

# Opinions and Ideas

*Editor's Note: The editorial mission of the Forum is to share opinions and ideas about the DRB process. Members are encouraged to submit articles or letters to the editor about issues presented in the Forum or challenges experienced within the work of dispute resolution.*



## WHAT ROLE SHOULD LAWYERS PLAY IN THE DISPUTE REVIEW BOARD PROCESS?

By Kurt Dettman

Most DRB processes minimize the role of lawyers in favor of emphasizing the engineering side of construction disputes. This article explores two aspects of the role of lawyers in the DRB process: first, whether a lawyer should be a member or chairperson of the DRB; and, second, whether lawyers should be permitted to play an active role in the presentation of disputes to the DRB. The author suggests that, although there is no “right” answer to these issues, they certainly should be carefully considered by owners and contractors when establishing and managing the DRB process.

### The Role of Lawyers as Members/Chairperson of the DRB

#### Current DRB Specifications Limit The Role of Lawyers On The DRB

Many DRB specifications do not encourage the role of a lawyer as a member or chairperson of a DRB. Some specifications provide that members must have an engineering background, but permit a lawyer to be a chairperson; others do not permit lawyers to be either a member or a chairperson. Not surprisingly, however, many construction disputes revolve around “gray areas” of who, as a practical matter, caused the event or circumstance that gave rise to the claim and who, as a legal matter, is ultimately responsible for the outcome of that event or circumstance. Owners and contractors need to consider whether permitting lawyers to be DRB members or chairpersons would

help in resolving these intermingled questions of fact and law.

#### Construction Disputes Often Involve Legal Issues That DRBs Must Resolve

The genesis of most disputes is the construction process itself. In these instances, persons with a background and expertise in construction and engineering are best able to review and analyze such disputes. That said, however, most of these disputes also arise in the context of a contractual arrangement between the owner and the contractor that allocates responsibility between the two parties. Sorting this out involves issues of contractual interpretation--or the application of general legal principles, to the extent the outcome is not dictated by the contract. Lawyers, who are trained to address the thorny issues of legal responsibility, teamed with people having expertise in engineering/construction issues, may provide appropriate skill sets that are needed to answer both the “engineering” and the “legal” aspects of such disputes.

#### The DRB May Benefit From A Lawyer's Perspective On Process

Another issue regarding the role of lawyers is the establishment and management of the DRB process itself. In many instances, the basic procedural rules are established in the DRB specification. In most specifications, however, the DRB is permitted some leeway in fashioning the details of the procedure, especially in the handling of unique features of particular disputes. Given that often the process needs as much legitimacy as the substantive outcome, the question for owners and contractors is whether lawyers on the DRB can play a positive role in the DRB process.

Lawyers are trained in the use of process, both from the standpoint of how to manage and present complex disputes and from the standpoint of “due process,” that is, fundamental fairness

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that permits all parties sufficient opportunity to present their claims and defenses. This is not to say that DRB members from an engineering/construction background are not capable of managing the DRB process; rather, owners and contractors should consider whether a lawyer on the DRB can help establish and implement a process that will have more credibility with, and therefore “buy-in” from, the participants.

The DRB May Benefit From A Lawyer’s Perspective On Formulating And Articulating Findings And Recommendations

A final consideration in the role of lawyers on the DRB is the form and content of the DRB’s findings and recommendations. The DRB findings/recommendations are the basis on which the parties will decide their respective positions on the outcome of the DRB process. It is important that the DRB findings/recommendations show the following: that all issues and positions were considered; that there was careful reasoning and logic applied; that due consideration was paid to the contract and any legal principles advanced by the parties; and that the findings and recommendations are clearly articulated.

As with process issues, lawyers are trained to write and record decisions in a manner designed to withstand legal (or judicial) scrutiny. Many parties rely on reviews by legal counsel to decide whether to accept the DRB’s findings and recommendations. Therefore, owners and contractors need to consider whether a lawyer can assist in the formulation and articulation of the DRB’s findings/recommendations in a manner that will increase the chances for acceptance of the outcome of the DRB process.

**The Role of Lawyers in the DRB Hearing Process**

Current DRB Specifications Downplay The Role Of Lawyers In The DRB Process

Most DRB specifications severely limit the role of lawyers in the DRB process itself. Typically, the DRB procedures specifically state that legal process such as motions, cross-examination and the like are not permitted. DRB procedures also restrict lawyers in their

attendance and participation at the DRB hearings.

The DRB Process And Outcome May Benefit From Permitting Lawyers To Play A (Constructive) Role In The Resolution Of Contractual Or Legal Issues

As noted above, often disputes that go to the DRB involve issues of contractual interpretation or the application of legal principles. Also as noted above, the acceptability (especially to public owners) of DRB findings and recommendations may revolve around whether the DRB has given due consideration to those issues.

In both of these areas, it may be advisable for the DRB to permit sufficient lawyer involvement to ensure that both parties get ample opportunity to present their positions, both factual and legal. Likewise, having lawyers assist the parties in clearly articulating the applicable contractual or legal principles may assist the DRB in analyzing and writing about the issues—especially where there is not a lawyer on the DRB.

The author does not suggest that DRBs let lawyers “take over” the process, but overly limiting their role—especially on “legal” issues—can also be detrimental to the outcome of the process. The key is to keep the overall informality of the process intact, but recognize that lawyers can play a positive role if their talents are properly channeled to assist the DRB in its job.

DRBs May Also Benefit From Permitting Lawyers To Play A (Constructive) Role In The DRB Hearing Itself

A perhaps more controversial issue is whether lawyers should be permitted to participate in the process where it involves non-legal issues. For example, should lawyers be permitted to summarize the party’s position at the beginning and end of the proceeding—or should lawyers be permitted to “orchestrate” the presentation, such as the proffering of expert opinions?

An argument in favor of this is that lawyers  
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are trained on to present cases in a logical and understandable way. Thus, having construction attorneys and/or claims consultants assist in putting together the material presented to the DRB can be helpful to the DRB because information and documents are “packaged” in an organized manner. They also are skilled in presenting complex issues, such as delay analyses, forensic cost accounting analyses, impact/productivity analyses, and quantum calculations. Finally, sometimes witnesses that have trouble presenting or articulating their position could benefit from some guidance in order to get relevant facts on the table.

Generally, DRBs will need to proceed with some caution in this area because part of the attractiveness of the DRB process is its informality and focus on “getting to the heart of the issue” using the best memories of project people that lived and breathed the job. Under certain circumstances, however, lawyers can be helpful in moving the process along—as long as they understand that their job is to better present the claim, not to exercise the “spin control” that is endemic to classic arbitration or trial advocacy.

**Conclusion**

Owners and contractors setting up DRBs--and DRBs themselves--must consider the appropriate role of lawyers on the DRB and in the DRB process. The author suggests that in order to make the DRB process and recommendations as acceptable as possible, DRBs must give due consideration to contractual and legal issues—and lawyers can play a positive role in that outcome as long as it is consistent with the basic principles of the DRB process.

**Note:** DRBF member Kurt Dettman was the chief counsel and associate project director for claims resolution on the \$14.6 billion Central Artery/Tunnel Project, which had one of the largest DRB programs in the country. He is now the principal of Constructive Dispute Resolutions and can be reached at [kdettman@c-adr.com](mailto:kdettman@c-adr.com).

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That lack of connection is something I have set as one of my primary goals to address for 2006. Through the Regional Representatives, I will be scheduling regional meetings, where we can meet each other, pool our collective intellect about the construction industry in your regions and jointly develop the means by which you not only will feel like a contributing member but also participate in the development of the process by which more DRBF members can participate as DRB panel members in each region.

The DRBF has been a very, very good organization. However, as the business author, Jim Collins, writes: “*The greatest enemy of great is good.*” Some of us may look back and wish we could return to where the DRBF used to be. As Mr. Collins points out, that previous place no longer exists. Time has moved on and, if we stay in one place, we actually fall behind. My efforts in 2006 are specifically focused on increasing opportunities, increasing revenue and increasing the sense of connectedness between you and the DRBF and placing the DRBF squarely at the front of the 2006 market.

To those of you who seriously are questioning whether you should continue your DRBF membership, I ask you to answer one question: Will you join with me for at least one more year to help move the DRBF from very good to great?

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**If you have news about DRBs, DRBF members, or an article to share, we’d like to hear about it.**



**Deadline for the next issue is April 1, 2006**