes helping parties decide what information will and will not be provided to the experts, what analyses the experts will provide, whether they could be called as witnesses in litigation, or whether their work-product could be introduced in evidence. Arrangements for engaging neutral experts might include provisions for obtaining additional expert input under certain circumstances, such as if the results are outside a specified range.

Considering all the tasks that may be involved leading up to the dispute resolution phase of the process, neutrals can help schedule various steps in the process, considering various critical-path sequencing issues. Neutrals can also help design multi-step dispute resolution formats so that parties start with negotiated processes like mediation and arrange for adjudicative processes like arbitration if they do not reach agreement within a specified period.

If parties do adjudicate the dispute, neutrals can help parties agree to narrow the issues to be argued, identify expert witnesses to be called, share exhibits and generally inform each other of their plans. Neutrals can also elicit an agreement by the parties to focus arguments on the merits of the dispute and avoid tactics that unnecessarily aggravate the conflict.

In addition to managing specific procedural issues leading up to the dispute resolution phase, neutrals can provide a great service by promoting good working relationships between the lawyers. Arranging a face-to-face meeting at the outset, perhaps over a meal, can help lawyers get to know each other as individuals, not merely as "opposing counsel." At these initial meetings, the neutral and lawyers may spend much of their time getting to know each other, not just discussing the details of the case. When lawyers and

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neutrals have such personal connections, they are more likely to resolve problems in a case more easily than if they maintain a professional arms-length relationship.

A Robust Role for Neutrals in Resolving Construction Disputes

Of course, neutrals participate directly in the ultimate dispute resolution process itself by providing a range of services such as mediation, evaluation and arbitration. If neutrals have managed the process of preparing parties to get ready for the dispute resolution process, it is a logical extension to help the parties design that process. Neutrals can manage the logistics in arranging for suitable space, audio-visual technology, refreshments and related matters. In some cases, key individuals may not be able to attend in person and the neutrals can arrange for video- or teleconferences if appropriate.

More substantively, neutrals can orchestrate the exchange of information and documents specifically needed for the process, attendance (and, possibly, non-attendance) of particular individuals, participation of experts, preparation of the parties to have realistic expectations about the process, scheduling of the meetings or hearings, facilitating procedural agreements about the process and arranging for procedural agreements to be documented, as appropriate. In coordinating with counsel before the mediation or hearing convenes, neutrals can specifically discuss potential problems in the process, ideas for making it work successfully and an agenda or schedule for the process. In mediations, neutrals may help lawyers prepare by discussing with them the parties' substantive concerns.

Mediators can also arrange for the lawyers to coordinate the drafting of boilerplate language of a settlement agreement before convening the mediation session. This helps avoid last-minute blowups over issues that were supposedly not controversial. If these issues are not addressed in advance, they may arise very late in a mediation, when everyone is tired and wants to go home. Or, if lawyers take a memorandum of agreement from a mediation and plan to draft a full settlement, disputes over boilerplate can lead to extensive delays and even kill a deal. Negotiating the boilerplate in advance can help parties start the mediation session with a positive expectation of settlement. If lawyers negotiate the boilerplate language before the mediation session and identify disputes over the language, the mediator can help resolve the disputes in a timely way as part of the mediation.

> This article recommends that neutrals offer to "bundle" a broader range of case management services. Certainly, some neutrals already do more than "helicopter" in to mediate or arbitrate a case.

Conclusion

The development of a market for a broad range of neutral case management services can help parties begin and end their dispute resolution processes sooner and more efficiently.

In contrast to the movement to "unbundle" lawyers' services by offering clients the option to retain lawyers to perform selected services "à la carte," this article recommends that neutrals offer to "bundle" a broader range of case management services.[2] Certainly, some neutrals already do more than "helicopter" in to mediate or arbitrate a case. Many providers and provider organizations offer administrative and logistical services in managing cases.

Sometimes, however, parties would benefit from a broader range of case management services, particularly those involving the professional skills of experienced neutrals described above. Enterprising neutrals can provide great value by offering a wider range of services, à la carte

or as part of more-or-less standard packages of services. Just as people can choose from various combinations of many products and services, ranging from bare-bones to five-star, neutrals might develop tiered levels of service to satisfy different clients' needs. If a substantial number of neutrals offer such services, parties and lawyers are likely to see them as normal and desirable—and then buy them.

Obviously, the parties need to compensate the neutrals for these case management and resolution services, but neutrals may be able to provide the services more economically than the parties' lawyers. Moreover, having neutrals provide these services gives greater assurance that no one will try to gain some advantage from making the procedural arrangements. And it also permits a fair allocation between the parties of the case management costs.

In an ideal world, parties in construction disputes would resolve all their disputes without lawyers and, when they do retain lawyers, resolve them without hiring neutral dispute resolution professionals. This isn't an ideal world. Parties sometimes do need to hire lawyers and neutral dispute resolution professionals, especially in complex construction disputes. In these situations, neutrals can provide great benefit to parties, courts and society by offering extensive early case management to supplement their dispute resolution services. ■

1. References to parties include their lawyers unless otherwise indicated by the context.
2. Hon. Frank Evans uses the term "ADR management" referring to a similar concept. See Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW., Sept./Oct. 2007, at 10.

Appellate Arbitration

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The *Procedure* empowers the parties to pick an Appeal Panel comprising one or three arbitrators to review, at the request of either party, an arbitration award issued by a panel below. Paragraph (D) of the *Procedure* articulates the standard of review as follows: "The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision." In essence, an Appeal Panel reviewing an arbitration award subject to the FAA exercises the same standard of review as that of a US Court of Appeal reviewing a decision of a US District Court. Thus, an Appeal Panel, *inter alia*, may review "de novo" all questions of law, and may issue an appellate award that affirms, modifies or reverses the award below prior to presentation of the Appeal Panel's award for judicial confirmation under the FAA.

In a recent JAMS appellate arbitration proceeding, two parties not satisfied with an award issued by a non-JAMS arbitrator on dispositive issues, filed an appeal with JAMS under its *Optional Arbitration Appeal Procedure*. The stipulated record on appeal included key documents and extensive briefing on seven critical legal issues. The parties selected three JAMS arbitrators with special expertise in construction law to sit as an Appeal Panel. The Panel reviewed "de novo" the parties' appealed legal issues on the stipulated record and briefs without a further hearing, and issued a final award that affirmed in part and reversed in part as a matter of law the award issued by the arbitrator below. The arbitration thereby was finally concluded. The cost of the appellate arbitration review itself was quite reasonable, and conferred the added benefits of (1) obviating further extensive expensive arbitration hearings below, (2) virtually assuring that the award, having already been subject to appellate review, would be confirmed perfunctorily by the court under the FAA, and (3) providing the critical "de novo" appellate review of legal issues by selected experts without regard to the statutory limitations of the FAA.

No longer must parties opt for litigation over arbitration in order to preserve the important right of appellate review. Parties now simply may provide in arbitration clauses and agreements that each party has a right to appeal an arbitration award to an Appeal Panel pursuant to *JAMS Optional Arbitration Appeal Procedure*. A copy of the *Procedure* may be found at http://www.jamsadr.com/rules-clauses/. ■

Mr. Bruner is a JAMS arbitrator, mediator and project neutral based in Chicago. Email him at pbruner@jamsadr.com or view his Engineering & Construction bio online.