ADR Process Design

# Collaborative Use of Technical Experts For Environmental and Construction Dispute Resolution

BY CHRIS KANE P.E., J.D.

Disputes involving environmental and construction issues, like other highly technical disputes, commonly require the use of experts, probably one of the most expensive individual items in an adversarial dispute resolution process. This article looks at how technical experts can be used most cost effectively and productively, and can help to resolve disputes in a collaborative manner.

In traditional adversarial dispute resolution, particularly arbitration and litigation, the use of experts involves significant time and expense. This includes engaging initial technical advisors to evaluate the problem, identifying experts, getting the expert to review all information, producing drafts and final reports, taking depositions of the experts during discovery, and preparing experts to testify at hearings. The final adversarial phase for experts is the cross-examination of the expert at the hearing, where opposing counsel attempts to obscure facts, distort positions, and point out prejudices, thus creating a difficult job for the non-technical decision-maker to decide which expert is correct.

All sides to a dispute go through this same process and expense of retaining an expert. In this traditional model, there is no opportunity to directly open a dialogue between the experts, stipulate areas of agreement, or agree on cost-effective technical solutions. Those familiar with these types of cases have most likely experienced the world of "dueling" experts. It is an "all or nothing" contest, with no one conceding anything they do not absolutely have to, and a third party non-expert making a binding decision.

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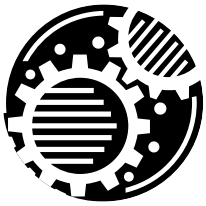

## A COLLABORATIVE APPROACH

How can experts be better utilized in resolving highly technical disputes? Two recent case studies illustrate how collaborative concepts and techniques can improve the use of experts and significantly reduce the transaction time and costs. The first case involved a mediation convened to find a "technical solution" to a storm water run-off dispute between a developer and local landowners. The second case involved a mini-trial with a non-binding advisory opinion by a third party expert to resolve a claim of differing site conditions found during construction of a power plant.

## USE OF EXPERTS IN A MEDIATED TECHNICAL SOLUTION

Mediation has proven useful when a dispute involves an environmental issue that requires, in addition to an allocation of responsibility, swift remediation. One such dispute involved farmers and an adjacent residential development. The development had an approved storm water management plan. Having completed only about half of the planned build-out, the developer put in the approved temporary structures to control storm water run-off. The farmers complained of an immediate effect on their properties from increased run-off, but couldn't get any relief from the county or the developer, because the storm water management plan was "approved."

After several years of frustrated attempts to get help from the county government and the developer, the farmers sued the homeowners' association and the developer for damage to their farms. The intervening years had seen an increase in storms with high intensity precipitation. The construction of the development had allegedly increased the water flow onto the adjacent farms, even though the water management plan was approved by the county and showed no change in run-off. The farmers claimed to have experienced erosion, increased mud patches, as well as the formation of potential new "wetlands." One major concern was that endangered turtles would move in under these new conditions, which would dramatically change the land use requirements on the farms.

After the lawsuit was filed, the case proceeded through more than a year of discovery and pre-trial posturing at the expense of all parties involved. The respective insurance companies of the homeowners' association and the developer got involved in the defense, and requested the court to order all parties to take a sixty-day "timeout" and to use mediation to find a technical solution. Even though there was some skepticism about whether the case would get resolved, there was fortunately an openness and willingness to try the process. If a cost-effective technical solution could be found, it would be much easier to determine who would pay.

The parties identified a mediator with the technical expertise required for the case. After being retained, the mediator and parties agreed to the following process:

1. *Direct involvement of the parties' technical advisers.* In order to mediate a technical solution, both sides were encouraged to use their own technical experts for advice on the nature of the problem as well as a proposed

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solution. Prior to the mediation, all of the parties' technical experts exchanged their analyses and technical solutions.

2. *Pre-mediation understanding of technical positions.* Conference calls were held prior to the mediation with all sides, both together and separately, to insure a clear understanding of each side's position and interests. Although the technical positions became understood, there was no agreement at the outset of the mediation on how to fix the problem.
3. *Mediation joint session*. In a two-hour joint session, the experts presented their views and had the opportunity to enter a dialogue with questions from the mediator and also direct discussion between them (see "hot tubbing" discussion below). Through this process the experts were able to agree that there was in fact an increase in storm water run-off due to the temporary nature of the mitigation measures.
4. *Positions on technical solutions.* The developer's expert recommended a simple solution involving immediate completion of the drainage structures originally designed for a later stage, when the project had been completely built out. In addition, they offered to add in a few upgrades. The farmers' expert on the other hand, recommended completely diverting the storm water into piping placed under a paved road to discharge directly into the creek downstream of the farms. The cost of the farmers' solution was several times higher than that of the developer's solution.
5. *An alternative technical solution.* The final phase of the mediation included caucusing with each side, with the mediator encouraging proposals. When an impasse appeared near, the mediator, who himself possessed technical expertise, was able to propose an intermediate compromise solution. Having a conceptual solution come from the mediator was helpful, in that neither expert had to concede his position and the parties could focus on a compromise that would solve the problem.

The mediator's proposal was tested by both sides' experts at the mediation and found plausible, and the parties agreed to stay the litigation and to continue to work on resolving issues around the alternative solution. Ultimately, the mediator's alternative solution needed to be modified, but the parties and their experts were now invested in the collaborative process and had a greater commitment to settling the case. Once a cost-effective technical solution was identified, the parties and their insurance companies had no problem contributing to the cost in order to resolve the dispute.

## Increased Efficiency in Using Experts

**The traditional approach:** Adversarial, time-consuming and costly. An 'all or nothing' contest.

**The collaborative trend:** Collaboration leads to focus on substance and furthers innovation and flexibility; saves time, money and relationships.

### MINI-TRIAL: NON-BINDING ADVISORY OPINION

If mediation cannot resolve a technical dispute, another method is to seek a neutral advisory opinion on the matter for the benefit of and as a reference for all sides. There are many names for this, including "neutral evaluation" and "mini-trial," a term that gained popularity in the 1980s and never completely fell out of use. A non-binding advisory opinion from an expert third-party neutral can be a cost-effective, real time method to resolve construction disputes. A recent large-scale power plant project successfully used advisory opinions to resolve disputes that arose early, in the first phases of construction. The owner had entered into a single construction contract with one contractor for the entire project, so their relationship was intended to last for several years. The contractor experienced sub-surface conditions allegedly containing unknown and undisclosed waste material, which ended up increasing his costs.

The contractor submitted multi-million dollar claims for differing site conditions, which the owner rejected. Following an unsuccessful settlement meeting of senior management, the contract called for mediation followed by binding arbitration. Neither of these options seemed appropriate or useful to the parties at this early stage in the project. They were skeptical of mediation, which they felt was not the type of evaluative process they needed. They were also not interested in binding arbitration, which is often adversarial, expensive and time consuming, besides taking away their control over the outcome. The parties therefore came up with a mini-trial process aimed at obtaining an advisory opinion within a short time frame.

This process was outlined in a written agreement between the parties and later adopted by the neutral:

1. *The neutral.* A mutually agreeable single neutral advisor would be selected, who was to be a construction claims expert with at least ten years in the industry. Costs were to be shared equally, unless there were objections to the decision (as discussed below).
2. *Pre-hearing exchanges*. Within thirty days, the parties would exchange all materials to be relied on in the hearings, including their technical positions. Two weeks after the exchange, position papers would be submitted, and one week after that, power point presentations would be exchanged. The parties were to be bound by their initial exchange of information and position papers.
3. *Conduct of the hearings*. Strict time limits were imposed on each party, with a thirty-minute opening statement and a four-hour presentation of their positions for each of the two claims. Both sides retained experts who provided part of the testimony. The hearing was scheduled to be completed in no more than three

consecutive days. There was no examination of witnesses by the parties, and only the neutral could ask questions at the end. The process again allowed for some "hot tubbing" of the experts.

4. *Decision*. The neutral advisor was to issue his decision within ten days of the close of the hearings. The opinion was to address both claims and defenses and be no more than three pages in length.
5. *Effect of decision*. Either party could object to the decision within thirty days. If there were no objections, the decision would become final and binding. If a notice of objection was given, the decision would remain non-binding and be treated as part of confidential settlement discussions. If only one party objected, that party would pay the other party's 50% share of the costs of the mini-trial proceeding. In the event of objection, the parties would revert to the contract and proceed to binding arbitration.

In this case, the advisory opinions rendered included two different decisions on the entitlement for two claims. Neither party objected to the decisions within thirty days, and the matter was therefore completely resolved before the project was even 30% complete. The entire process was completed within ninety days from start to finish, compared to a minimum of twelve months for a full-blown arbitration. The cost of this mini-trial process was around 10% of that of an arbitration, and probably only slightly higher than the cost of mediation.

As demonstrated in this case, an advisory opinion can give the parties a neutral benchmark to settle the dispute, thereby conserving time, money, and on-going working relationships. In addition, party experts can be used in a cost-effective manner. This highlights the flexibility of ADR: when the parties' original multistep process turned out not to be sufficiently flexible, rather than leading to a stalemate, it could be adapted to fit the problem using an updated, hybrid technique—an example of true ADR innovation.

## "HOT TUBBING"

The concept of "hot tubbing" experts is a technique that arose in the Australian judiciary system as a more productive way to present expert testimony. It is more formally referred to as "concurrent expert testimony," and is gaining in popularity as a means of saving time and costs in arbitration, and even in some U.S. courts dealing with environmental and natural resources disputes. This form of expert testimony generally follows the fact witnesses' discussion of the circumstances surrounding the dispute. The technique allows the experts to give testimony (or informal opinions) in the presence of each other and to enter into a dialogue. Each expert produces a brief written submission, followed by a short oral summary of his or her opinion. Each expert is then given the opportunity to question the other expert. Finally, each expert again summarizes his position before answering questions from the neutral and/or counsel, depending on the agreed terms.

## BENEFITS OF EXPERT COLLABORATION

In the two cases above, the collaborative forums chosen allowed for something similar to this technique. The benefits of this process are multiplied in the context of a settlement process, as illustrated above. Among the benefits:

- Focusing on the actual technical area of the dispute may narrow or eliminate the technical issue or question;
- Determining areas of agreement and disagreement may narrow required testimony and discussion;
- Concurrent expert discussion gives the parties and the neutral a better understanding of the experts' positions;
- Reducing the adversarial relationship between the experts allows them to relax and focus on substance;
- Abbreviated schedules and shorter submissions eliminate the time and expense of preparing for and testifying at a formal hearing;
- Many experts would prefer to have a structured professional discussion, rather than an attorney-led interrogation.

These benefits can be summarized as "increased efficiency" in the necessary use of experts in dispute resolution. As demonstrated by the case studies, experts can be helpful in finding solutions, narrowing issues and resolving disputes, and can do so at far less cost and time when there is commitment to a collaborative process. Counsel should therefore seek to avoid the long, narrow and expensive path to resolution in an adversarial proceeding requiring experts by identifying a forum to make use of expert opinions in an early settlement context. The collaborative use in mediation of experts who work toward a cost-effective technical solution with a technically competent mediator can be effective in solving a problem, narrowing the gap and simplifying the settlement discussions. In addition, an abbreviated non-binding mini-trial with both experts concurrently presenting testimony before a technically competent neutral can also provide an effective process for early settlement.



## FURTHER READING:

Stephen E. Snyder, Daniel L. Uecke, and John E. Thorson, "Adversarial Collaboration: Court Mandated Collaboration Between Opposing Scientific Experts in Colorado's Water Courts," 28 *Natural Resources & Environment*, No. 1 (American Bar Association, Summer 2013).

Chris Kane, "The Future of the Engineering & Construction Industry: Greater Integration and Collaboration," presented at the American Bar Association Forum on the Construction Industry Fall Meeting, Sept. 26, 2013, Washington, DC.

Chris Kane and Kurt L. Dettman, "Collaborative Conflict Management for Alternative Project Delivery," presented at the American Bar Association, Dispute Resolution Section Conference Apr. 4, 2013, Chicago, IL.

Megan A. Yarnall, "Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?" 88 *Oregon Law Review* 311 (2009).

# CPR News

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*Committees*

CPR member-only committees are the backbone of CPR's thought-leadership and play a critical role in shaping the future of ADR. Committees provide the unique and rewarding opportunity for users and practitioners to convene, collaborate, define best practices and spearhead innovation in commercial conflict management. If you are interested in joining a committee, attending one of these meetings and strengthening your connections, contact CPR Membership Director Terri Bartlett at tbartlett@cpradr.org or +1.212.949.6490.

- Dec. 6, 2013 Energy, Oil & Gas Committee Call - 12:00 PM-1:00 PM Eastern. Location: Dial-in information provided on committee page.
- Dec. 11 European Executive Board Call - 10:00 AM Eastern /3:00 PM BST /4:00 PM CEST.
- Dec. 12 Arbitration Committee Meeting - 12:30 PM-2:00 PM (lunch @ 12:15) at White & Case, 1155 Ave of the Americas, New York, NY.

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- Feb. 20-22, 2014 CPR Institute's 2014 Annual Meeting "Through the Looking Glass: Divergence in Global ADR Practice" in Charleston, S.C. The keynote address to be given by retired U.S. Supreme Court Justice Sandra Day O'Connor. The latest information, including sponsorship opportunities, is available at http://bit.ly/UGixzt. The full conference brochure is available at http://bit.ly/1e4Gicz.

  Contact Mara Weinstein at mweinstein@cpradr.org or ±1 646 753 8230 for more information.

## DIVERSITY TASK FORCE ADOPTS COMMITMENT

The National Task Force on Diversity in ADR has adopted the following commitment to diversity, which corporations and law firms are encouraged to adhere to:

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