CE News **"Risky Business" No. 9**

IS THERE ADR IN THE HOUSE?

Lawyers often are maligned because they make such outrageously unfair claims on behalf of their clients. But that's exactly what lawyers are supposed to do; i.e., serve as advocates for their clients in a *process* designed to provide justice. Lawyers aren't that bad. Litigation is.

To begin with, litigation is adversarial, meaning that, if only for purposes of self-protection, each side needs to act as though the other is a loathsome enemy. As a result, the process can become vile enough to enrage even the most placid, self-possessed professionals. How would you react to being called an incompetent, a liar, and a cheat, when you know you did nothing wrong? And how would you react to seeing those allegations printed as fact in your local newspaper?

Making matters even worse, litigation can last for months, years, and – in some cases – decades. The process can be expensive, too. Do you think insurance protects you? Think again. While insurance will cover much of the cost once you satisfy your deductible, it will not cover the value of lost productivity or opportunity costs (i.e., the value of the engagements you fail to obtain because those who write proposals and make presentations are otherwise occupied). Nor will insurance reimburse you for the costly effects of adverse publicity on public procurement opportunities.

Who's doing all the suing? It's those nasty contingency fee lawyers who advertise on the back cover of the Yellow Pages and on radio and TV, right? Wrong! Fully 60% or more of the claims against design professionals are brought by private and public owners (your direct and indirect clients), with another 20%-25% being brought by contractors. As such, more than eight of every ten claims are pursued via attorneys who are paid for their time rather than a percentage of the winnings, an arrangement that encourages some attorneys to make the process even longer and more convoluted.

Given that virtually any client has the potential to be a client for life, and given that a client for life can be worth $5 million to $25 million or more over a 30-year period, the most costly aspect of litigation often is losing an actual or potential client for life.

"Loss prevention" is the term used to characterize any number of practices and techniques applied to help prevent the loss of money and mental health caused by litigation. "Providing top-quality deliverables," some advise, is the number-one loss prevention method. To some extent that's true, but recognize that much of the litigation brought against civil engineers is occasioned not by a significant error or omission, but rather by an owner's and/or contractor's realization that the project will cost more – sometimes far more – then originally budgeted. At that point, those seeking "contribution" call upon their lawyers and experts to identify those who are most vulnerable; i.e., those who have enough money to make pursuing them worthwhile, and who can be made to appear negligent to a jury that knows little or nothing about technical issues. "But my plans and specifications are flawless," you say? I'll bet you dollars to doughnuts I can find five "experts" who are willing to say you were negligent. Faced with such charges and the rigors of litigation, many firms find that knuckling under to tactics that smack of extortion makes more financial sense than having one's "day in court."

So what can you do? A lot, with one of the most important steps being to make litigation a nonoption. You can do this by using your contract to require that any disputes arising from the agreement must be resolved through alternative dispute resolution, or ADR, meaning a procedure other than litigation and, for the most part, other than binding arbitration, which also requires an adversarial approach. *Alternative Dispute Resolution for the Construction Industry*, available from the Foundation for Professional Practice (www.fppnet.org), identifies almost 25 separate accommodative ADR methods. Of these, mediation, mediation-then-arbitration, Med/Arb 2, resolution through experts, and dispute review boards are among the most used. They and other methods regard disputes as business problems that need to be resolved quickly, at the lowest possible process cost,

without resort to moralistic chest thumping and extraordinarily intricate rules and regulations. As a result, a dispute that might take five years and $300,000 (not including damages) to resolve via litigation can often be settled in three months, for $5,000, via ADR. And possibly best of all, because accommodative ADR measures eliminate the need for adversarial posturing, a dispute does not have to mean the end of a relationship.

You should be sure to include an ADR-based dispute resolution provision in your standards agreements, and seek to include such a provision in clients' agreements, too. Of course, some clients might prefer to not use ADR. *Ask such clients why*, given that litigation should be just as costly and distasteful for them as you. It just may be that they prefer litigation, because they can use it to arm-twist their consultants into submission. You really need to introduce such clients to your competition!