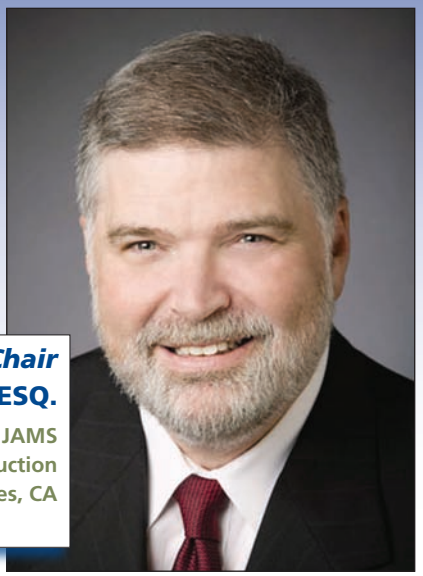
Construction ADR: What's Working and How Can We Make it Better?

SF CONSTRUCTION SUPERCONFERENCE PANEL RECAP

In December 2007, a panel of Construction Law experts was assembled at the Construction Superconference in San Francisco. They were asked to discuss the current use of Alternative Dispute Resolution in complex commercial construction projects, as well as new developments and suggested improvements to the existing processes. We captured the highlights of the panel for the benefit of our clients, contacts, and friends in the construction litigation/ADR arena.

Panelists:

- **ADRIAN BASTIANELLI, ESQ.,** Partner, Peckar & Abramson, Washington, DC
- **PHILIP L. BRUNER, ESQ.,** Mediator/Arbitrator; Director, JAMS Global Engineering & Construction Group, Chicago, IL
- **GREGORY M. COKINOS, ESQ.,** Partner, Cokinos Bosien & Young, Houston, TX
- **JOHN R. HEISSE II, ESQ.,** Partner, Thelen Reid Brown Raysman & Steiner, San Francisco, CA



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Session Chair
KENNETH C. GIBBS, ESQ.
Mediator/Arbitrator, JAMS Global Engineering & Construction Group, Los Angeles, CA

GIBBS: Our goal today is to talk about a subject with which you are all familiar, which is, of course, Construction ADR. We'll go through what we think is working, how can we make it better, and items that, perhaps, can be done better than they're being done currently.

The first thing I wanted to talk about is the relatively new concept of the Project Neutral. This is a concept that is really at the cutting edge – one where parties are writing into their construction contracts a non-party to the contract to act essentially as a mediator throughout the contract period. It should be an ADR specialist – hopefully someone who knows about mediation and dispute resolution. The notion is to select someone who is not a player in the project–a person whose only client, in fact, is the project–and to have that person work with the parties to facilitate dispute resolution as the project moves on. You obviously need to choose that person while you're all still friends at the beginning. I've been privileged to act in that capacity in the construction of a major hospital, a major hotel, and a major public infrastructure project, and it's worked very, very well. It takes a lot of trust by the attorneys, because they're letting go to an extent, and it takes that special facilitator who can gain the trust of each side.

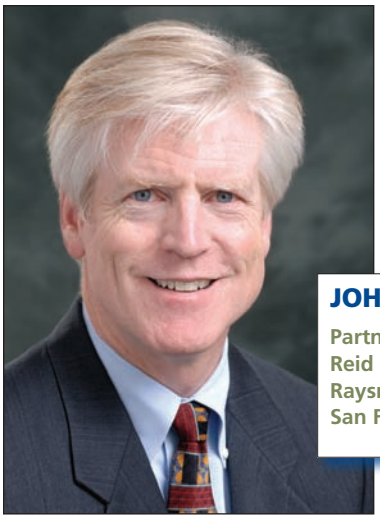
I think it's a really great concept, one that is taking mediation and pushing it to the beginning of the project rather than waiting for disputes to arise and fester at the end of the project. It's also a situation where the facilitator, hopefully, gains the trust of the participants and can solve not only disputes that have arisen, but also prevent disputes from occurring in the future.

One of the interesting things about this Project Neutral concept is that it has now been incorporated, in a sense, in the new 2007 AIA documents. We have the concept of the Initial Decision Maker, which has always been in the documents. In the past, however, going all the way back to the early 1900s, that Initial Decision Maker has been the architect of the project, someone who was supposedly above the fray.

As years have gone on, however, and litigation has become more and more prevalent, the architect has been placed in a very uncomfortable position. The contractor feels that the architect is being paid by the owner and is not really delivering a straight decision. The owner expects the architect to rule in its favor, because, after all, they are paying him or her. The architect is caught in the middle and also is making decisions that could potentially affect his or her own liability.

The new AIA documents that have just come out have recognized this and have allowed the parties to select an Initial Decision Maker who is not somebody involved in the project. What the documents say is that the architect shall be the Initial Decision Maker unless otherwise specified by the parties, and the architect shall always be the decision maker for aesthetic considerations, which are in their realm of control.

Let me ask you, Phil – what are the crucial decisions that the architect once made that an independent or Initial Decision Maker will now make under these documents?



JOHN R. HEISSE II, ESQ.
Partner, Thelen Reid Brown Raysman & Steiner, San Francisco, CA

BRUNER: One of the decisions is the certification of default termination. I have met very few architects over the last 43 years who truly had a comprehensive understanding of the legal concept of wrongful termination. Yet, under the old AIA documents, the architect had been required to certify that sufficient cause existed to justify an owner in terminating for default. I believe it is critical to have an Initial Decision Maker who has a strong grasp on the technical issues as well as the legal issues surrounding the propriety of termination and the concept of material breach.

GIBBS: People should remember that–if you're in the drafting process for the AIA–the architect is still the default Initial Decision Maker if you do nothing. It is a matter that both parties have to affirmatively manage. Adrian, what can you tell us about the value of using Dispute Resolution Boards?

BASTIANELLI: Dispute Resolution Boards ("DRBs") have been involved in over a hundred billion dollars' worth of contracts. There have been over 1500 contracts that have had DRBs, and only one to two percent of those contracts have resulted in litigation. I think the general answer is that DRBs do work and do help resolve disputes.

GIBBS: Why are DRBs so effective?

BASTIANELLI: I think the cornerstone or the starting point of every ADR practice, or every type of ADR, is the selection of the neutrals. One of the problems in selecting neutrals, or selecting arbitrators, once the dispute arises, is that everybody thinks that anybody proposed by the other side must be suspect and should be stricken. Before the project starts, however, that's not the case. Everybody gets along together; everybody trusts each other, and will generally accept the other party's proposed DRB member or arbitrator.

GIBBS: What are some additional benefits of DRBs?

BASTIANELLI: One of the real benefits is the visits to the site, which are generally done quarterly, whether there are any disputes or not. The DRB talks about problems on the job; members of the board look at the construction. They get to see the areas where there are potential for disputes, making it far easier to decide that dispute when and if it arises. The second benefit is that the DRB gets to meet with the people on the job site before the lawyers get a hold of them and tell them what they should be saying. I've had a contractor say, "Well, this is a bogus dispute, but my boss says I've got to submit it just to get it rejected." One owner came back and said, "For political reasons, we have to take this defense, but I know we're not going to win it." Their lawyers would be dying if they knew they were telling the DRB that information, but that's the kind of rapport that is developed by the DRB with the people.

> *"Mediation is an art and mediators who are good have in their gut a knowledge of when, whether, and how to do certain things during the course of the day."*
>
> *–John Heisse*

GIBBS: That rapport with the DRB has additional advantages, correct?

BASTIANELLI: Most definitely. As the dispute process gets underway, the DRB members already know the witnesses who are testifying. It is much harder for those witnesses to get up there and shade the truth when they are talking to people they know and they like; people who have become their friends. They are much more likely to be frank and truthful and not be pushed into saying things that they probably shouldn't have been saying in the first place. Another advantage is that the parties tend not to want to bring bogus disputes and bogus positions to the DRB. Often, the DRB comes to many jobs and never sees a dispute. They hear talk about the dispute arising, but the parties either settle the case or decide not to bring it to them. I think that of the 15 or 16 DRBs on which I have served, I've had less than one dispute per DRB that has actually been heard. It really cuts down the number of claims.

GIBBS: What is the biggest area of dispute, or discussion, of DRBs?

BASTIANELLI: It has to be whether or not DRB rulings should be binding. There are three possibilities that are generally discussed. One possibility is that they're binding, and they really are just arbitration boards. The second is that they have no binding effect and the parties stipulate that they're not even admissible in court. The third, which has been promoted by the DRB Foundation and most of the DRB members, is that they are non-binding, but they are admissible in court. Anybody who is in here will understand that if you take recommendations from a DRB panel and you offer it to jurors, they're likely going to accept it – particularly if they don't understand the issues. Consequently, there is a tremendous bite to the DRB's recommendations.

HEISSE: Adrian, what does the recommendation look like? Does it look like a reasoned award from an arbitrator, or does it reflect the fact on its face that this has been less than a full hearing and the parties have taken some shortcuts in the interests of getting things resolved?

BASTIANELLI: It is a set of recommendations. The key to the DRB recommendations is that the DRB needs to convince the parties to buy into their recommendations. They've selected you because they think you're neutral and because they think you know what you're talking about. Now you have to write a decision that recognizes their arguments and that convinces them to buy it, because this decision isn't binding. What I think the decision should say is: Here are the parties' arguments, and this is a good argument, but here's the reason we believe that the answer is X. So that

you are working and selling yourself, not just sitting as a judge, saying, "Here's the answer, take it or leave it." Because, if you do that, I don't think you're doing your job.

GIBBS: Adrian, any final thoughts on DRBs?

BASTIANELLI: The key to all ADR is getting the right people, and too often some of the DRB members are not dispute resolution-oriented, and that can be a problem.

GIBBS: Thanks, Adrian. I want to turn to the topic of mediation, which is literally a way of life for us in the construction area. Let's discuss what's working, what's not working, and how the process can be improved. John, why don't you start by talking about mediator selection.

HEISSE: The ABA Forum on the Construction Industry did a study several years ago where it surveyed construction litigators and asked them a bunch of questions. One was whether they wanted an evaluative mediator, someone who, during the course of the mediation, is going to tell the parties what he or she thinks of their case and what their chances of success are going to be. Ninety-five percent of the respondents to that survey said they wanted evaluative mediators. Therefore, I think we have to start from that position. If we're going to hire as a mediator someone who understands our industry and understands construction law, we're doing that because we want that person to help our clients get the case to resolution.

GIBBS: What are some other things you think about when selecting mediators?

HEISSE: Personality always comes into play. I mean, do you want the heavy-handed, chest-beating, head-basher who's going to force a recalcitrant party to go somewhere, or do you want the more even-handed, low-key person, or someone who has both and can pull them out at different points? That's something to consider.

GIBBS: To what extent is stature important in the selection of a neutral?

HEISSE: If you have a party where you think the decision maker really needs cover with the board of directors, for example, to settle a case, you want a mediator who will enable the attorney to go back and say, "Well, Ken Gibbs says X," and "Everybody knows who Ken is, and he's got the stature, of course we should do what Ken thinks." So, that's another thing to consider if that's what you need for your client. Finally, I would say objectiveness is a key trait. You want a mediator who is going to give the parties the understanding and belief that he's listening with an open mind to their positions and reflecting that back in the way they conduct the mediation.

> *"There have been over 1500 contracts that have had DRBs, and only one to two percent of those contracts have resulted in litigation."*
> *–Adrian Bastianelli*

GIBBS: Greg, let me turn it over to you. I know you're litigating these cases; what are your thoughts?

COKINOS: I, personally, prefer a strong mediator, one who's going to render and give you an opinion and tell you what he thinks based on the facts that you have. I don't necessarily want someone just criticizing our position and making us feel bad about it, but, at the same time, there needs to be some objectivity. Let's be frank; we're there to try and settle the case, and unless we take an objective view of our warts and understand exactly what the problems are, then we're not going to get it settled. It is also crucial to have a mediator that is both well schooled in the construction industry and understands burdens of proof at trial and what kind of case you're going to have to put on.

GIBBS: Let's talk about exchange of information and your views on that subject.

COKINOS: In almost all of the situations where we've gone to mediation, we've exchanged mediation memos only to the mediator, and they're confidential; the information's not to be disclosed to the other side. I think you're going to be a little more candid by giving it to your mediator and not to the other side. Regardless of the fact that it's confidential and not admissible in court, I think you want to be an advocate. So, my preference is to give information directly to the mediator only.

GIBBS: I would suggest that there's value in adopting the middle ground there, because I think educating the other side about your case is important, and I think, as a mediator, I'd like to see the parties exchange the briefs. If you want to say something private to me as a mediator, I would encourage you to send a separate statement to me that gives your down-and-dirty thoughts, perhaps, that you don't want to share with the other side. I do think, however, that a clear exchange of your views with the other side is valuable. When their decision makers see in an abbreviated form what they're going to face in trial, it forces them to make a risk analysis, which is what the process is all about.

BASTIANELLI: Yes, I hate to see parties show up at the mediation and not be prepared for oral arguments, so I think it's very important to exchange the mediation statements so everybody knows what the issues are on the table.

ADRIAN BASTIANELLI, ESQ.
Partner, Peckar & Abramson, Washington, DC

Peckar & Abramson, P.C.

GIBBS: One thing I wanted to talk about which you may have seen is the concept of dual mediators. Sometimes, certainly, in cases where we have multiple parties, it may be very helpful–so people aren't sitting around and rotting–to have two mediators. The other concept is to have a mediator, but, also, to have a scheduling consultant working with the mediator who has the technical ability to evaluate the schedule claims and disruption claims, and on an evaluative basis, give advice that is perhaps beyond the expertise of the mediator. It's not really a dual me-

diator, because they're doing a technical job, but I think it's a good thing for our particular industry where we're dealing with aspects where people are presenting schedules which may be more art than science. I think it is a good idea to have a third party that can evaluate it and determine what's real or not real and also provide a reality check. What do you think, John?

HEISSE: On the dual-mediator thing, I've done the schedule issue before with a separate scheduler who acts as a mediator's assistant, if you will, and it made that really work. I've acted as a mediator about a half a dozen times in a dual-mediation context, and in some ways it's good, because two heads are better than one, and the second mediator may come up with something that the first mediator didn't. At the end of the day, however, unless there's a real reason for two mediators, you don't want to do it. Mediation is an art and mediators who are good have in their gut a knowledge of when, whether, and how to do certain things during the course of the day. If you're sitting in a room and your co-mediator pops off with something that you really

don't think ought to happen, let me tell you, it's a very frustrating experience.

GIBBS: Can you talk about what happens if you reach impasse in the dual mediation circumstance?

HEISSE: If you get to a mediator's proposal, which we'll talk about in a little bit, you have to commence a whole separate negotiation between the two mediators as to where the number is. And it's really frustrating to go through that negotiation to finally give up and say to your colleague, "Okay, we'll use your number," and then have the case not settle. Then, I think, you've actually harmed the process more than you've helped it.

GIBBS: Okay. We wanted to talk about some things which we think are not working well. I think mediation sometimes may be its own worst enemy. What I hate to see is mediation as a standard part of the claims process. If you're in the mediation only because the contract says you have to be here, all you're going to do is posture for the four or eight hours, not get anywhere, and simply tell the other side how you're going to shove it down their throat. I've been in many, many mediations where they said, "We really don't want to be here. We've been ordered to be here by the contract, that's why we're here, and we have no intention of settling now or at the end of the day." I think mediation needs to be a voluntary decision by the parties to sit down and try to resolve their dispute. Greg, what's your take on this issue?

COKINOS: I think you're absolutely right. One of the biggest problems is premature mediations. It serves no purpose to sit down and mediate before everybody has enough information to make an educated decision on what they're doing. It really dovetails with a discussion we had about lawyers not understanding business resolution. I think one thing lawyers need to be a lot more aware of than they typically are, is that there's a business resolution and it's not a matter of digging your heels in on your position and beating your chest to show that you can win. There is a degree of objectivity you have to come in with in mediation to try and reach a reasonable business resolution. You serve yourself a lot better by getting your mind into more of a business-resolution mode with a client than to come in and just try and advocate your position to win.

PHILIP L. BRUNER, ESQ.
Mediator/Arbitrator;
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GIBBS: Phil, did you want to add something on that topic?

BRUNER: I think that parties certainly have to get together, and the only way to do it is to keep the business people together. You really have to consider and reinforce the business reality that created this dispute. It's the only way to align all of the stakeholders to this decision.

GIBBS: That's a good point. Greg, can you talk about experts in mediation and some of your thoughts, which are slightly controversial?

COKINOS: When I hire an expert for a jury trial, I want someone who is capable of defending his position, getting on the witness stand, being tough and advocating on behalf of the client. In a mediation, however, the client should be in a more conciliatory position to come to a business resolution and try and work out the dispute. That can backfire if you've got an expert who is there just advocating, and pushing, and saying, "It's our position that we've been delayed 365 days and we should absolutely get five million dollars for it." That may fuel my client and make him think, "We'll win in court, so why settle?"

"I believe it is critical to have an Initial Decision Maker that has a grasp on both the technical issues as well as the legal issues…"
–Phil Bruner

GIBBS: Adrian, could you give your view?

BASTIANELLI: As the mediator, I love to see an expert that I know show up at the mediation because I try to use that expert as a co-mediator. I had one case that would not have settled but for the fact that the expert sold his client when I was out of the room. So, I think experts can be a wonderful addition if it's the right expert and you know them.

GIBBS: Let's discuss the issue of who should and shouldn't be at the mediation table. Every mediation generally starts off with the question, "Do we have everyone here to make the decision?" It's always the same answer: "Oh, yes, sir, we sure do, absolutely." And four o'clock rolls around, and you find out the guy who has to sign off is in Sweden, and that he's asleep, and we can't get a hold of him. We can't reinforce this enough. Don't come to the table without the person who has the final authority.

There is also an issue with having too many people there. I love to have the experts to start, but I try and pare it down. Otherwise, you get the church-revival mentality as the day goes on with everybody cheering each other on about how great a case is. I try and bring it down to just the essential decision makers as the day goes on. Finally, there's the issue of the insurance carrier failing to attend. Adrian, do you have some thoughts about that?

BASTIANELLI: It's a problem I see more and more, and I'm not sure there's any solution to it other than trying to keep them on the line during the mediation so you bring them along as part of the mediation.

GIBBS: I also see the insured often not having personal counsel there to do what's necessary to "put the appropriate pressure" on the insurance carriers, as opposed to insurance defense counsel who may be very adequately representing the insured in terms of the underlying dispute, but are not representing the insured's interests with respect to the carrier.

COKINOS: I think that's a significant point. You really need to have personal counsel there, because insurance companies deal with risk and the time value of money, and the longer they have to pay, the less likely they're going to. So, I think it's really important to have someone there advocating on behalf of the insured to really push that carrier into getting payment.

GIBBS: We're now going to switch over to arbitrations. There have been changes recently in various contract provisions, and I'd like Phil to address that.

BRUNER: Over the years, arbitration has gotten a bad name in some quarters. While it's supposed to be quick, inexpensive, and a process to come up with the right result more often than not, some in the construction industry have not found that to be the case. The American Institute of Architects just within the past month has, for the first time in 100+ years, provided the industry with an extraordinary impetus to craft their own procedures under which their disputes are going to be resolved. Not only have they established this concept of the Initial Decision Maker to replace the architect in that initial role, but they also provided that litigation will be the default option for dispute resolution unless the parties affirmatively agree otherwise in the contract. You're going to have to check off a box now to do it. Everybody in the construction industry is now going to have to decide the best way to structure ADR in their contracts.

GREGORY M. COKINOS, ESQ.
Partner, Cokinos Bosien & Young, Houston, TX

GIBBS: Why do you think arbitration has gotten such a bad name in the past?

BRUNER: One reason is poor arbitrator selection, and the other is poor administration. There's nothing fundamentally wrong with the concept of arbitration itself. When you look back at the genesis of the first national construction contract in the United States, called the "standard form" contract, it provided for arbitration in 1905–well ahead of any arbitration act. This was the way that the parties in the construction industry believed disputes should be resolved.

GIBBS: How do individual parties pick an arbitrator without talking to him or her, and if they talk to him or her, do they lose neutrality?

HEISSE: Well, I've done this more and more. In my practice, I find that I'm using an AAA panel less and less when I'm against counsel that I respect. With counsel with whom I have a relationship, the two of us can work together to pick three arbitrators on a big case and one arbitrator on a small case.

GIBBS: What are some of the different considerations, depending on the size of the case?

HEISSE: On a small case, you want someone who you know will be efficient to get it done quickly. A big case, you may want a blue-ribbon panel that covers certain bases, and you don't want it to be the same people, so you wind up having to do research. I found a study done by the Charter Institute of Arbitrators in the U.K. on the guidelines for interviewing potential arbitrators. I found it fascinating what they say, because many lawyers consistently violate these guidelines.

GIBBS: John, I assume you are referring to more than just their basic requirements–a sole arbitrator, both sides represented, the interview taped or captured by the interviewee's assistant, etc.

HEISSE: Exactly, Ken. The tricky part becomes where the English regulate the questioning and testing of the arbitrator's knowledge of certain areas. Obviously, you've got to keep that very general and that's why you really want both parties on the same interview, so one person isn't shading the arbitrator in a way and trying to co-opt them into breaking a ruling later on. They also say that if the interviewee gets to a place where he or she thinks that the parties are really seeking to find out enough so they can get the person who believes in their case, or that they're trying to color that arbitrator's opinion, the arbitrator should walk out of the room and call it a day and not serve.

GIBBS: As you're discussing this, I can picture the red flags going up.

HEISSE: The question that is raised is: How do you police this? I mean, if you find out that your opposing counsel is doing something that violates these guidelines, what do you do? I don't really know the answer to that, although I would say if you're in arbitration, I would be very careful about how you play that card, because arbitrators, often think they've been there, they've seen everything. It's like running the fraud card up the flagpole. I mean, you don't want to accuse people of fraud too often or no one listens to you anymore. It's the same thing here. It's a very interesting area, and I think we need to give more thought to the limits of permissible pre-selection communications with potential arbitrators."

GIBBS: Arbitrator disclosure is a sensitive, timely, and important topic.

Phil, could you give us your thoughts, please?

BRUNER: Disclosures are particularly important because all three arbitrators, including the two appointed by each party, truly should be neutral. It means that even though a party appoints an arbitrator, there should be disclosures to the other party and the other arbitrators of their relationships. The old days, where the party-appointed arbitrators served as adjunct counsel to argue the case further, have gone by the board.

GIBBS: With regard to pre-hearing issues, there certainly are a number of them. Greg, can you talk to us about dispositive motions?

COKINOS: Well, dispositive motions roll right into the cost issue, because I believe they are the most underutilized tactic that you can employ in arbitration. They can really reduce the time and effort of all the parties. I use summary dispositions on a regular basis, assuming I have the facts to support them. I use them to dispose of causes of action that aren't viable in the arbitration, or, potentially, the case in its entirety. I think it's underutilized, and you need to consider it, assuming you have the factual support for it.

GIBBS: Can you elaborate further on the cost issues to which you referred?

COKINOS: I have a great deal of concern about cost issues in arbitration. The arbitrators are expensive. A lot of lawyers want to discover a case in arbitration just as they would at the courthouse. I think it makes a lot of sense to reduce the amount of discovery. Then go in there and try your case. You think you're trying it by the seat of your pants, but you're not, really. You've got all the documents you need. I think that really can reduce the costs associated with the length of the arbitration, as well as the time consumed in preparing for the arbitration. As Phil said earlier, arbitration was intended to reduce the costs, and I don't think we should fear the idea of going into an arbitration without fully discovering and taking every witness's deposition.

GIBBS: My personal technique is that if the parties can agree, I'll live with whatever you say, but if you don't agree, my view is that depositions should be limited, and no interrogatories, and let's try and streamline this thing to make the arbitration process what it's supposed to be. I don't think you should be without expert depositions, however, and I think certainly a limited number of percipient depositions give attorneys in a major construction case some comfort zone that it's not going to be trial by surprise. Okay, why don't we discuss some of the other items that we think can streamline this process. Phil?

> *"I tell my arbitrators to please say 'Uncle.' When you've had enough of a subject, feel free to tell us… 'We've beat this horse to death.'"*
>
> *–Gregory Cokinos*

BRUNER: Arbitrator availability is certainly important. If you're in a process where you're given a list of 10, and each of you strike three, for example, you're really captive to the arbitrators' schedules. When you select your own arbitrators, you can at least find out availability and make sure the time gets blocked out.

GIBBS: I think one of the advantages of arbitration is that the strict rules of evidence are not applied. I would urge you to turn in a timeline of the key events as a demonstrative piece of evidence to have the arbitrators essentially have a checklist and a reference tool throughout the entire arbitration for your evidence and testimony to be measured against and for them to have a permanent record of what you're trying to show.

BRUNER: Electronic presentations accelerate various things. The use of ELMOs and computers make a big difference. You know, the old days of just walking in with piles of boxes of documents and dropping them on everybody is just not the most efficient way.

GIBBS: We just had a major arbitration where we didn't have a single piece of paper at which we were looking. They were there if we needed to see them, but everything was done by the computer and by visual presentations and electronic presentations. I think it certainly shortened the procedure considerably. Adrian, I think you were going to talk about pre-filed testimony.

BASTIANELLI: The pre-filed direct testimony going directly into the cross-examination is an excellent way to shorten the arbitration, and I think you get a much better presentation because the arbitrator will read it the night before. When I've done it, I come prepared and I know what the questions are, and I think I do a lot better with pre-filed testimony.

HEISSE: But Adrian, I would suggest that although it may expedite the arbitration hearing itself, it's much more expensive for a lawyer to sit down and write out the answers. That's what they're doing. The lawyers are now writing out the questions and the answers that the witness is going to respond to rather than actually having the person talk and do it themselves.

BASTIANELLI: When I've done it as an advocate, what I do is bring the court reporter in, and the witness, and go through the testimony just as if I was before the arbitrator, and then I get to go back and rewrite it.

GIBBS: Let's talk about time clocks. I urge folks, particularly for construction arbitrations, to try and select an appropriate time period, divide up the time, including opening statements, direct examination, and cross-examination, and then use a chess clock technique to keep track of people. You can finish the case in the time allotted if you understand you're under some time pressure. Greg, have you used those?

COKINOS: I think time clocks are great. It puts the pressure on everyone, but it puts the pressure on you to streamline your case, to be concise. Also, I tell my arbitrators to please say "Uncle." When you've had enough of a subject, feel free to tell us "I've had enough. We've beat this horse to death."

GIBBS: What about the concept of dueling experts?

COKINOS: I've utilized it as an advocate as well as when I've sat as an arbitrator. You get both experts in the room at the same time, let one testify, let the other testify, and then start asking them questions about their specific positions. I think that's a good way to save time; it's a good way to get to the

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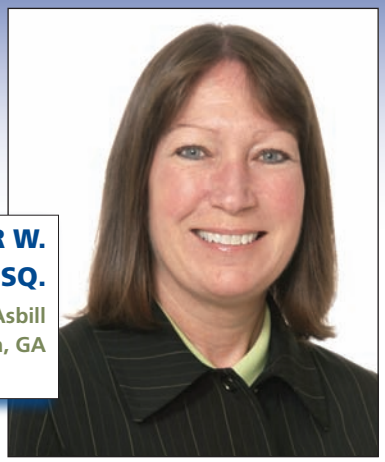
Perspectives from the Construction Bar

Jennifer W. Fletcher, Partner, Sutherland, Asbill & Brennan, Atlanta, GA, was an original member of our Construction Superconference ADR panel and was integral in helping draft the presentation. Unfortunately, Jennifer's role in a significant ongoing arbitration prevented her from attending the conference. I caught up with Jennifer to get her perspectives on some of the issues addressed by our panel:



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GIBBS: Jennifer, we heard a lot of positive comments from the panelists about DRBs. Some clients, however, are still reticent about going that route. Why do you think that is?

FLETCHER: One argument that I hear from clients is that they do not want to incur the cost of having a DRB. The DRB Foundation statistics show that the actual cost of the DRB itself is really minimal in the context of a major construction project. I think the average reported range is from about $30,000 to $80,000, which is certainly not prohibitive on a major project. More difficult to assess is the cost of having personnel needed to manage the project involved in dispute resolution activities and presentations while the job is ongoing. Especially on a fast track or time sensitive project, this can be a distraction (and thus a cost) many companies do not want to incur.

GIBBS: What factors do you take into consideration when choosing a mediator?

FLETCHER: It is important to consider the personalities and even psychology of the decision makers on each side. What kind of mediation approach will be successful with your client? What kind of mediator will be persuasive to the other side? Some clients need a "head banger" but others will respond to a reasoned engineering or even mathematical approach. Back when mediation first became popular, participants used to be wary of mediators who had connections to the parties. I view that differently, in that a mediator who is respected by your opponent may be more persuasive to him and may also understand the business needs that will enable a settlement.

GIBBS: Can you give us an example where this strategy was particularly effective for you?

FLETCHER: We were involved in the first mediation ever approved and conducted by the Georgia DOT – now they mediate many cases, but this was back in the beginning of the mediation trend. We had jointly selected a very highly regarded national mediator (from JAMS in San Francisco), but we were still concerned that the DOT lawyers and principals were not going to be comfortable making a decision to pay the very substantial sums we were requesting. Therefore, we suggested they choose a co-mediator, and they selected a former Justice of the Georgia Supreme Court who also had a connection to the DOT. Ordinarily there might be a concern that he would be biased in their favor, but he was someone in whom the decision-makers had ultimate trust. They could go back to their Board and say that this Supreme Court Justice had recommended the result that they were going to adopt. So, the combination of the very experienced mediator, plus the judge in whom the government group had confidence, turned out to be a great team and we settled the case.

GIBBS: Mandatory mediation is one of the contract clauses that you usually modify. Can you tell us about that?

FLETCHER: We think forcing people into a premature settlement process is a waste of money and often causes the parties to become polarized in their positions before they really understand their case. Apparently, a fair number of people agree. I understand the new AIA forms will no longer require that a mediation be completed prior to commencing legal proceedings; a mediation need only be "commenced." That makes sense, as the parties must at least initiate a settlement process before taking the dispute to another level, but they can then define what they need by way of background and preparation before the mediation process goes forward to a completion. They may do this as well, using a selected mediator who can assist in designing the process.

GIBBS: Our panelists all chimed in on the various complaints about arbitration. How do you view this issue?

FLETCHER: We all know that one of the principal complaints about arbitration is that, although it is supposed to be faster and cheaper than litigation, often that is not the case. If, however, the parties can reach agreement on a knowledgeable and experienced construction industry arbitrator or panel, then they have some security that the process will be managed efficiently, and that they will have a reasonable and predictable time frame to conclusion.

GIBBS: Have you been involved in circumstances where the use of dispositive motions had a clear impact on the cost of the process?

FLETCHER: In a recent arbitration, the parties agreed to hold off on deposition discovery pending the arbitrators' decision on dispositive motions. The arbitrators handled the motions very expeditiously and granted several of the motions, disposing of about eight million dollars of the claims. That resolution allowed the parties to view their case more realistically and the disputes were then settled. So the combination of strong dispositive legal issues and strong arbitrators resulted in cost savings and a resolution. ■

bottom of the real issues. It's a scary proposition for some folks, but I've seen it work on many occasions.

GIBBS: One of the issues is how much the arbitrators are actually asking the questions as opposed to the attorneys. As an arbitrator, I try not to do that too much. I want the attorneys to run the case, not me.

BRUNER: Well, I can tell you of a case in which I was serving as an arbitrator and we put two scheduling experts on the stand. One used one methodology; one used another. After the lawyers had examined the experts, the panel went back and forth until we were satisfied as to what the differences were in their opinions and came to our own conclusions.

GIBBS: That, of course, is the advantage in having knowledgeable experts on the arbitration panel. Adrian, why don't you talk about preliminary decisions and oral arguments after you've rendered a preliminary decision?

BASTIANELLI: One of the things that I've done in the past that is somewhat unique is, after the case is closed, and the arbitrators, or I, have sat down and gone through it and reached my decision and laid out the basis for my decision, is to call the parties up and say, "Look, here are the issues with which I'm having trouble" or "Here is an issue which I don't recall you addressing, which I think is critical. Why don't you come back in next week, and I'll let you all try to sell me that I am wrong in the way I'm leaning or present your arguments on those specific issues alone." As an arbitrator, a lot of times you get back 30 days after the hearing; you're trying to reach a decision and you're running into issues on which you need more information. I think it's a very good process.

GIBBS: Arbitration's been under fire, and one of the issues, of course, is the scope of review of an arbitration decision. Phil, your thoughts?

BRUNER: The question always is: Just how binding is it? You're supposed to have binding arbitration, but, as we know, under the various arbitration acts, there are certain grounds for review. On the international scene, there's been talk for years about actually setting up some kind of a board of arbitrator review. It would consist of other arbitrators who would review the decisions so the courts don't get involved and reverse an arbitration award on grounds of their local public policy. Be that as it may, the U. S. Supreme Court has before it the question of whether parties may alter by contract the statutory scope of judicial review of arbitration awards.

GIBBS: I wanted to turn back to the mediation topic for a second, because there was one issue that we didn't cover. Often, as mediators, we want to do something, even if the parties are far apart. You're all probably familiar with the concept of the mediator's proposal. John, can you tell us a bit about these proposals?

> *"We just had a major arbitration where we didn't look at a single piece of paper. I think (the electronic presentations) certainly shortened the procedure considerably."*
>
> *–Ken Gibbs*

HEISSE: A mediator's proposal can be used if the parties are at an impasse. There's a big gulf, and people are taking baby steps across that gulf at a glacial pace. The mediator sees no end in sight and proposes a number somewhere between the two numbers, and in caucus with each individual party, presents the number and says, "Tell me if you'll take that or not." If both parties say yes, you have a deal. If one person says no, that person never finds out whether the other party said yes or not. So, it allows you to take one step to solve the problem and have a deal without changing the negotiation.

GIBBS: But you believe that mediator's proposals are sometimes overused or misused. Why is that?

HEISSE: If the mediator gets it wrong and comes up with a bad number, the mediator's just done what he or she is trying to avoid. The mediator has put a stake in the ground. One of the parties is going to say, "Okay, that's my new floor," or "That's my new ceiling, because the person we picked, the expert, said so." So, I think that's a problem. I think some mediators get lazy, and sometimes they're calling impasse and going with the mediator's proposal before they have to. The biggest concern to me, however, is that the lawyers for the parties–we're all very good at adjusting to things – will start gaming the system. If you have a mediator who you know likes to go to mediator's proposal, your mediation strategy starts to be aimed towards that proposal and conditioning the mediator for what the number's going to be, rather than coming to a number to which both parties can consent. So, that's my soap box. I think it has its place. It just should be used sparingly and I think we're using it too much.

BASTIANELLI: I would like to hear from the other mediators as to how you select the number that you put forward on the mediator's proposal. Is it what you think is right, the number they should get? Is it something you think will settle it? Is it somewhere in between? What do you do?

GIBBS: Well, if your client at the mediation is "settlement," which it should be, you're really trying to pick a number that will settle the case, not necessarily an evaluative number. That's what the mediator's proposal truly is, I believe. Ultimately, I'm trying to figure out a position that works for both sides. And they may be kicking and screaming and saying it's not going to work, but if there's truly an impasse, that's what I'm looking for.

HEISSE: I agree wholeheartedly, but that's also what raises my concern – the idea that the strategy of the parties becomes conditioning the mediator towards that number.

GIBBS: Another thing I'm not doing is making the mediator's proposal the day of the mediation. I say, "Okay, see you later," and let them go home at that point and think about it. So, there are all sorts of different techniques, and I do agree that gaming the system is part of it. You know, mediation was the miracle. Well, mediation has become like penicillin. We've got people who are immune to it. Because they've been there so often, it's now just part of the system. And, yes, they're gaming the system, as you say, John. So, I think, as mediators, we have to be innovative in understanding that we're dealing with sophisticated people who are working the system as much as we are as mediators. ■