CE News **"Risky Business" No. 6**

Wanna' Fight?

LP. The time-honored initials of loss prevention, a well-know term among civil engineering practitioners. But what does loss prevention *really* mean? Litigation prevention. Because it's as a consequence of litigation that one loses not only money and time, but also peace of mind, reputation, and clients.

Let's face it: To err is human. Sooner or later you'll commit an error or omission. Does that mean you'll be sued? No. Most errors and omissions get caught when they're still in the molehill stage, and are corrected easily, often for little or nothing at all. Some grow to more sizable proportions, of course, but even then, those responsible often "take care of things" for the client. That means keeping the cost of an error or omission to the cost of correcting it, with nothing having to be spent on the dispute resolution process. And most clients really appreciate such attitudes: "It's nice to know that, if something goes wrong, you'll be there to make it right." As such, rectifying one's mistakes quickly, and in full, helps minimize costs and can actually strengthen client relations.

Litigation is expensive because of the people it requires and the frustrating, time-consuming convolution of the process. More than lawyers and experts are needed. At least one of a firm's principals usually gets involved, along with one or more project managers, a technical specialist or two, and clerical help. And the process drags on and on, commonly spanning two, three, or more years, and sometimes a decade or more. Thus, while we might look forward to our "day in court," having it can be so costly, and so far into the future, that about 95% of all claims initiated through litigation are resolved long before "the day" arrives. In essence, it's smarter to settle for $25,000 than pay $50,000 to support a possibly fruitless effort to prove you should not have been sued to begin with.

If your contract is silent about dispute resolution, litigation is apt to be the method of choice when a client can gain an important advantage because it can afford better lawyers than you, and/or when your defense will have to be rooted in technical issues a jury cannot easily fathom. Litigation can also be a problem when a client has in-house legal staff, and can use it to fight a war of attrition somewhat cost-effectively.

Here's another set of initials worth knowing: ADR. Many people will recognize it to connote alternative dispute resolution, with "alternative" meaning alternative to litigation. A better meaning is *accommodative* dispute resolution, meaning accommodative methods ("If we can accommodate each other we can resolve this thing and we both win") rather than litigation or binding arbitration, both of which are adversarial processes ("Let's get lawyers and try to destroy one another, and whoever's left standing wins").

If your contract specifies mediation or some other ADR technique, one or possibly two accommodative, nonbinding procedures would have to be attempted before an adversarial approach could be applied. Because such ADR usually makes litigation or binding arbitration unnecessary, it provides a variety of benefits. Key among them is low cost, because it radically reduces the amount of time attorneys, experts, and firm personnel need to spend. It's also fast, in part because court dockets do not have to be considered, and because so much less legal process is involved.

Some practitioners dislike ADR because it tends to focus on "splitting the baby" rather than the merits of the case. In many a mediation, for example, the mediator's role is to get one side to take less and the other to give more, until both sides are accommodated. But let's face it: Cases seldom get resolved on their merits, because judges, juries, and arbitrators often don't grasp what the merits really are. Besides, settlement is often achieved between the principals, via their lawyers, not through a trial, and often not because of merits.

If your standard agreement does not now have a dispute resolution provision, it should. Your professional liability insurer can probably provide sample language, or you can

obtain it from an attorney. *Do not enter into oral agreements.* They leave so much unsaid they can aggravate disputes, and almost always require litigation. Much the same can be said for brief letter agreements.

If your client offers you an agreement that does not address dispute resolution, suggest including ADR. If the client refuses, or objects to one in your agreement, beware. A client that believes litigation or binding arbitration gives it an advantage might prefer to fight when problems arise. Can you really afford to have clients like that?