



Alternative Dispute Resolution (ADR) as a Legal Alternative to Workers Compensation Insurance for Infrastructure and Construction

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Zetlin & De Chiara senior partner Michael Zetlin moderated a thought-provoking panel discussion for the New York Building Congress on “Alternative Dispute Resolution (ADR) as a Legal Alternative to Workers Compensation Insurance for Infrastructure and Construction” on July 14 at the Harmonie Club.

The panel featured a diversity of vantage points with Don Naber, EVP, Safety, Risk and Insurance for Gilbane Building Company; Jack Frasier, SVP for American Global LLC; Brian Palmer, AVP, Claims Advocate Lead for Alliant Insurance Services/Construction Services, and Nadeem Mir, Clinical Director for First Care.

Carlo Scissura, President and CEO of the NYBC, opened the session and welcomed the audience of construction industry representatives and insurance professionals.

Noting that New York City will account for about 10% of the expenditures in the \$1.5 trillion infrastructure bill, Mr. Scissura urged that we need to think “big and bold” and “act accordingly” as the construction business evolves. “We are transforming every part of the industry. We are transforming the way we do business...the way we are building...the way we are designing or engineering...We are finding ways to do business more efficiently.”

Mr. Scissura introduced Mr. Zetlin, who also serves as General Counsel for the NYBC. Mr. Zetlin quickly set the program’s agenda to cover: How ADR may be a viable option for the construction industry...How other states have adopted ADR...and How ADR may be a viable solution on certain projects in New York State. He set the tone by stating the case for ADR that “when used in appropriate circumstances, the results can be positive for all parties.”

Mr. Zetlin asked Mr. Palmer to open the discussion. Mr. Palmer reminded the attendees that “it is fitting that we are having this conversation about worker compensation here in New York City because the concept of workers compensation was actually born here, going back to March 25, 1911, with the tragic Triangle Shirt fire in Greenwich Village,” adding that “there had to be a partnership between the injured workers, the injured parties, labor, and the government. It was a collaborative effort.”

Mr. Palmer observed that workers compensation had evolved over the years to the point that it was collectively bargained in the late 1980s, becoming law in New York State in 1995. “Most importantly, the concept of collectively bargained workers compensation allows for all parties to opt out of the statutory workers compensation system.”

To achieve the opt-out from workers comp, he explained that there are certain steps in the process to which all parties must be in agreement. He emphasized that there has to be a partnership with the insurance marketplace. “You have to have the buy-in and support of the insurance carriers, as well as with the government and the New York Workers Compensation Board.”

Mr. Frasier reinforced the collaborative nature of ADR by reminding the audience that there is “the ability to collectively bargain in the construction industry is an alternative system as long as it is equal to, or better, that basically removed the workers comp board from the process and enabled the collective bargaining process in partnership to create an alternative system.”

Putting the argument for ADR in numerical terms, he shared that “We have been doing \$5 billion of ADR throughout the Hudson Valley and have never had a labor law claim. I see no reason for labor law reform. I have done ADR for 27 years in the Hudson Valley and the results are losses of both workers comp and GL (general liability) of under 0.5% of construction value with many advantages that ensue from that.”

Mr. Frasier then offered some of the advantages for labor, including the ability to “create your own dispute process” as well as safety and wellness while ensuring that no benefits are being taken away.

Michael Zetlin raised the question if using ADR in this context is “a claims program or risk management?” Mr. Palmer responded that it is both. “It truly is a partnership with the ability to create a risk management program in conjunction with the unions,” with the agreement extending to concerns about wellness and taking care of post-accident injuries.

Mr. Zetlin asked Dr. Mir about the differences between statutory workers compensation and ADR. “There is a huge difference between the usual workers comp situations and the ADR programs,” Dr. Mir responded. He expanded upon the differences by focusing on the amount of time each takes. Dr. Mir explained that workers comp requires an authorization process that is often lengthy, whereas ADR is much quicker, almost immediate.

Dr. Mir used an example of a patient who comes in with a bicep tendon rupture as to how the two differ. “We have to get an authorization to get an MRI. The patients need surgery in the first 7-10 days in order to have the best outcome. We don’t get an authorization for an MRI immediately. And then after that, we would have to wait another 40 days to receive authorization to proceed with surgery. You’re talking about almost two months out before surgery and they (the patients) don’t have the perfect outcome they should be having.

“On the other hand, with ADR, when the patient comes in, we can expedite that care a lot quicker. There is no red tape to wait for these authorizations. A patient comes in, we get to see him immediately and determine if the patient needs an MRI and/or surgery. The time frame goes from 40-60 days down to a week or two. Patients have their surgery. They get their expedited care, and they are happy with the care they are getting. This gets them back to work immediately and they have top-level care.”

Mr. Naber reinforced the notion that collaboration makes ADR attractive. “ADR brings logic into place. It is a collaborative effort. It is something that is negotiated upfront. It brings solutions to the table. We understand exactly what is going to happen if there is an incident.”

He spotlighted the concept of how ADR reduces costs for insurers through its wellness focus. “It is a tool that puts us in a better place. It gets employees back to work. Especially now, it is critical that we get people back to work.”

Building on the theme of collaboration, Mr. Naber expressed his view that the insurance carriers are “partners,” adding that “they bring expertise to the table that helps drive a better result.”

Mr. Frasier brought union support into the equation, saying that ADR cost savings lead to greater market share, which is important to organized labor. He said unions also like very much the accelerated process with which ADRs resolve health matters.

Mr. Zetlin asked the panel to share ADR success stories. Dr. Mir focused again on the time differential, comparing, along with Mr. Palmer, ADR handling of workplace injuries such as torn elbow tendons to how professional sports teams, such as the Yankees, waste no time to address injuries to their players.

“It is crucial that the patient be taken care of almost immediately,” he stressed, using the example of a construction industry patient who had surgery within a week of his tendon injury and was back at work later that week, with some accommodations, and at full strength a few weeks later. Had he gone through workers comp, the worker probably would not have even received approval for the MRI by then.

In fact, Dr. Mir said he is able to refer patients to the same doctors the Yankees and other pro teams use rather than a typical private orthopedic surgeon. “ADR benefits the patient more than anything else,” Dr. Mir concluded.

Mr. Zetlin then redirected the discussion to New York City, which has not yet fully embraced ADR. Mr. Frasier emphasized that ADR is still beneficial to The Big Apple as size doesn’t matter. “It’s quality over quantity. You don’t need a big network.” ADR should be viewed as an option to consider for particular projects.

Mr. Zetlin followed up by asking the panelists what they would like to see in New York City. Dr. Mir called ADR “a great idea – a win for the employer, a win for the employee, and a win for the provider.” He said ADR would make a “huge difference” in New York.

Mr. Naber was skeptical about ADR becoming a quick solution across the five boroughs. “We’re in a tough place here,” he said, pointing out that “carriers don’t want to commit to construction projects here [because claims are more significant than other states], making it more challenging.”

However, he urged that ADR become more standard in NYC, saying that “if we don’t make changes, it will get worse.” Hitting on the positives to go forward, he said, “if we continue to invest, if we prevent, all the things we are talking about fundamentally take care of themselves.” Arguing for ADR in New York City, he said, “We need to make a change. From a collaborative standpoint, ADR

provides a change.”

Mr. Palmer referenced the \$1.5 trillion infrastructure bill and what additional work can be done with the savings from ADR. He brought up the example of the MTA, which reduced its insurance budget by \$60-90 million. Based on that savings, the MTA found the funding for an ADA project it otherwise could not afford. ADR, declared Mr. Palmer, is “an avenue to reinvest in New York.”

“Educating is key,” said Mr. Palmer, stressing the need to educate unions all over New York State “to reduce risk and enhance collaboration.”

Mr. Zetlin concluded the insightful session by thanking the panelists, sponsors, and hosts adding that they had clearly satisfied the NYBC’s stated goal. “This was intended to be a forum for discussion, a venue for exploring new ideas,” he said.

The Corporate Sponsor was Alliance Security Specialty Insurance.

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