

SPECIAL REPORT

Stopping Disputes in Their Tracks

How to Create a
Multi-Level Dispute Resolution Program



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Even today, after years of working to improve the construction process, many projects remain plagued with disputes and claims. If you think about the unique relationship between construction project stakeholders it is easy to see that you can't have a win/lose outcome. This is because each stakeholder on your project, in order

On construction projects there is either win/win or lose/lose - no other outcome is possible

to succeed, needs every other stakeholder to "perform". This interdependent relationship means that, on construction projects, there is either win/win or lose/lose - no other outcome is possible!

This special report has been developed to help you understand how you can create an almost foolproof process for resolving disputes on your projects. A process that will drastically reduce the chances of a dispute having to proceed to litigation.

An Explosion of Litigation

Almost no one approaches a project today without keeping in mind that they might be sued, or how they might sue someone else. Far too often a project is looked at as a potential liability instead of as a challenge to be taken.

Too often a project is looked at as a potential liability instead of as a challenge

This thinking costs everyone time and money, and results in added stress. Today, many in the industry feel that design and construction just aren't fun anymore.

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Sue-For-Profit Industry

A New York businessman told the Wall Street Journal "It's just a jumble of litigation... all you need is a good lawyer and

you can tie up somebody's bid for a year." Protesting bids, creating claims, pushing risk on anyone available, and refusing to accept responsibility have become a natural part of doing business. And, if in the end, you fail to make a profit, or the project costs more than you want, you will have created enough documentation for a rip-roaring lawsuit to recapture your losses or cost overruns.

Over the past twenty plus years there has been an explosion of construction-related litigation. Some say the tab runs as high as \$60 billion a year. A Texas professor, Steven Maggee, conducted research to discover the impact of having a growing number of lawyers in the United States. Although

Over the past twenty years there has been an explosion in construction related litigation

controversial, his findings are interesting. According to Maggee, for each lawyer in the country, and each new lawyer who passes the bar, the gross domestic product loses a million dollars each year¹. The loss occurs in higher prices charged due to potential liability, and in products and services that never get to market because they are deemed too risky.

Lawyers - Unparalleled Power

In *The Litigation Explosion*, Walter K. Olson states: "America is the litigious society it is because American lawyers wield such unparalleled powers of imposition. No other country gives a private lawyer such a free hand to select a victim, tie him up in court on undefined charges, force him to hire lawyers of his own at dire expense, trash his privacy through we-have-ways-of-making-you-talk discovery, wear him down on the perpetual-motions treadmill, libel him grossly in documents that become permanent public records, and keep

him scrambling to respond to Gryo Gearloose experts and Game of the States conflicts theories.”¹

Lawyers have the power to control the destiny of almost any type of dispute. Many feel that truth, fairness and equity are not any longer a part of the judicial process. Given the billions of dollars per year the “lawsuit” industry yields, lawyers have not just sat back and watched the money roll in. They have shrewdly invested their wealth and power in the currency of political and ideological influence.² The trial lawyers organization has become one of the most powerful lobby groups in America.

Several respondents stated that the presence of a lawyer hinders open communication

In a survey of designers, contractors, and construction lawyers conducted by the University of Washington, more than one-third of the respondents said that their primary concern when obtaining the services of a lawyer is

that the resolution of the issue is not timely and that the involvement of the lawyers actually tends to slow up the resolution process. Several stated that the presence of a lawyer hinders open communication between disputing parties and, in fact, contributes to polarizing their positions.³

The Anatomy of a Dispute

Over the years I’ve found that most disputes are a result of someone on the project team feeling as though they were being treated unfairly. In fact, whenever someone feels that they are not being treated fairly you can predict with great accuracy that there is (or will be) a dispute brewing. Lack of trust means that the

project team doesn’t feel free to communicate openly and honestly. So rumors, misinterpretations, and imaginations often take over.

According to research done by Frederic Luskin, this is how a dispute is made:

Most disputes are about feeling unfairly treated, not about technical issues

1. Something has to happen that you don’t like
2. You have to take part of this personally
3. When a negative thing happens your body goes into a fight or flight response

4. We then begin to blame the unpleasant response we feel on someone else

5. This starts a feeling of helplessness

6. We explain/tell and retell our story, write letters and try to get constituents, cementing our feelings of being a victim

7. Overtime we loose track of what really happened because the story is just a snapshot, not the whole picture - the dispute lives on

To resolve disputes we need to address the personal, professional, and financial issues

In order to resolve a dispute we need to address the personal, professional and financial issues that underlie it. This is best done by

the parties themselves, but, if they are unable to successfully address these issues, there are dispute resolution processes designed to help.

If the project is not yet completed we must also be careful to establish a (or not de-

stroy the) working relationship between the project team members. If one dispute is resolved, but, as a result there is no working relationship left on the project, you know that there will be more disputes along the way. This potential loss of working relationship is a tremendous risk to the success of the project. Successfully resolving the current issue by going through the

The potential loss of working relationships is a tremendous risk to the project

dispute resolution processes can help the project team feel more secure that they will be able to work out future project issues.

Many times no one on the project really understands that they are engaged in a dispute. Most project team members work daily to resolve problems, so often they fail to see that what was a project problem has now become a project dispute. Here is a simple definition of what constitutes a dispute: A dispute is a disagreement between two or more people. It's that simple. When a dispute

Today, despite years of effort, projects remain plagued by disputes

continues for some period of time without any movement toward solution, you are at an impasse. When at an impasse, people are usually entrenched in their positions and want to WIN, or at least prove that they are right and the other person is

wrong.

Red Flags / Triggers for When to Implement ADR

There are certain "red flags" that should be monitored; when one occurs it is a signal for the use of an ADR process. Here

are a few red flags to look for:

- Positioning letters being written without prior discussion
- Key stakeholders not attending weekly meetings
- A pattern of conflict or miscommunication
- Excessive NOPCs (Notice of Potential Claims)
- A downward trend on the partnering evaluation survey

Alternative Dispute Resolution in Design and Construction

The majority of disputes that end up in litigation are not technical in nature

Alternative dispute resolution (ADR) is a growing wave within the design, building, and construction industry. Frustrated with litigation and its overwhelming time and expense, owners, contractors, and designers are looking for

new ways to resolve project disputes. At a construction conference I attended, one of the lawyers stood up and boldly stated that partnering and ADR were so effective in preventing and resolving project disputes, that construction lawyers are having to redefine their role, and that within five years there may not be a need for construction litigation.

Well, I'm not sure about the elimination of litigation, but certainly partnering and other forms of dispute resolution are changing the nature of construction. One reason for this change is that the majority of construction disputes which end up in litigation are not technical in nature, but have to do with relationship issues. Ego, hurt feelings, resentment, frustration — all

Hierarchy of Alternative Dispute Resolution Processes

Parties Control Agreement	Third Party Decides
Partnering	Dispute Review Board
Negotiation	Arbitration
Facilitated Dispute Resolution	Mini-Trial
On-site Neutral	Court Mandated ADR
Mediation	Settlement Conference
	Litigation

Taking a Multi-Level Approach to Managing Dispute Resolution

In using a multi-level approach to ADR you start with one ADR process. If that process is not successful you catch the dispute at the next level and proceed to use the next ADR process, and so on. You should select two to five of the following processes (tools) for your project. They should be utilized in the order shown in the hierarchy so, that if one process fails to resolve the dispute, you can move to the next process which will, by its nature, be more formal.

of these lead people to court.

Hierarchy of Alternative Dispute Resolution Processes

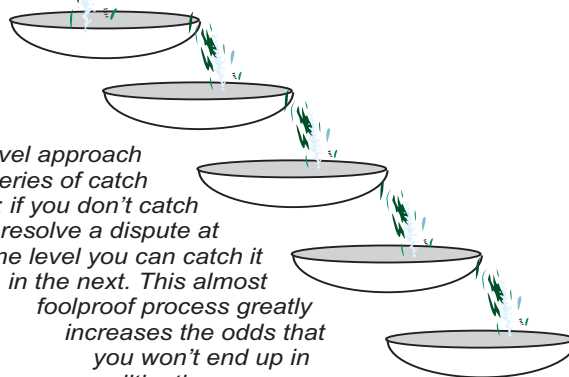
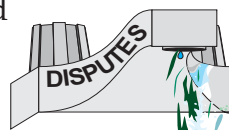
There is a hierarchy to ADR, with each succeeding process becoming more formalized, and control shifting from the parties controlling agreements to a third party deciding. All of the processes on the left side of the figure above are controlled by the parties involved in the dispute. All of those on the right side are controlled by someone else.

ADR is much less costly and faster than litigation. Costs escalate with litigation due to the discovery process — the more discovery the higher the tab. Since there is little or no discovery with most forms of ADR, your costs will be dramatically lower. You may also find that your agreements are more lasting.

The larger and more complex the project, the more levels you will want to have. For example, on a \$50 million project you

might have:

- Partnering
- Facilitated Dispute Resolution
- Mediation
- Dispute Review Board
- Arbitration



The multi-level approach is like a series of catch basins; if you don't catch and resolve a dispute at one level you can catch it in the next. This almost foolproof process greatly increases the odds that you won't end up in litigation.

■ Litigation

This would give you five chances to prevent or resolve the dispute BEFORE you ever entertain the idea of litigation. For smaller projects you might have partnering, dispute review board and on-site neutral.

Having multiple processes increases the odds of successful resolution

The concept is that by having multiple processes to move your disputes through you will increase the odds

that you will resolve any dispute that arises on your project.

Dispute Resolution Tools Where the Parties Control the Outcome

Partnering
Project Partnering

Partnering has proven to be the best dispute resolution process. After all it is designed to PREVENT disputes in the first place. Project partnering works to bring the project team together to form a good working relationship right from the start. Project partnering is the first line of defense for an effective

Partnering is the first line of defense in an effective ADR program

ADR program. It is the umbrella under which all of the other processes operate. Partnering helps to create and foster the atmosphere necessary for a successful project delivery, no matter what stage you are at: planning, environmental, design, construction or start-up.

Turn-Around Partnering

When a dispute erupts on a project it often harms the working relationships. A turn-around partnering session is designed to resolve the dispute, begin to heal the relationships, and get the project back on track. If a dispute occurs during the first quarter or half of the project, it can significantly jeopardize the completion of the project, which is still a long way down the road. Project stakeholders begin to push responsibly, and blame, on others. But the project still must be built, whether or not there is a war going on. A turn-around partnering helps set the stage for the project's completion without hostility.

Negotiating

The better you become at win/win negotiating, the less risk you have of conflicts escalating

Direct Negotiating

When there is a problem, negotiation between the concerned parties is what you do to try to solve the problem. Most conflicts will be solved through negotiation. This entails collecting information about the problem and then meeting and coming

to agreement on how to proceed. The better you can become at win/win negotiating, the less risk you have of conflicts escalating. Note: few construction managers, owners, or project managers know how to negotiate non-adversarily - instead, they quickly move to positions and become adversarial. I highly recommend training in this area. The IPI is in the process of putting together such a program.

Step Negotiation (Dispute Resolution Ladder)

One of the cornerstones of partnering is the dispute resolution ladder (or stepped negotiation). This process is also called elevation of an issue. The dispute resolution ladder is created during your

partnering workshop. At the top of the ladder are the two primary parties to the contract. Lining up behind these two primary parties are all of the other project stakeholders. For example, behind the contractor are the subcontractors and suppliers. Behind the owner might be the designer or the architect. If any of these project stakeholders have a dispute, the two main parties are obligated to champion that dispute, along with the disgruntled party, through the dispute resolution process.

Each party to a dispute needs to understand the other person's position – understand it well enough that they can explain

ing if possible. This can simple be a "speedy memo" addressed to the next level explaining the problem (issue) and identifying the points of disagreement. It is best if it is written by both parties.

Once the issue is elevated, it is incumbent on the next level to meet as soon as possible to try and negotiate a resolution. It is important that a separate meeting be held to address the issue (don't try to do it, for example, in the middle of the weekly project meeting). Also, don't assume

Once a dispute is elevated, it is incumbent on the next level to address it quickly

that the next level truly understands the issue and the points of disagreement, or that there will be automatic concurrence with your position, even if you have discussed the issue previously. This is a negotiation process!

	Designer/Architect	Subs/Suppliers
Level	Owner	Contractor
I	Inspector	Foreman/Superintendent
II	Resident Engineer	Project Manager
III	Construction Engineer	Area Manager
IV	Division Chief	Operations Manager
V	Board	President/Owner

it to the other's satisfaction.

The process starts at the lowest level possible for each organization and proceeds up through both organizations' hierarchy until the issue is resolved. An issue is elevated to the next higher level when 1) an agreement cannot be reached at the current level within the agreed upon time, or 2) if more than the agreed upon time has passed without a solution, or 3) by request of one of the parties at the current level (after first informing the other party).

Elevation to the next level in the dispute resolution ladder should be done in writ-

With the help of a facilitator issues are broken down into parts, each being resolved on its merits

Facilitated Dispute/ Claims Resolution

This is an extension of the partnering process, bringing together all stakeholders with a trained, neutral facilitator. The session is held in an informal setting with each side presenting their "story", facts, and supporting information. With the help of the facilitator issues are broken down into parts (sub issues), and each part is resolved on its merits. The process itself creates a deadline for resolution. The International

Partnering Institute has a special report available should you like to find out more about facilitated dispute/claims resolution.

On-Site Neutral

Some projects chose to have an on-site neutral. The on-site neutral can be used in

An on-site neutral usually has specialized knowledge or experience related to the issue

two ways. One is to select the on-site neutral and have her act as the neutral for all issues for the entire project. More frequently, a second method is being used, particularly for technical issues. An on-site neutral, usually with special-

ized knowledge or experience related to the issue at hand, is selected at the time the dispute arises and comes in to assist in the resolution of the technical issue involved. Thus, there may be more than one on-site neutral over the life of the project. Either way, the on-site neutral helps the parties understand and agree on a solution to the dispute.

A mediator's style is greatly influenced by their background and experience

Mediation

Mediation is rapidly growing as a preferred method of dispute resolution. Here a trained mediator helps the parties come to resolution. A trained mediator utilizes many techniques to move the parties closer

together, achieving a durable agreement.

There is no one way to mediate. A mediator's style is often a result of his/her background. Many people from different professionals have entered the field of mediation. On one hand you have litigators, who after twenty years of litigating disputes, feel that they want to try

their hand at mediation. Some former litigators (and former judges) see mediation as an opportunity to be lawyer, judge, and jury, and work to beat up and wear down the parties until they submit. This is the Atilla the Hun approach to mediation. Far too often the agreements fall apart when the "mediator" leaves.

The other end of the spectrum attracted to mediation are family counselors and therapists. Their approach is to investigate "how it feels" rather than to explore options and solutions to the problems at hand. The message here is to select a mediator who has the right approach for your dispute and has a track record of helping parties create durable agreements.

DRB language has become prevalent in construction specifications

Ask your facilitator for help in selecting a suitable mediator.

Dispute Resolution Tools Where a Third Party Decides

Dispute Review Board
DRBs are created at the

beginning of construction. They usually consist of three people. One is selected by the contractor and one by the owner. These two then select the third member. Each side of the dispute makes its case to the board, then the board makes a decision. The decision can be binding or non-binding depending upon the contract or agreement between the parties.

Dispute review board language has become prevalent in construction specifications, and it works. It works because nobody wants to go before the dispute review board, so they come to agreement just before the board is to convene.

Board of Adjustments

Dispute review boards are difficult to

maintain on multiple prime projects since you might have to have as many as twenty different boards. A board of adjustments offers a different approach. A board of adjustments is comprised of two parties selected by the owner from the owner's team (and who are not a part of the particular dispute), and two selected by the prime contractor from the contractor's team (who, again, are not a part of the dispute).

Each side states its case before the four board members, with the board members asking questions. Then the parties to the dispute leave and the board caucuses and makes a finding. While this process can be binding, it usually is not.

Arbitration can be formal or informal; there may be one arbitrator or a panel

Arbitration

Arbitration takes many different forms, just as mediation does. Some organizations' approach to arbitration is formal, following the processes of litigation. You might have one arbitrator or a panel of three. The arbitrator(s) is selected and agreed to by both parties. Often there are expert witnesses, discovery, and all the trappings of court. Opponents of this formal approach say it can take almost as long as litigation and can be just as expensive.

Another approach to arbitration is to have your dispute heard in front of your peers. This approach selects an experienced arbitrator who is also an expert from your field, and who is acceptable to both sides, to serve as arbitrator. He/she listens to both sides, and then renders a decision. Formal or informal, arbitration can be binding or nonbinding.

Mini-Trial

Simulated court rooms have been built in office buildings in which to hold mini-trials. A retired judge usually presides over the case and renders a decision. I have heard of mock juries being the decision-makers in some disputes. This form

A mini-trial is often used to see what would happen if the case were to go to court

of ADR is a private litigation process. It is much faster than going through the judicial process, and it can be binding or nonbinding.

Many times the mini-trial offers everyone a chance to see what would happen if the case were to go to court. With this insight, a settlement can usually be struck.

Settlement Conference (Mandated ADR)

Before you get to trial, the judge will probably require a settlement conference. Over 90% of disputes that lead into litigation end up being settled - so why not settle it before you get here?. More and more judges have the ability to select a special master to oversee your settlement,

Litigation takes too long, costs too much, and damages relationships

and can even mandate an ADR process to your case. A settlement conference and/or a special master is your last chance to come to agreement before you go to trial.

The Last Resort: Litigation

You are probably all too familiar with litigation. But I want to make what might be an obvious point, that litigation is not a good method for resolving most project disputes. It takes too long, costs too much, doesn't create fair decisions and damages relationships.

Far too often we look to litigation as our first step in resolving conflict – instead of the last step. Even the courts feel that they are seeing far too many cases which are better solved in different realms. This is why there has been a strong movement within the court system to add ADR processes to their way to resolve cases.

On the plus side, litigation can assist in changing unfair laws

On the plus side, litigation is a viable tool for setting precedents. Precedent-setting is responsible for changing many of the methods we use today. It can assist in changing or overturning unfair laws or conditions.

However, the outcome from litigation on construction disputes is often lose-lose in terms of time, energy, and money spent. It should not be your first alternative, but your last!

Putting Together Your Project ADR Tool Box

If you think of your Multi-Level Dispute Resolution Program as a risk management tool, you will be better able to assess which of the ADR tools will fit together to manage the risks (and therefore the potential disputes) on your project.

Assess your project to determine which ADR tools should be in your program

If your project is relatively routine and seems to not have a lot of risk, you might want to create a program that includes partnering, and a DRB. If your project is a bit more risky, you might want to go with partnering, facilitated dispute resolution, DRB, and arbitration. And, if your project is even more risky, you might want to have partnering, facilitated dispute resolu-

tion, DRB, nonbinding arbitration, and mini-trial. So, as you can see, if you do a good assessment of the risks you face on your project, you can easily construct an appropriate dispute resolution program.

The task of creating the program usually falls to the owner. However, it is always best if you can co-create the program with all the stakeholders. This can be difficult if the dispute resolution program must be a part of the specs or contract. If this is the case, it is important that the project owner, when putting together the program, seeks input from other stakeholder groups.

Stopping Disputes in Their Tracks

If you wait too long to resolve a dispute all you'll be able to argue about is money

All of the ADR tools are designed to help stop disputes in their tracks. This means that disputes are acknowledged, dealt with swiftly, and then put behind you so that you can stay focused on the real goal – to compete your quality project on time and on budget.

The best time to try to resolve your project issues is while there is still an opportunity for a technical resolution. This means that you can still implement what you decide on the project. After all, that is time when you can reap a significant benefit. Later on, all you can do is argue about money. There is no creativity in that.

Unresolved project issues act like DRAG on your project. Everyone knows that there is an issue out there that is not yet resolved. It effects every decision that gets made by every stakeholder until it is resolved. Loss of productivity, communication breakdown, and stress are always a result of having long-standing project

disputes. The cost of implementing a multi-level dispute resolution program will be small compared to the potential risk you are managing.

If you implement this almost foolproof multi-level program on your projects, you are highly unlikely to be burdened with unwanted litigation. And, your projects are much more likely to be successful.¹ “Lawyers are more likely to \$500 billion a year,” *Contra Costa Times*, 3 April 1991.

² Walter K. Olsen, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Truman Talley Books/Plume Printing, 1992), 299.

³ Jim Hinze and Bruce Dammeier, “Litigation Proliferation: Survey finds Causes,” *CB&E*, 17 September 1990, 22.

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