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Air Conditioning Contractors of America
Greater New York Chapter
229 South Street, Oyster Bay, NY 11771

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Greater New York Contractors' NEWS

Air Conditioning Contractors of America
Greater New York Chapter

www.accany.org September 2007

President's Message

Ken Ellert

By the time you receive this month's issue of the Contractors' News, the summer of 2007 will almost be a thing of the past. We had a very successful night at the Met's with over 1,100 people in attendance. Thanks to the Baseball Committee for putting together a wonder-

Please turn to PRESIDENT'S MESSAGE on page 3

Let us know ONLINE you are coming: www.accany.org

ACCA, a federation of 60 state and local affiliated organizations, is the leading trade association representing the business, educational, and policy interests of the nation's heating, air conditioning, ventilation and refrigeration contractors. ACCA represents over 9,000 small businesses nationwide through its federation of affiliates.

PRESIDENT'S MESSAGE *from page one*

ful night, to all of our sponsors, especially ABCO for their participation and our executive director, John DeLillo, for putting it all together.

August, besides being a busy air conditioning season, also saw Barry Bonds take over the home run crown, A-Rod hit #500, Tom Glavine made the list of 300 winners and Tiger won his 13th major — but, more importantly, we have our annual golf outing coming up on August 20th. This should be an exciting day of golf. Besides the golf, there is great food and terrific prizes to be raffled off at the end of the evening.

As part of trying to make you, the contractor/business owner, a better manager, we have scheduled two business management classes through ACCA National. Details on the classes and dates are in the newsletter. The classes are being limited to small groups so it is in your best interest to sign up early. We also have our first fall meeting scheduled for September 6th at the Westbury Manor. The meeting will be a discussion on GPS tracking systems, Drug Testing and Background Testing. I think these are very important topics in today's business operations and urge you to be there.

Have a great end of summer.

Ken Ellert

Letters to the Editor

Please fax your comments or experiences that you would like included in our monthly newsletter. Send it in, hand write if you like. Fax it over and we will print it and see what others think. Fax...516-829-5472.

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Editor's Notes

By Anthony N. Carbone

The summer season started off slow due to the cool nights and lack of humidity. Some residential contractors were operating with four day work weeks and rotating days off in July! This is a phenomenon, because most summers kick off in June and last through August. I'm not sure if El Nino or global warming contributed to this lack of heat. It may very well skew the year end financial numbers of many contractors. This, combined with the burden of extraordinary gasoline prices this summer, has put a damper on consumer spending.

We have found that much of the business is weather driven. When it's hot and humid as it had become in August, the phones begin to ring. The array of questions from a confused public begins with "R410A or Puron? Is R22 outlawed? Should I buy 13 SEER? Why use 12 SEER? What matches my existing system? Do I need to change both the inside and outside unit?"

The time invested in each potential sale is incredible in these changing times. No compensation reward is granted for time spent. I have written this before. Although we are technical professionals, our industry is not respected. We are willing to educate and inform and unravel information gathered from the internet, but the time investment is huge. After the decision of product is made, the model numbers are requested and the consumer shops for the lowest price and the reverse auction begins! Most contractors provide free estimates. The engineering of systems provided at no cost.

If this scenario is one you recognize, please email me (AC2@SystematicControl.com) your experiences so we may publish these interesting stories! I hope your summer proves profitable and please make it your business to come to our monthly meetings.

The annual Night at the Mets was a great success and ACCA extends its sincere thanks to ABCO Refrigeration, the largest of our sponsors, as well as all those who supported the event. ***— Anthony N. Carbone***

Member Training Classes

As part of our ongoing efforts to assist members to advance the quality and profitability of their businesses, the greater New York Chapter, ACCA, will present the following two business management training classes this fall.

HVACR Financial Management 101

October 16, 2007

*One Full Day * Limit 25 Attendees*

This unique financial management course is developed and taught by successful, working contractors, so it's got a "real world" approach at helping contractors truly understand their financial operations and learn how to make good business decisions. Gain practical skills to improve cash flow and build a more profitable business!

HVACR Sales & Marketing 101

November 13, 2007

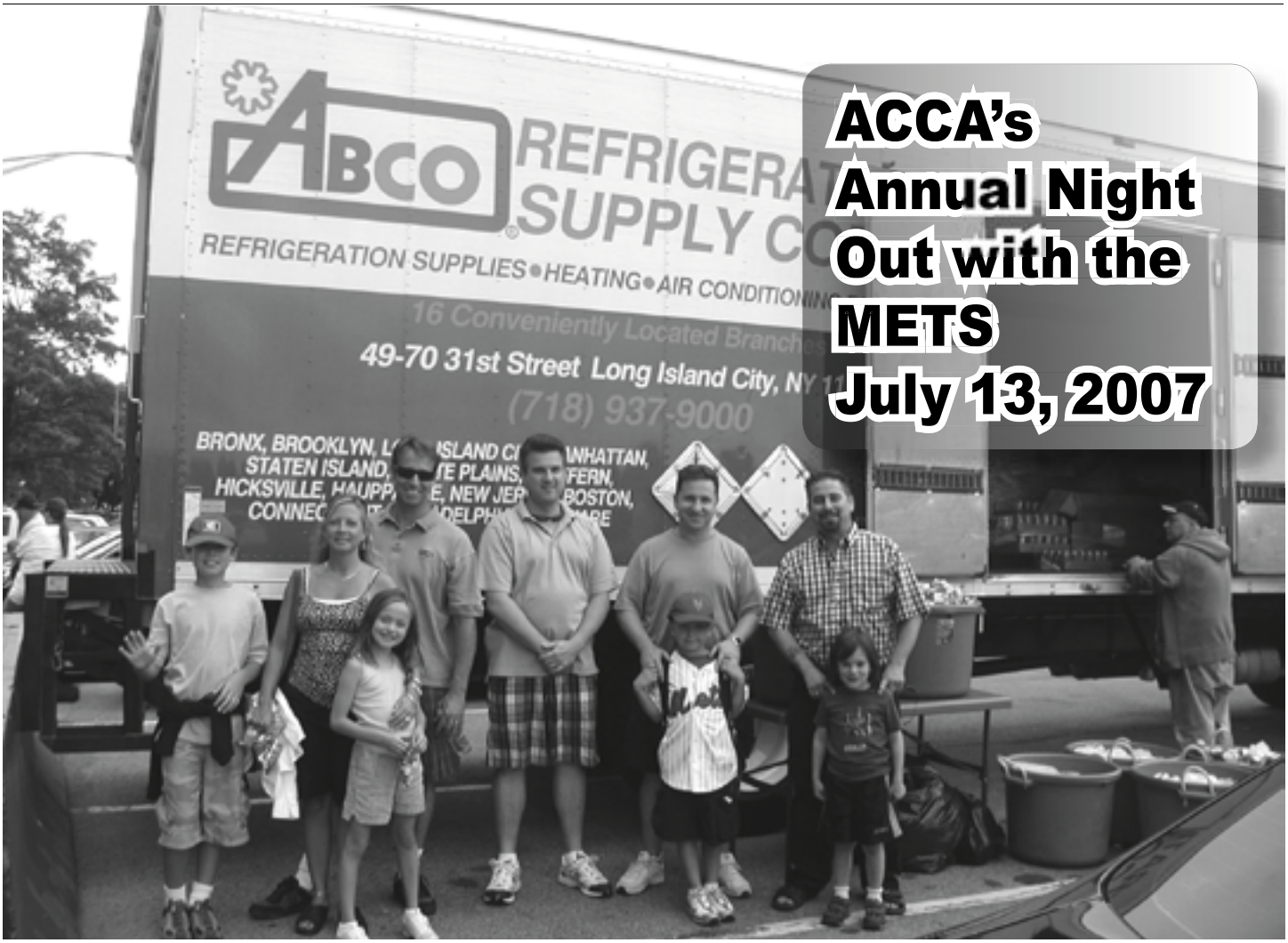
*One Full Day * Limit 25 Attendees*

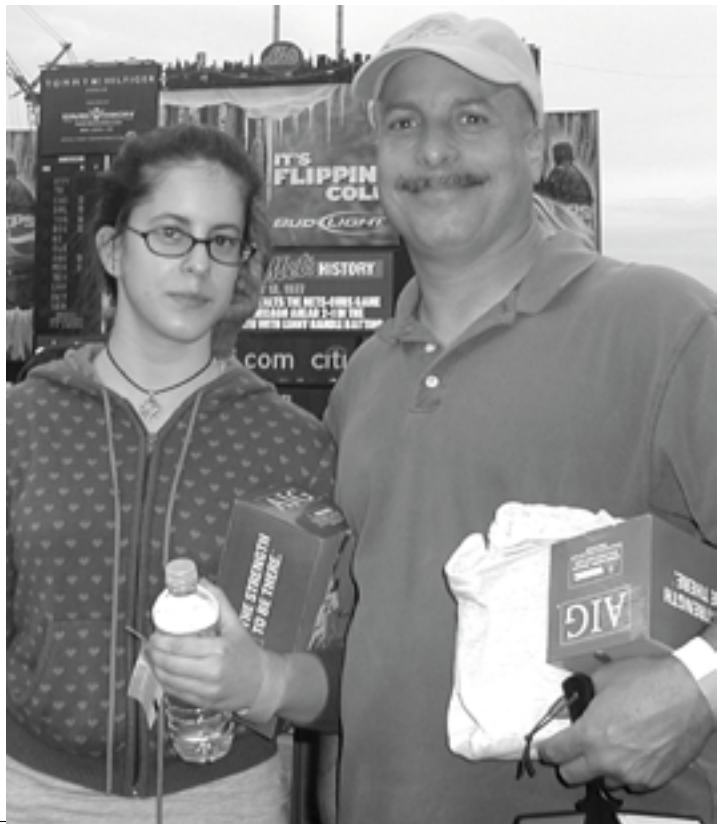
Good marketing is not about copying what other contractors do, it's about differentiation! This one day class is designed and taught by contractors to show you how to distinguish your projects while projecting a positive business brand. Learn how to get your company's name on the streets and money in the bank!

Class Location to be Announced

For more detailed information on the content of each of these classes, visit the ACCA website link – http://www.acca.org/training/bml/

ACCA's Annual Night Out with the METS July 13, 2007



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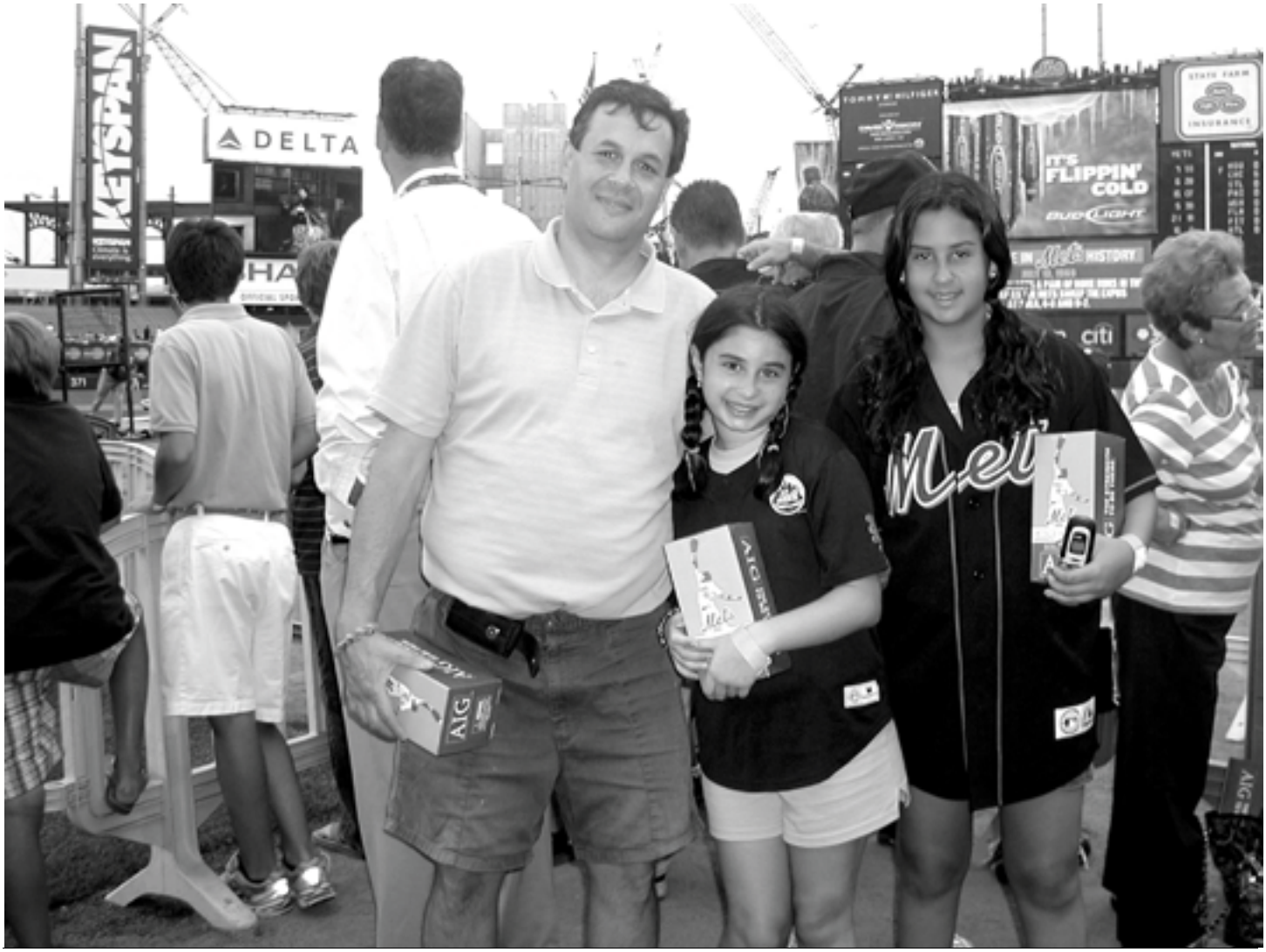
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Home Depot To Sell HD Supply

By Anthony N. Carbone

It has been confirmed that Home Depot has sold its HD Supply Division to a major private equity consortium. The three firms making up the bid are Bain Capital, Carlyle Group and Clayton Dubiller & Rice. The original bid of $10.3 billion has since been reduced, as reported by Bloomberg News Radio on August 9, causing the stock to drop by 6%.

Since Robert Nardelli, past CEO, envisioned a path of making the Home Depot, not only a force to the homeowner, but also tried to become a factor in the wholesale supply side. Many criticized this strategy because it took a lot of the focus away from homeowners and the stores themselves.

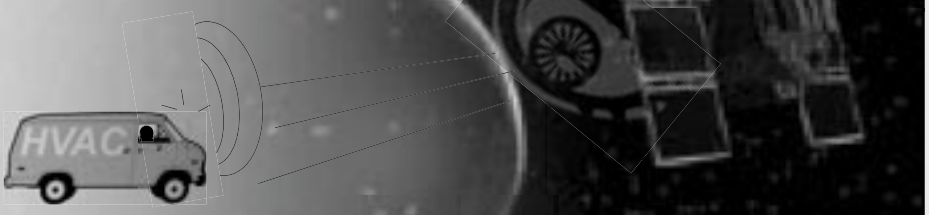
The huge chain has suffered losses in market share from competition with Lowes and stores were no longer operating as they had in the past. A lack of personnel and disorganization began to deteriorate the perception to the consumer. HD Supply has 26,000 associates. •

The Greater New York Chapter of ACCA is an association of professionals who provide quality work. Make a difference in your business by joining an organization that will bring both intellectual and financial profits to you!

SEPTEMBER MEMBERSHIP MEETING

Global Positioning Satellites: FRIEND OR FOE TO YOUR COMPANY?

GPS



Join us on Thursday, September 6, 2007 at the Westbury Manor

Cocktails — 5:30 pm; Dinner — 6:30 pm
Followed Immediately by the program

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- Will your employees feel like Big Brother is watching them?

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People & The Workplace

By Alan B. Pearl,
Portnoy, Messinger, Pearl & Associates, Inc., Syosset, NY
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Fear of Firing

It has never been easier for U.S. workers to go to court and allege that they've been fired unfairly. Over the past 40 years, federal, state and local laws have expanded the categories of protected workers and effectively altered the status of "at-will" employment. The many anti-discrimination laws prevent employers from making decisions based on characterstics such as an employee's age, race, religion, sex, and national origin. Because the majority of employees fit into one or more of these categories, the company's decision to terminate must be reviewed carefully. Not because anyone falling into a protected category is immune from firing, but because the company will likely be forced to show a legitimate, non-discriminatory reason for the termination should the firing ever become the subject of a claim.

Even if the company is not sued for discrimination, more and more employees are winning large sums of money in court where they can prove the company retaliated against them when they complained of unlawful (albeit unproven) treatment. In 2005, EEOC statistics reflected almost 30% of all discrimination charges filed contained retaliation claims. In 2004, the resolution of retaliation charges by the EEOC resulted in $90 million dollars in payments from employers – a figure that does not include judgments and settlements obtained by employees through private litigation. And last year, the Supreme Court made business decisions even riskier for employers by ruling that retaliation can involve acts that fall far short of firing or demoting a complaining employee.

Because of the relative ease with which employees can file claims for wrongful termination under one of these categories, it has become very expensive for employers to prove that there was a legitimate business reason for the termination. Many companies are so concerned over the cost of a firing that they allow unproductive employees to linger. However, laying off valuable employees and retaining poor performers can affect a company's bottom line by sending the message that an employee's solid work performance is not valued by the company.

It's often supervisors who are to blame when a company is advised not to terminate a poor performer. Most supervisors fail to give regular and candid evaluations that provide the necessary proof of poor performance

should the fired employee file a claim. Often, when a manager decides an employee's performance has slipped far enough to warrant termination, there is no documentation to substantiate the decision – or worse, the personnel file contains mutliple performance evaluations stating "meets expectations."

The best way for a company to avoid litigation is for your HR person to provide a support function to supervisors/managers before the personnel problem reaches a crisis stage. HR should work with managers to develop, communicate and document specific, measurable performance objectives for employees.

Here's our advice for documenting employee performance:

1. Establish clear and realistic performance goals, review these goals with your employees, and state on the appraisal form whether the goal was met. Be as objective as possible, and rate the same performance and conduct for all similarly situated employees.

2. Avoid being too lenient or too strict, and don't give the same rating to everyone. A rating system should ensure that your employees are ranked from your best performers to your worst performers. Include unfavorable comments on these evaluations if there is unfavorable performance that is in issue. Being candid with an employee at his or her yearly review could help them to improve. At worst, it will provide you with a paper trail. Waiting until later to bring up problems, (such as when the employee is terminated) won't help anyone.

3. Finally, never review an employee and discuss a wage adjustment in the same session. The reason is simple: the employee won't be listening to you until you mention the money.

On a similar note, every time that you write a disciplinary notice for one of your employees, you should keep in mind that someday that memo or notice might be a document in a legal proceeding. Whatever the circumstances, you should take the time to consider what you write on that piece of paper, since you don't want it to hurt you, and if done correctly, it could very well help you.

If an employee deserves to be disciplined, it should be carried out and documented as soon as possible. If you delay, the discipline becomes suspect and could create the appearance of pretext. Timeliness means investigating what happened right away, but it does not mean you should rush into conclusions.

Make sure any discipline notice is accurate, signed and dated. Get the facts and details straight. List all witnesses who presented information.

Continued on following page

People in the Workplace

From preceding page

Accuracy also means being thorough in your evaluation of what the employee has done. If you list two things on the memo, but later at the trial you try to convince the judge or jury that it was really twenty things, they won't believe you. They will assume that if these things happened, you would have written it down.

Things to remember when issuing a written disciplinary notice:

1. Include details of why the employee is getting discipline, including a statement of what company policy was violated. Describe how the employee should have acted or behaved, your expectation for improved performance, and when you expect the improvement to occur by.

2. Be specific in explaining the consequences if the expectations aren't met. You should also summarize the employee's reaction to the discipline, whether they got angry, defensive, apologetic, etc.

3. Disciplinary memos should be drafted carefully and checked for grammar, spelling, and complete sentences. If it is entered as an exhibit later on in a judicial forum, you don't want to have to cringe while the other side points out your spelling errors.

4. Finally, the employee should be shown a disciplinary notice and asked to sign it. If he or she refuses to sign it

to acknowledge receipt, then you have a serious problem to deal with. Since all you asked was to acknowledge receipt, then there is no reason not to sign - or is there? If so, ask the reason. If it is not a valid reason, then suspend the employee indefinitely (if it's a union employee, refer to the collective bargaining agreement first). Why suspend? - Because signing for a paper isn't an offense or a criminal act, and it will assure you of the proper paper trail.

PMP offers a comprehensive training program on this subject. If your supervisors have not been "trained" to write a review properly, now is the time. Questions? Call me at 516-921-3400 or email me at abpearl@pmphr.com. •

Statement From Stuart S. Zisholtz, Esq.

This is the last in a series of articles that are being written with respect to the unholy alliance between American Institute Of Architects (AIA) and American Arbitration Association (AAA).

In my previous articles, I pointed out various problems with arbitration, such as incompetent arbitrators, high cost of filing with the AAA, lack of ability to appeal, etc.

In addition to all of the other problems that exist with arbitration, the arbitrators are given enormous latitude. In a courtroom if you say you are owed $50, you have to prove that you are owed $50. Not so with arbitrators. They can accept anything into evidence and they will say "we will take it for whatever it is worth". You never know how to evaluate it, you never know how to respond to it; you never know whether it is good or bad for you, and you never know if you have to explain something. "For whatever it is worth" can mean anything.

Again, you have absolutely no control over how to either prosecute or defend a case in arbitration. The question now arises as to what to do about it. If arbitration is so horrendously difficult, what are you, the contractor, supposed to do about it?

The answer is that if you have an AIA contract or any contract that specifies that arbitration has to go before the AAA, then modify that provision in the contract to provide for, ADR, or Alternative Dispute Resolution.

The burgeoning volume of cases before the courts created a windfall opportunity for the AAA. It has also created a situation where many judges who reach the mandatory retirement age go out on panels to various arbitration associations. They call them ADR for Alternative Dispute Resolution organizations. There are scores of those around. They hire these retired Supreme Court judges of other lawyers who charge anywhere from $350 to $500 an hour. The filing fee is about $250 and for that you can get a retired Supreme Court judge to hear your case.

If a case lasts two days, the cost of $5,000 is split, but at least you will get a decision that makes sense. The same rules apply in arbitration where a retired judge sits as the arbitrator, i.e., no appeal, no discovery, etc. However, a retired judge will give you more leeway and ask the other side to give you an explanation as to what the claim or the defense may be in the case.

The bottom line is, if you can get away from arbitration, do it. If

you have to go into arbitration, do it with the least possible damage.

At the beginning of this series, I indicated that AIA has essentially come up with three forms of contracts. One is between the owner and the G.C., the other is between the owner and the C.M. and another one is between the G.C. and the sub.

Another subject is the contract between the owner and G.C. or C.M. A general contractor is somebody who assumes responsibility for his own bills. If you are hired by a general contractor, you have to look to him to have the bills paid. The only way you can jump over him is through a Mechanic's Lien. A Mechanic's Lien establishes your right to receive the funds owned to you by the G.C., but only to the extent that the owner may owe the G.C. any money. If you are owed $100,000 from the G.C. and the owner has paid the G.C. in full and can prove it, then you get nothing from the owner. If, on the other hand, the owner owes the G.C. $75,000, then the most that you can collect from the owner is $75,000.

That does not mean, however, that you are without remedy against the G.C. If the G.C. picked up the $100,000 and played the ponies with it, you have an action against him for diversion of trust funds, which is a whole different ball game, which won't be discussed at this point.

There is also a contract between an owner and a Construction Manager (C.M.). In that contract the C.M. is acting as the agent for the owner. He is the owner's representative and he is not responsible for your bill, but the owner is responsible for the bill. The distinction between the G.C. and the C.M., however, often becomes blurred. Both, essentially do the same work. Both, oversee the job and may supply labor and materials, etc. The C.M. essentially is a window to the owner. The G.C. is a brick wall to the owner. The owner is protected by the responsibility of the G.C. to paying his own bills.

In the AIA contracts the distinction is often difficult to tell. If you are signing up with a C.M., you have to make sure that the owner goes along with the fact that the person you are dealing with is his Construction Manager. If the job goes sour, the owner is going to run away from the C.M. and claim that he is a G.C. You have to specifically indicate that he is a C.M. and you have to get the owner to acknowledge that. I he does not, then you are running into a possibility of having the owner disavow his relationship to the C.M.

There are legal distinctions between the G.C. and the C.M. other than the responsibility. The cost of insurance may be significantly different. In signing contracts with a C.M. you have to be very, very careful to make sure that you are dealing with a C.M. and not a G.C. and that everybody knows it.

Never let your lien time run out.

For a free copy of a pamphlet pertaining to Mechanic's Liens and Payment Bond Claims, feel free to contact me or the Association.

Stuart S. Zisholtz is a partner in the law firm of Zisholtz & Zisholtz, Mineola, New York, a general practice firm specializing in Construction Law and Mechanic's Liens. He is also a member of the Greater New York Chapter, ACCA. He can be reached at 516-741-2200. •