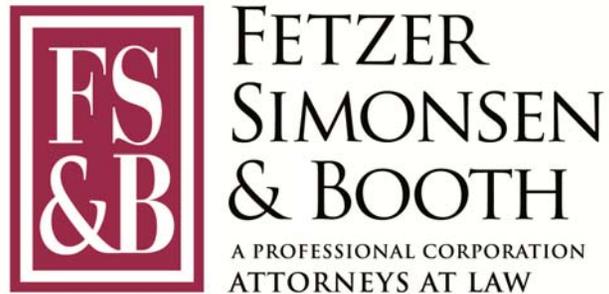




QUESTIONS TO ASK YOUR LAWYER (AND YOURSELF) BEFORE GOING TO COURT:

**Alternative dispute resolution for contractors,
engineers, and suppliers**

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QUESTIONS TO ASK YOUR LAWYER (AND YOURSELF) BEFORE YOU GO TO COURT

- Is a lawsuit the only way to solve the dispute?
- How much will it cost to litigate?
- What are the alternatives to court?
- What do I really want?



LIMITATIONS OF LITIGATING

- COST
- TIME
- CONTROL
- COMMUNICATION
- CREATIVITY
- COLLECTION



“ADR is constructive, not destructive and a constructive approach can generally bring out a solution, a fairness. Just trying to wage war by using all the courtroom techniques is generally going to be unfair to at least one of the parties and maybe to both of them.”

Hon. William H. Webster, former Judge, U.S. Court of Appeals for the Eighth Circuit and former director of both the FBI and the CIA.



How many pay?

KSL reported after an extensive review, that 79% of cases that were awarded judgments and are still open for collections, remain unpaid.

5,143 civil and small claims cases in seven district courts in Utah; reported in late 2010



SETTING THE TABLE

ADR SMORGSBORD

- ❑ DIRECT DISCUSSIONS (CONSENSUS DOCS)
- ❑ NEGOTIATION
- ❑ FACILITATED NEGOTIATION
- ❑ MEDIATION
- ❑ MED-ARB
- ❑ PROJECT NEUTRAL
- ❑ DISPUTE RESOLUTION BOARD (DRB)
- ❑ INITIAL DECISION MAKER (AIA)
- ❑ EARLY NEUTRAL EVALUATION
- ❑ FACT-FINDING
- ❑ CASE EVALUATION
- ❑ MINI-TRIAL
- ❑ ARBITRATION

THE ADR SPECTRUM

DISPUTE AVOIDANCE/ EARLY RESOLUTION	NEGOTIATION	MEDIATION	EVALUATION	ARBITRATION
Initial Decision Maker Project Neutral Dispute Resolution Board	Direct Discussions Facilitated Negotiation		Early Neutral Evaluation Mini Trial Initial Decision Maker Project Neutral Dispute Resolution Board	



MEDIATION

Dispute resolution process whereby the parties, either by contract agreement or voluntarily after a dispute arises, agree to use a third-party neutral mediator to help the parties find a resolution to a dispute (or series of disputes). The mediator acts as a neutral facilitator for all parties and does not render any decisions for the parties. If all the parties negotiate terms to settle their disputes, they will often draft an agreement that all parties sign and agree to abide by after the mediation.

Source: Announcement, "Call for Papers: Special Issue on Alternative Dispute Resolution for the Engineering and Construction Industry," *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, November 2011 pp. 141-142.



ARBITRATION

Dispute resolution process whereby parties, usually through a contract agreement, will engage a neutral arbitrator (or a panel of three arbitrators) to serve as an informal judge to decide the resolution of a dispute. More formal than mediation, arbitration resembles an informal litigation (conducted outside of a court system), whereby parties will present evidence and argue their side of a dispute before the arbitrator(s). The arbitration award is issued at the end of the hearing and can be converted to a judgment in court through a simple court proceeding.

Source: Announcement, "Call for Papers: Special Issue on Alternative Dispute Resolution for the Engineering and Construction Industry," *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, November 2011 pp. 141-142.



PROJECT NEUTRALS

On-site neutral(s) who are engaged before the start of the construction project to assist all parties in the identification of potential issues and provide advice to the parties on issue resolution. Typically the project neutrals are experienced in the design and/or construction that is the subject of the project. The project neutral either reviews the project periodically or is on call to the parties to raise or discuss potential issues and possible solutions with the parties before the issues become emerging disputes. The project neutral uses his or her experience to assist the parties to avoid disputes and can be a predecessor to other forms of alternative dispute resolution.

Source: Announcement, "Call for Papers: Special Issue on Alternative Dispute Resolution for the Engineering and Construction Industry," *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, November 2011 pp. 141-142.



DISPUTE RESOLUTION BOARD (DRB)

On-site neutral(s) who are engaged before the start of the construction project to assist all parties in the quick resolution of disputes during the project. The DRB meets at regular intervals at the job site to conduct an on-site visit and meets with all the parties (owner, architect, contractor, and major subcontractors) after each site visit. All emerging and pending issues – and possible solutions – are discussed between the parties with the DRB member(s), who are present but not participating unless there are clarification questions requested by the members to understand the nature of the dispute. Any disputes not voluntarily resolved by the parties may be submitted to the DRB, which may offer either nonbinding or binding opinions on resolutions. A DRB may be employed as part of an overall dispute resolution process for a project, and the DRB's scope of authority, meeting schedule, and other conditions are all agreed upon by the parties before the start of the project.

Source: Announcement, "Call for Papers: Special Issue on Alternative Dispute Resolution for the Engineering and Construction Industry," *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, November 2011 pp. 141-142.



RESOURCES

- ❑ American Arbitration Association www.adr.org
- ❑ Dispute Resolution Board Foundation www.drb.org
- ❑ Construction Industry Institute www.construction-institute.org
- ❑ Journal of Legal Affairs and Dispute Resolution in Engineering and Construction www.ascelibrary.org/lao/
- ❑ Air Conditioning Dealer Association (Australia) www.acda.com.au/what-the-acda-can-do.html
- ❑ “Questions Clients Have About Mediation: What Happens in Mediation?” Kent B. Scott and Cody Wilson
- ❑ Utah Council on Conflict Resolution www.uccr.net