



Forum

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How NOT to Implement the DRB Process



By Robert A. Rubin

Dispute Review Boards have an unprecedented record of success. Yet, there have been a handful of unsuccessful DRBs, some of which have even been characterized as “DRBs from Hell.” Since the DRB is a rela-

tively new dispute resolution process and is solely a creature of contract, the term has no well-established, industry-wide meaning as, say, “arbitration” does, which has a long history in construction dispute resolution and is defined both by contract and by statutes. Some contractual ADR procedures are labeled “DRBs” that should not bear the label. The following is a list of features that have yielded less-than-satisfactory, and in some instances, even disastrous results. These have led the parties involved to swear that they would never use a DRB again and have tarnished the DRB’s reputation as a highly effective process for disputes avoidance and resolution.

- Waiting to form the DRB until the project is well underway and disputes have already arisen – Having a DRB in place from the outset of the project creates an incentive to the parties’ resolving issues by themselves,

in many instances not even permitting them to rise to the level of “disputes.” As nature has it, people do not like to appear foolish or to be judged by their peers, especially those who are “older and wiser.” The DRB is most effective when the DRB members have seen the physical construction from the very start of the project and have developed relationships and credibility with key project personnel as the project has progressed.

- Limiting DRB members’ fees, reimbursable expenses and the geographic area from which members can be drawn – These limitations are penny-wise and pound foolish. The avoidance of a single dispute or the expeditious resolution of a dispute by the DRB process can save the parties tens and sometimes hundreds of thousands of dollars in attorney’s fees and litigation expense, let alone the time wasted by key personnel diverted from project performance. The success of DRBs is directly related to the caliber of DRB members and trust and confidence they engender in the parties. Cost savings limitations that deter service by the most highly qualified individuals as DRB members are self defeating.

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“As nature has it, people do not like to appear foolish or to be judged by their peers, especially those who are ‘older and wiser.’ ”

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President's Page



The Dispute Resolution Board Foundation has made good progress on several fronts in the last quarter. The directors recently approved a change in the membership grades that will require a change in the by-laws and approval by the membership in this year's election process. The changes do not appear dramatic but nevertheless lay the foundation for future growth of the DRBF and expansion of the use of the DRB process. Individual grades remain the same except that we have added a Student grade to enable those enrolled in institutions of higher learning to learn about our approach to dispute resolution, and to enable the DRBF to grow relationships with those institutions. We have folded the Corporate and Institutional grade into that of Sponsor with two different levels of membership prices. The message we hope to send is that the DRBF exists to ensure timely resolution of disputes whatever the result and we look for the entire industry to provide special support to the DRB process and the Foundation.

As part of the discussion of membership grade modification the directors have instituted new requirements for members to post their resumes on the DRBF website. Members will be required to have completed the Administration and Practice Workshop and the Chaining Workshop. In addition those members also must complete DRBF continuing education courses at no more than three year intervals. There will be ample time for all members to comply with this requirement. The directors have established a two year grace period from the time the revised membership grades are adopted by the membership. Kerry Lawrence and his Education Committee believe they will have the first continuing education course in place by the middle of this year. We will keep you advised of the progress. The new website resume requirements and continuing education courses will enable our executive director to refer to listings of experienced and trained DRB members for those users who need them.

One of my ongoing concerns has been that the Foundation is not close enough to the members (and vice versa). We have taken the first steps to narrow the distance through energizing the Regional and Country Representatives. A Terms of Reference has been developed for this position and new people appointed to some positions that were unfilled. John Nichols will coordinate these efforts for the U.S. and Gwyn Owen for the multi-nationals. One of the first steps will be for each Regional/Country representative to contact you and recruit you to convey to them news of ongoing or upcoming work that could be candidates for the use of DRBs. After this first step and others, it is my hope that Regions/Countries become much more active on a local level.

There is more detail on membership grades and the Regional/Country representatives elsewhere in the *Forum*. We have taken steps to ensure the *Forum* content be of broader interest to the industry. We intend to publish articles that may be somewhat controversial and invite dialogue from the readers as well as interviews with some of our members soliciting their views on items of interest. We are deleting the minutes of the Board of Director's meetings except for occasional brief summaries of items of importance. The complete minutes are being made available on the Members Only section of the website.

In conclusion, in the coming months I anticipate seeing a lot more activity on the local level and greater participation by all DRBF members in promoting the most successful dispute resolution process ever known to our industry.

Sincerely,

A handwritten signature in cursive script that reads "Lawrence V. McKittrick".

Board of Directors Meeting Minutes Move Online

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The DRBF Board of Directors meets on a regular basis to address new ideas and opportunities to advance the work of the Foundation. The discussions and decisions are always made available to the general membership. Previously, a summary has been printed in each issue of the *Forum*.

In an effort to bring the news to the membership in a more timely fashion, the Board of Directors Meeting Minutes Summary is now available on-line in the member's only section of the DRBF website. A brief summary of the actions taken in the meetings will be featured in each issue of the *Forum*. For a more detailed report of the discussions and on-going actions of the Board you will need to visit the website to read the Board of Directors Meeting Minutes Summary.

How to Access the Board of Directors Meeting Minutes Summary:

- Go to **www.drb.org**
- Login through the **Member Login** button
- Click on **DRBF Board of Directors**

DRBF Board of Directors Meeting Overview

The DRBF Board of Directors met by conference call on December 15, 2005 and January 13, 2006. A complete review of the discussions and actions taken can be downloaded from the DRBF website, www.drb.org. Following is a brief overview of the actions taken:

- The 2006 Annual Meeting and Conference location was changed from New York City to Orlando, Florida.
- The 2006 Budget was approved.
- The DRBF declined a proposal from CDRS to operate joint DRB training programs.
- The price of the *DRBF Practices and Procedures* manual was raised to \$30 for DRBF members and \$60 for non-members.

All DRBF members are encouraged to read the summary minutes and submit any comments or suggestions to the president of the Board, Harold McKittrick. The Board's meeting schedule will continue to be published in the *Forum*, and can be found on the Calendar of Events on the DRBF website.

Board of Directors Meeting Schedule:

February 10

March 24

May 19-20

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

Forum Editor: Ann McGough

Editorial and subscription address:
Dispute Resolution Board Foundation,
6100 Southcenter Blvd.,
Suite 115, Seattle, WA
98188-2441
Phone: 206-248-6156
Fax: 206-248-6453
Toll free (US only)
888-523-5208
E-mail: home@drb.org
Web site: www.drb.org

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The *Forum* welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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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 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
(continued on page 10)



A MESSAGE FROM THE EXECUTIVE DIRECTOR...

I started as the DRBF executive director exactly one year ago today (January 5, 2005). While there were no known road maps for this position, I am sure that not only each Board member but also each of you had your own expectations. After one year in this position, there have been significant achievements.

Revenue and membership are up and DRBF national exposure has experienced a marked increase. The DRBF gave a DRB session at both the international and the domestic *Superconference*. At the San Francisco Superconference, the DRB session was scheduled for the last day, Friday, in the last time slot. There were over sixty people in attendance, a turnout apparently larger than any session that did not include a free lunch!

Two state agencies that never before had DRBs now are in the final stages of DRB program implementation for the 2006 construction season. Caltrans contractually committed to have the DRBF hold eight training sessions utilizing the new training materials over two weeks in four cities in California. Caltrans also has requested the DRBF to enter into discussions regarding potential additional work for 2006 and 2007.

Perhaps the most exciting aspect of the past year concerns DRBF education. In June 2005, the Board directed me to develop a new set of training materials. I was provided extraordinary assistance by the DRBF Education Committee (Kerry Lawrence, Jim Donaldson, Bill Baker and Dan Meyers) and the new materials were first presented at the Administration & Practice (A&P) Workshop in Connecticut in December. The attendee responses can be summarized as follows:

Overall Program: 67% excellent and 27% very good
Program Materials: 34% excellent and 60% very good
Presentation: 73% excellent and 21% very good
Rating: 17.6 (1-20 scale, with 20 as excellent)

Perhaps most telling were the remarks of the Caltrans DRB program manager, who attended the workshop:

... presented a complete and clear outline of each subject . . . the teacher's way of delivering the workshop was fantastic . . . able to get the participant's attention and motivation without getting each in the classroom sleepy and bored. The instructor always had something interesting to say that you wanted to hear and understand. The course material outlined a thorough flow of topics . . . explained the concepts and best practices of DRB and allowed time for questions and answers . . . room for improvement in the "questions and answers" . . . overall opinion of the workshop, HIGHLY COMMENDABLE

These materials presently are undergoing review by a state education department for improvement in organization, Q/A and testing metrics. Caltrans, the DRBF's largest direct client, is very excited about the direction of the DRBF training materials. Once the education department's comments are incorporated, the revised A&P and Advanced/Chair training materials will be submitted for approval for Continuing Education Units and Continuing Legal Education hours.

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Based upon approval of the DRBF Education Committee, the present schedule for DRBF Workshops has targeted over 20 workshop sessions in eleven states. Once the workshops receive their CEU/CLE approvals, specific marketing campaigns will be developed for additional DRBF workshops for the CEU/CLE markets. There also are several state agencies that have requested internal training to be presented by the DRBF in 2006.

In another significant 2005 achievement, a Memorandum of Understanding is in the final stages of negotiation between the DRBF and ASCE's Construction Institute to jointly offer educational programs throughout the country. This is a very exciting achievement for which Hal McKittrick and his involvement in ASCE is to be applauded.

I have been working with the DRBF Education Committee to develop a national construction claims conference, where the collective wisdom of the DRBF derived from processing owner/contractor position papers allows tremendous insight into the type of claim development and presentation that best facilitates a decision-makers' process. ASCE's Construction Institute is very excited about joining with the DRBF in presenting this course and, subject to DRBF Board approval, it is hoped that this course will debut in 2006.

The DRBF always has been focused on "giving back" to the construction industry. The real asset of the DRBF is its collective wisdom. Therefore, the philosophical and financial future of the DRBF rests within in its education programs. Based upon actual experience and feedback, I honestly can report to you that the DRBF education programs will become an industry leader in 2006 – giving back to the construction industry at a level never before imagined and providing the DRBF, owing to the recurring need of the market for these courses, with a sound financial base from which it never will have to look back.

These workshops provide the opportunity for a concerted marketing effort in the various locations where they are held. The DRBF finally has a full complement of Regional Representatives, who will be a central component of these

workshop area-based marketing efforts.

Let me close with an issue that has weighed heavily on me this past year: DRBF members writing to express their concerns as to whether or not they should renew their membership. Regardless of the number of new members who come through the door each year, attrition will offset some percentage of the increase each year.

To me, this is not a numbers game. I want my efforts to result in increased opportunities for the DRBF membership such that everyone wants to continue their membership from year to year. The DRBF needs the participation, wisdom and experience of each member if it is to move forward. Specific Board-directed initiatives have been undertaken to bring lapsed members back to the DRBF.

A composite of DRBF members' letters to me questioning their continued membership would read somewhat like the following:

I've paid my dues to the DRBF for (fill in the blank) years. I've paid to go to all the DRBF training workshops. And I've never even gotten a nibble for a DRB job. I was never a consultant, so all this talk of yours in your columns about networking is not something I feel comfortable with. I know construction, man, do I know construction. So, should I just "deep 6" the DRBF dues notice for '06? Should I just accept the fact that I'm getting old and give up trying to give back to the industry, something I thought my membership in the DRBF would help me do?

You have read above what has happened and what will be happening in the DRBF in 2006. I guess if I were you, I might be saying what a DRBF member told me last month:

That's all well and good, what you're doing. You're doing a great job for you and, I guess, for the Foundation. But I don't feel like I have anything to do with the Foundation, or them with me, even though I've been paying my dues all these years.

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Spotlight on the DRBF's Representative in South Africa

Country Rep: Andrew L. Griffiths

Indications are that South Africa stands at the threshold of a boom in construction activity, the like of which has not been seen for two decades. Real domestic output growth accelerated through last year to reach an annualised 5.6 percent in the third quarter - a rate last seen in 1996 - with contributions coming from all sectors of the economy. Inflation has been consistently maintained at less than six percent per annum and the currency, the Rand, has been stable at approximately R 6 to the U.S. dollar.

In the past ten or so years since the election of South Africa's first democratic government, its focus has been on poverty alleviation schemes with a result that investment in new infrastructure has lagged somewhat. However, that is now changing. South African President Thabo Mbeki, in his State of the Nation address in 2005, noted his government's programme for the coming year is premised on the broad objectives to increase investment in the economy, lower the cost of doing business, improve economic inclusion and to provide the skills required by the economy. To facilitate sustainable growth, the government has developed infrastructure investment plans upward of R180 billion (\$30 billion) in relation to transport logistics, electricity and water resources.

Among the drivers of this impending construction boom, some of the major projects that have been identified and widely publicised in the local media, are:

- R165 billion investment in ports and rail infrastructure and power generation (both fossil fuelled and nuclear);
- R15 billion expanded Public Works programme;
- R2.5 billion cement plant capacity

expansions;

- R20 billion Gautrain rapid rail project, linking Pretoria and Johannesburg and Johannesburg Airport;
- Stadium and infrastructure upgrades for the 2010 Soccer World Cup;
- R5 billion investment in dams and major water projects;
- Regional and local mining and minerals mega-projects.

The local South African construction and consulting sector is well developed with a number of international firms also active in the market. Whereas the construction industry has been somewhat bedevilled in the past with a plethora of different bespoke forms of contract, the government, in conjunction with both contractor and consultant organizations, has standardized on four forms of contract, one of which is FIDIC '99, with its provisions for use of DAB's in dispute resolution.

South African law is Roman-Dutch law, but much of its commercial, and hence construction, law has drawn much of its precedent from English and other similar common law systems. South Africa's General Conditions of Contract, which is also one of the four "approved" forms of contract, have been the mainstay form of contract for civil engineering works. Reflecting the influence of English law and systems, this form of contract comes from the same stable as the UK ICE form of contract and FIDIC 3rd and 4th editions. Interestingly though, the South African contract makes mediation a mandatory step before either arbitration or litigation. This process has generally served the industry well, and has led to a well developed dispute resolution industry.

DRB's and DAB's are not new concepts to South Africa, the first being the DRBs

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established in the early 1990's for Phase 1A of the R 5 billion Lesotho Highlands Water Project (LHWP), which included Al Mathews as Chairman and Peter Chapman as member. DRB's were established for Phase 1B of the LHWP as well as a number of other major projects undertaken in South Africa and the region, such as the greenfield Port of Coega, the Berg Water Project in the Western Cape.

An interesting variant adopted on one of the LHWP contracts and repeated on the Maguga Dam project in Swaziland, was to establish a DRB comprising a very senior executive from each of the employer, contractor and engineer. These DRBs were also found to work very well.

It therefore seems that exciting times await the South African construction industry and hopefully the advent of DRB's can assist the process in resolving disputes quickly in a cost effective manner.

Note: Andrew (Andy) Griffiths was born and educated in Wales, UK. He obtained a Bachelor of Science (Hons) in Civil Engineering from Leeds University (UK) and a Masters of Science in Mathematics from Reading University (UK). He left the UK for South Africa in 1981 on a two year contract, but somehow forgot the end of the contract! He met his wife, Shireen, in South Africa and married in 1984. They have two daughters studying at university.

Andy has gained experience in managing projects and over many years, particularly on the Lesotho Highlands Project where he was involved from 1988 to 2002. During that time he has held the positions of project director and "the engineer" (on behalf of consulting joint ventures) for the R850 million, 32 km long Mohale Tunnel and the R250 million Matsoku weir and tunnel of Phase 1B; and project manager and "the engineer" for the design and construction supervision of the R1.3 billion, 185m high Katse Dam and R1.2 billion, 45km long Transfer Tunnel. In each of the posts, as the engineer he was intimately involved in making presentations to the DRBs. He is thus

well experienced at the receiving end of the DRB process. To date, Andy has served as Chairman of one DRB, and is presently a member of one other DRB. He says it is interesting to now see things from the other side of the coin – although, he says, "maybe I must represent a contractor on one or two DRBs to get the full perspective!"

Currently Andy is Chairman of the consulting joint venture for the R1.2 billion Berg Water Project in South Africa, which includes a 60m concrete faced rockfill dam, river abstraction works and major pipeline; and is project director for the R200 million sub-aqueous Durban Harbour Tunnel, which is the first use of a mixed-shield slurry TBM in South Africa. He is also a member of the management committee for the R2.5 billion VRESAP in South Africa which comprises an abstraction works, de-silting facility and high-lift pumpstation at the Vaal Dam, providing water to Secunda via a 118km, 1.9m diameter steel pipeline.

Andy Griffiths is a director of the South African consulting engineering firm Goba (Pty) Ltd, based in Johannesburg, where he is responsible for their International Operations, Dams and Tunnels. He is also a director of Consult 4 International, a long-term consortium of four South African consulting firms focused on dams and underground projects in the Southern African region. He can be reached by e-mail at andyg@goba.co.za. □



Would You Like to Be a Country Representative for the DRBF?

Help give the DRBF a voice in your country by becoming a Country Representative. You may be called upon to act as a spokesperson, and should be interested in raising the profile of DRBs and increasing membership. You may also be asked to help organize DRBF events within the country you represent.

To qualify, you must be a member of the DRBF and live in the country you represent (you need not be a national). Terms are for a three year renewable period.

If interested, contact the DRBF office today: Phone 206-248-6156, Fax 206-248-6453, or e-mail home@drb.org

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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 kdetman@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?

Larry Delmore, Executive Director
 T: 781-400-1024
 E: lfdelmore.drb@comcast.net □

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

Membership Grades

By Harold V. McKittrick

In response to member's suggestions at the DRBF Annual Meeting and Conference in San Francisco in 2004, the Membership Committee and the Board of Directors (BOD) drafted proposed revisions to the membership grade structure for presentation to and feedback from attendees at the 2005 conference in Denver. The result has been further revision to the proposal and final acceptance by the BOD at the Dec. 15, 2005 directors meeting.

The grades currently in effect are:

- **CORPORATE**
- **SUSTAINING MEMBER (Individuals)**
- **INSTITUTIONAL**
- **INDIVIDUAL MEMBER**
- **GOVERNMENT EMPLOYEE MEMBER**
- **EMERGING NATION MEMBER (Individuals)**

The new grades are:

- **SPONSOR Level 1**
- **SPONSOR Level 2**
- **SUSTAINING MEMBER (Individuals)**
- **INDIVIDUAL MEMBER**
- **GOVERNMENT EMPLOYEE MEMBER**
- **EMERGING NATION MEMBER (Individuals)**
- **STUDENT**

The new grades are Sponsor Levels 1 and 2 that replace the Corporate and Institutional grades and the Student grade. A Student is defined as an individual member who is enrolled in a recognized institution of higher learning. The annual membership fees remain the same for the Sustaining Member, Individual Member, Government Employee Member and Emerging Nation Member grades. The fee for Sponsor Level 1 will be \$ 300 (the same as Institutional) and Level 2 will be

\$600 (the same as Corporate). The annual Student fee will be \$25. Since the revised grades will require a change in the by-laws, members will be asked to ratify the new grades in the annual DRBF election.

The institutional and corporate members that support the DRBF with their membership fees help sustain the Foundation but more importantly help to sustain and promote the DRB process that has had such a positive effect on dispute resolution in the construction industry. The DRB process is neither an owner's nor a contractor's and the DRBF is further emphasizing that by bringing both supporters under the same banner. By the addition of the Student grade the DRBF will be able to engage academic institutions and students and introduce the DRB concept and practice to future industry leaders.

None of the preceding addresses the issue of making the individual membership grades more meaningful to users. Along with the change in grades the BOD has mandated certain requirements for members to place their CVs or resumes on the DRBF web site:

1. To be permitted to place CVs on the web site, DRBF members must have completed the Administration and Practice Workshop and the Chairing Workshop. A two year grace period from the date of acceptance (The Acceptance Date) of the revised grade structure by the ratification of the by-laws will be given to those current members who have not taken these courses to do so. Members who have taken the Administration and Practice and Chairing Workshops in the past must take a continuing education course within two years of the Acceptance Date. All must take a continuing education workshop at no less than three year intervals thereafter.
2. CVs must contain, as a minimum, the member's number of DRBs; the total monetary value of the contracts covered;

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- Removing DRB members without cause – Parties sometimes seek to hedge against the possibility of an errant DRB member by specifying that each party is entitled to remove its designated DRB member *without cause*. In the face of such a specification, what invariably happens is that a party against whom one or more adverse DRB recommendations are made will seek to change its DRB designee in the hope of improving its chances of success. In so doing, the continuity of the DRB, its familiarity with the project, the trust and confidence it has created with the parties, the working relationship the DRB members have established with one another, all are impaired. Disputes then arise over the approval of successor DRB members. Mistrust and dissension is created among the parties. The right of removal of a DRB member *for cause* should always be provided for, but not the right of removal *without cause*.
- Imposing procedural obstacles to access the DRB – Some contracts specify a lengthy procedural process precedent to a party's right to have a dispute heard by the DRB. The earlier a dispute can be resolved, the less will be the cost of resolution and the less adverse impact the pendency of the dispute will have on the parties and on project performance. Disputes grow stale and positions harden the longer a dispute remains unresolved. Parties should be given the right to access the DRB early in the dispute process rather than late in the process.
- Giving parties the right to be represented by counsel at DRB hearings- A certain amount of anti-lawyer bias exists in the U.S. DRB community which is not entirely without merit. Lawyers should be permitted a role in the DRB process, but that role should be limited. Lawyers should participate in drafting the DRB specifications and three-party agreements; lawyers should counsel parties as to the legal implications of the contract documents; lawyers should assist parties to draft written submissions to the DRB;

lawyers should assist parties to prepare presentations at DRB hearings; lawyers should be permitted to observe DRB hearings and to counsel the parties; lawyers should assist parties decide whether to adopt DRB recommendations or to pursue further remedies such as arbitration or litigation. But lawyers for parties ought not to make presentations nor to cross examine witnesses at DRB hearings. Lawyers' direct participation representing parties at DRB hearings changes the essential character of the hearing and exacerbates the adversarial relationship that inevitably develops among parties to a construction dispute. Adversarial hearings are important to fully protect the rights of parties in *binding* dispute resolution. Adversarial proceedings are at the core of our legal system and are essential to fully protect parties' constitutional right of due process. But full-blown, due process, adversarial hearing are time consuming. Because DRBs issue only recommendations, not final and binding decisions, expediency outweighs full constitutional protections in the conduct of DRB proceedings. Speedy dispute resolution, even at the possible sacrifice of complete correctness of result, is an important attribute of the DRB process. Therefore, the role of lawyers representing parties at DRB hearings should be proscribed.

- Appointing lawyers lacking adequate construction experience to serve as DRB members – Experienced construction lawyers serving as DRB members add value to the process by providing to non lawyer DRB members the legal implications of contract provisions, by exercising their training and experience in conducting hearings and by providing their expertise to assist drafting DRB recommendations. But since DRBs only issue recommendations, the effectiveness of the DRB is entirely dependent upon the parties' trust and confidence in the DRB. Lawyers lacking adequate construction experience are not likely to engender such trust and confidence.
- Imposing limitations on the DRB's jurisdiction – Attempts have been made to limit the types of disputes that can be

brought before the DRB, such as claims for wrongful termination of contract. Disputes over whether the DRB has the jurisdiction to consider a particular dispute have been taken to court. Limiting the DRB's jurisdiction creates more problems than it solves and should therefore be avoided. DRBs should be given jurisdiction to consider all disputes arising out of or in connection with the construction contract.

- Creating hybrid DRBs – Attempts have been made to use DRBs to serve as arbitration panels issuing final and binding decisions as to disputes under a certain dollar amount, and issuing only recommendations as to disputes exceeding that dollar amount. This creates particular problems for DRBs whose members lack legal training. When the result is final and binding the parties ought to be given greater procedural protections than when the result is merely a recommendation. The entire character of the DRB hearing changes when a dispute is conducted as a due process, adversarial proceeding. For that reason, traditional arbitration should be conducted by trained arbitrators where there is to be a final, binding decision, and the DRB process be reserved for the issuance of non-binding recommendations.

Some owners are fearful of relinquishing their traditional authority to truly neutral DRBs. They seek to “tilt the table” in their favor by invoking one or more of the features described above. This reduces the success and effectiveness of the DRB process. It has likewise tarnished the public perception of the DRB process, and in some instances it has created “DRBs from Hell.” An owner ought not adopt the DRB process *at all* if it lacks confidence that the process will add significant value to the project.

Note: Robert A. (Bob) Rubin is immediate past president of the DRBF and a partner in construction law firm Postner & Rubin. Bob can be reached by e-mail at RARubin@postner.com. □

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and the type of work of those contracts. If asked for verification members must be able to furnish for reference purposes parties for whom they have served along with some Board members with whom they have served.

The CV web site search engine is capable of identifying categories of expertise for users. That capability will be reviewed to ensure users searching for a particular category can find candidates by entering a key word such as “railroad.” If appropriate search capability is lacking, it will be developed. The website resume requirements require no changes in the by-laws and will be in effect as noted above.

In conclusion, these changes will create a Sponsor grade whereby the DRBF will not segregate supporters by category and define itself and the DRB process as beneficial to the industry as a whole and beneficial to both owners and contractors. At the same time it will allow sponsors to support the DRBF to the extent that each organization desires and is allowed. We essentially have left the individual member grades intact but add the grade of Student to access that future potential.

One of the main concerns in reviewing membership grades was to make DRBF membership more meaningful to users and the preferred source of members for their DRBs. We believe we have at least partially addressed that not by a revision of member requirements but by modifying the requirements for individual members to place their CVs on the DRBF website. Because of the education requirements, users will be assured they are getting not only experienced Board members but also ones regularly trained and current with the industry. In the future members will be asked to compose their on line CVs to be of more use to users seeking DRB members. Changes will also be initiated in web site CVs to make the data more accessible and meaningful to users. In conclusion, all of this should result in more opportunities for members and benefits to users to further the DRB process. □



6th Annual International Conference Budapest, Hungary May 6-7, 2006

Dispute Boards – *massive potential in Central Europe*

*“Disputes shall be adjudicated by a Disputes Adjudication Board
in accordance with Sub-Clause 20.4”
- FIDIC Contract Sub-Clause 20.2*

Conference

The Dispute Resolution Board Foundation (DRBF) is holding its 6th annual international conference on May 6-7, 2006 in Budapest, Hungary. The conference will be in English and is open to all.

The focus of this conference will be to:

- introduce the latest concept of dispute boards (DBs) to the new Central European members of the European Union
- explain how DBs already work in other parts of the world to the benefit of both employers and contractors
- investigate how DBs can best be adapted to suit local conditions

Why dispute boards?

Dispute boards are used most often in infrastructure construction projects associated with power generation and distribution, water supply and treatment, and road, rail and air transportation. Increasingly, dispute boards are being established for long-term concession projects and for large building projects such as hospitals and major commercial developments.

Particularly since 2004, European Union enlargement has conferred membership to many Central European countries. Some of these new members are looking for EU funding for this type of projects. EU funding is granted on condition of parties adopting FIDIC contracts. FIDIC contracts stipulate the use of dispute boards. Consequently the number of projects that will be required to establish dispute boards is undoubtedly set to rise rapidly.

Who should attend?

Employer organisations and those procuring public works
Contractors who undertake these works
Consultants who would design and supervise construction
Investors, such as banks and EU officials
Lawyers wishing to advise parties in the event of disputes
Professionals interested in serving on dispute boards

Conference Program

Day 1: (full day session)

Speakers from Central European countries will describe existing procurement and construction dispute resolution procedures and how dispute boards could best be deployed within Central Europe for both EU and non-EU funded programmes

Short workshop to demonstrate how the DB concept works

Specific example of DBs now operating in Romania

Group session to discuss if there is a common generic approach for dispute boards in all Central European countries

Day 2 : (half day session ending with lunch)

Practical issues of:

Setting up dispute boards in line with FIDIC, ICC, ICE requirements

Best practice procedures and guidelines

Enforcement of dispute board decisions in Central Europe

Prevention of problems

On both days, there will be opportunities for delegates to ask questions, make new contacts and learn from those already experienced with dispute boards in Central Europe and elsewhere.

Application Form and Fees

Costs are kept deliberately low to allow maximum delegate participation. The delegate fee of 350 euros includes all conference sessions, coffees, and lunches, but not hotel accommodations. Optional Saturday evening “Dinner on the Danube” is an additional 50 euros per person. Total fees are payable on application and are non-refundable.

Venue

**BW Grand Hotel Hungaria
Rakoci Street, Budapest**

The hotel is offering a special room rate to DRBF delegates of 120 euros for single or double occupancy, which includes buffet breakfast, related taxes and fees. To book a room here, please send email, specifying **DRBF**, to: grandhungaria.reservation@danubiusgroup.com

The BW Grand Hotel Hungaria fax number is 00-361-889 4411 or 00-361-889 4412

Delegates are welcome to choose their own hotel, of which there are many of all standards in Budapest.

Capacity

Delegates are accepted on a first-come, first-served basis. DRBF reserves the right to accept or reject applications at its discretion.

**Visit www.drb.org to download a registration form,
copy of the program, and hotel information.**

Regional Representatives

In order to continue to spread the DRB concept throughout the industry and be more closely connected with the membership, the Regional Representatives (RR) within the U.S. will be used more effectively by the DRBF. They have been charged with gathering information on active and planned construction underway in their region and relaying that information to Regional Representative Coordinator John Nichols and Executive Director Larry Delmore. The RRs are also challenged to identify the local needs of DRBF members and possible workshop requirements. Over the next several months, your RR will be contacting you about projects in your region. This is the first step in activating membership in the regions. It is intended that much more activity directly affecting individual members arises out of these initiatives.

The regions and representatives are:

- NE - New England - ME, VT, NH, MA, RI, CT
RR - Blase Reardon reardon@bostonsolv.com
- NOE - Northeast - CT, NY, NJ, PA
RR - Kathleen Harmon kharmon777@aol.com
- MA - Mid-Atlantic - DE, MD, WV, DC, VA, KY
RR - Adrian Bastinelli bastianelli@govconlaw.com
- SE - Southeast - NC, SC, GA, AL, MS, TN
RR - Jim Brady bucorp@att.net
- FL - Florida - FL
RR - Ralph Ellis relli@ce.ufl.edu
- SC - South Central - TX, OK, KS, AR, LA
RR - Diane Gollhofer dgollhofer@dart.org
- NC - North Central - OH, IN, MI, WI, MN, IA, IL, MO
RR - Larry Lenahan lleanahan@mcnallytunneling.com
- RM - Rocky Mountain - CO, MT, ND, SD, NE, NM, WY, UT
RR - Ed Wheeler edwardfmwheeler@aol.com
- NW - Northwest - WA, OR, ID, AK
RR - Jim Donaldson jpdadr1934@aol.com
- NCA - Northern California - Northern CA, HI
RR - John Jacobs jjacobs222@aol.com
- SCA - Southern California - Southern CA, NV, AZ
RR - Bill Carlson wjccal@aol.com

Direction and Coordination of the RR's activities are handled by John W. Nichols, Regional Representative Coordinator. He can be reached at jwnchallis@aol.com. □

DRBF Committees

If you have comments for any committee chairs or would like to get involved in their efforts, please contact the committee chair directly. Contact information is available on the DRBF website, www.drb.org.

Annual Meeting and Awards

Robert Rubin

Data Compilation

John Nichols

DRBF Best Practices and Other Publications

Marianne Ramey

DRBF Bylaw Revisions

Robert Smith

DRBF Manual

Joe Sperry

Education/Training USA

Kerry Lawrence

Education/Training Multinational

TBA

Executive Director Oversight

Harold McKittrick

Finance and Administration

James Donaldson

International

Gwyn Owen

Membership

Harold McKittrick

Nominations

Jack Woolf

Professional Conduct

Robert Smith

US Regional Chapter Coordination

John Nichols

Web Site/Advertising

Ann McGough

World Bank Liaison

Gordon Jaynes and Armando Araujo

WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS NOVEMBER THROUGH JANUARY 2006

Theodore Basil Cabot Ahier Johannesburg, Gauteng SOUTH AFRICA	Kenneth Gible GNCB Old Saybrook, CT USA	University of Washington Capital Projects Office Seattle, WA USA
Louis C. Aurigemma, P.E. The Nielsen-Wurster Group Ft. Lauderdale, FL USA	Bodo Goeppert Lingen, GERMANY	Richard J. Parrett Parrett, Porto, Parese & Colwell P.C. Hamden, CT USA
C. Merritt Bird Ranger Construction South Coral Springs, FL USA	Douglas J. Holen Santa Fe, NM USA	Royce R. (Rob) Remington Hahn Loeser & Parks LLP Cleveland, OH USA
Wolfgang Boensch Idstein Woersdorf, Hessen GERMANY	Dr. Thomas Krause Hochtief AG Bremen, GERMANY	Mahmoud El Sarnagawy Private Consultant Cairo, EGYPT
A. James Booker PT Paiton Energy Jakarta, INDONESIA	Mary Libassi Schiavone Construction Co. Secaucus, NJ USA	Timothy Sears A & A Solutions Unlimited, Inc. Margate, FL USA
Sheryl Bregman San Francisco Attorney's Office San Francisco, CA USA	Ian W. Luke Skanska Cementation Int'l LTD Rickmansworth, Herts ENGLAND	Victor James Smith Charndell Associates Bangkok, THAILAND
Nguyen Canh Chat VECAS Hai Ba Trung - Hanoi VIETNAM	John J. McTighe County of San Diego San Diego, CA USA	Marcus Theil CCM Consuting GmbH Austria A-1010 Vienna, AUSTRIA
Paolo V. Daniele CESECO Roma, ITALY	Glenn Monek Ranger Construction Pompano Beach, FL USA	Scott Wayland Eagles Nest Ranch Alt. School Canal Winchester, OH USA
Thomas N. Frisby The Frisby Group Mt. Pleasant, SC USA	Rick Moore City of Zephyrhills Zephyrhills, FL USA	Larry Whipple CornerStone Consultants, LLC Old Saybrook, CT USA □
	John Palewicz	

Notice is hereby given that the **Utility Contractors Association of Washington** and the **Underground Utility Locate Center** invites the submittal of written Letters of Interest and Statements of qualifications from qualified individuals to serve on a dispute review panel. Panelists will be required to review utility damage claims and attend hearings once a month to assist in resolving disputes between excavators and utility owners. Members must have a knowledgeable background in underground utility installation and industry practice, along with applicable guidelines and laws of the State of Washington. If selected as a panelist, each member will be expected to serve on the dispute review panel for no less than a six-month term. A pre-determined hourly rate of \$150 per hour has been established to compensate each panelist for their services. A per-trip travel allowance of \$50 per trip will also be allowed.

Any qualified individual wishing to be considered as a member in the pool of panelists shall submit a brief written statement of their qualifications that shall include any relative experience and background in the industry. Statements will be received no later than 5:00 p.m. on March 24, 2006 at the offices of the Executive Director, Utility Contractors Association of Washington, 635 Andover Park West, Suite 101, Tukwila, WA 98188, phone: 206-315-7697 fax: 206-315-9965.

Other News

U.S. Launch of the ICC Dispute Board Rules: Using Dispute Boards under ICC's Unique Rules

On October 14, 2005 in New York City, the DRBF and the United States Council for International Business (USCIB) co-sponsored a presentation of the U.S. debut of the ICC Dispute Board Rules.

As the USCIB stated: Prevention and timely resolution of contract disputes is a goal of every business organization. Now considered a standard for international construction contracts (a multi-billion dollar annual market), Dispute Boards (DBs) can be beneficial in other types of mid- to long-term contracts, such as those for goods and services, custom item manufacturing, and energy sale and purchase. The DB process is increasingly being used in such mid- to long-term contracts today. In recognition of these developments, ICC added Dispute Board rules to its current range of dispute resolution products and services. These rules went into effect in September 2004.

Panelists at this conference representing the DRBF included Bob Rubin, Bob Smith, Gordon Jaynes and Larry Delmore. There were nearly forty attendees from six countries and ten states. The ICC DB rules are a great international achievement for the DRB process and the USCIB and the DRBF look forward to further successful presentations of this DRB application that holds significant potential for international business. □



DRBF Member Ted Von Rosenvinge Named ACEC/CT Engineer of the Year

The American Council of Engineering Companies of Connecticut (ACEC/CT) recently named DRBF member Theodore von Rosenvinge IV, P.E., as the 2005 ACEC/CT Engineer of the Year.

Ted was recognized for his work as chairman of ACEC/CT's first Government Affairs Committee including legislative activities. The group was recently successful in getting a Good Samaritan Law passed to allow engineers to quickly respond to a declared emergency in Connecticut without undue liability. Ted has served as ACEC/CT President and as a national ACEC Director.

Ted is founder and president of GeoDesign, Inc., a geotechnical, environmental and construction engineering firm headquartered in Middlebury, Conn., with offices in New York City and Vermont. He is a registered professional engineer and a fellow of the American Society of Civil Engineers. He received his MS in Civil Engineering from MIT in 1980, and his BS degree from Northeastern University in 1978. Ted lives in Ridgefield, Connecticut with his family.

The DRBF congratulates Ted on his achievement. □

Special insert included in this issue of the Forum:

Dispute Review Boards:

Real Time Avoidance and Resolution of Construction Disputes

A reprint of an article written by DRBF Executive Director Larry Delmore has been included as an insert to this mailing of the Forum. This article, which provides a summary description of the DRB process and its successes, appeared in the Winter 2006 Issue of the American Bar Association's *Section of State and Local Government Law* with a national distribution to lawyers involved in urban, state and local government law and policy. Please contact Larry if you would like additional copies for your marketing efforts on behalf of the DRBF.

Dispute Boards Addressed at Workshop in Rio de Janeiro, Brazil

A workshop about Dispute Boards was held on the 5th of December, 2005 in Rio de Janeiro, Brazil. Sponsored by the ICC Brazilian Committee, the main theme of the event was “ICC rules for Dispute Boards.”

Considering that Dispute Boards (DB) are truly a novelty in Brazil, the discussion surrounded the method’s compatibility with Brazilian legal order and the potential of this alternative dispute resolution method in the country. The different Dispute Board models were discussed in detail, especially relating to the nature of the board’s recommendations/decisions. Particular attention was given to the question of whether final and binding recommendations are adequate for our legal system.

The potential of the DB method in Brazil was analyzed in the face of several construction projects in the country which are still attached to obsolete dispute resolution forms. The first experience with DRBs in Brazil, the introduction of clauses in the contracts of the expansion of São Paulo Metro System, was cited as an example of how the method can be implemented in Brazil.

Gilberto José Vaz, the Dispute Resolution Board Foundation country representative for Brazil, brought an overview of the method’s development throughout the last decades, showing some statistics and remarkable facts. The DRBF’s view of the advantages and reasons for non-binding recommendations was then presented and discussed as a balanced and secure alternative within the Brazilian legal system.

Mr. Vaz also presented an article with considerations about the method in Brazil, analyzing briefly the international practice and the problems that Dispute Boards may face inside Brazilian legal order.

In sum, the growth potential of the method in Brazil set the tone to the discussion. The speakers emphasized that there is a lot to be learned within the legal system, but the method’s growth seems predictable and absolutely realistic.

Gilberto José Vaz can be reached by e-mail at escritorio@gilbertovazassociados.com.br. □



DRBF Country Representative for Brazil, Gilberto José Vaz (pictured third from left), participated in the panel discussion about Dispute Boards in Brazil.



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FOUNDATION FORUM

Dispute Resolution Board Foundation
6100 Southcenter Blvd., Suite 115
Seattle, WA 98188-2441

FOUNDATION FORUM

Workshop Calendar

February 23 - 2006 Administration and Practice Workshop
Location: New York, NY

April 17 - 2006 Administration and Practice Workshop
Sponsored by Caltrans - Limited space available to general public
Location: Burlingame, California

April 19 - 2006 Administration and Practice Workshop
Sponsored by Caltrans - Limited space available to general public
Location: Sacramento, California

April 24 - 2006 Administration and Practice Workshop
Sponsored by Caltrans - Limited space available to general public
Location: San Diego, California

April 26 - 2006 Administration and Practice Workshop
Sponsored by Caltrans - Limited space available to general public
Location: Arcadia, California

Registration fee includes lunch and workshop materials. Each participant will receive a Certificate of Completion from the DRBF. To register for a workshop or learn more about the new programs, contact the Dispute Resolution Board Foundation by phone at 206-248-6156 or e-mail home@drb.org.

For the latest additions to the training schedule, visit www.drb.org.