

WHITE PAPER

Stopping Disputes in Their Tracks

How to Create a Multi-Level
Dispute Resolution System
for Your Project



ORG•METRICS LLC
Advancing the Art and Science of Collaboration

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How to Create a Multi-Level Dispute Resolution Program for Your Project

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Even today, after decades 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 to succeed, needs every other stakeholders to "perform". This interdependent relationship means that, on construction projects, there is either win/win or lose/lose – no other outcome is possible!

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This white paper 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 proceeding to litigation.

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

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

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.¹

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:

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. You then begin to blame the unpleasant response you feel on someone else

5. This starts a feeling of helplessness

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

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

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.

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

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

If the project is not yet completed we must also be careful to establish (or not destroy the) working relationships between the project team members. If one dispute is resolved, but, as a result there is no working relationships left on the project, you know that there will be more disputes along the way. This potential loss of working relationships is a tremendous risk to the success of the project. Successfully resolving the current issue by going through the 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

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

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 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

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

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

Alternative dispute resolution (ADR) offers the design, building, and construction industry a path to resolution. 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 of these lead people to court.

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Hierarchy of Alternative Dispute Resolution Processes



Hierarchy of Alternative Dispute Resolution Processes

There is a hierarchy to ADR, with each succeeding process they become more formalized, and control shifts from the parties controlling agreements to a third party deciding. All of the processes on the left hand side of the ADR Hierarchy are controlled by the parties involved in the dispute. All of those on the right hand 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. The agreements made during ADR are also more “durable”, meaning people follow through with their agreements.

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.

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:

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

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

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.

Clearly, the best (most durable) dispute resolution methods are where the locus of control for deciding stays with the parties. And only if the parties cannot resolve the issue does it move to processes where a 3rd party decides.

Dispute Resolution Tools Where the Parties Control the Outcome

Partnering

COLLABORATIVE PARTNERING

Partnering has proven to be the best dispute resolution process. After all it is designed to

Having multiple processes increases the odds of successful resolution

PREVENT disputes in the first place. Collaborative partnering works to bring the project team together to form a good working relationship right from the start. Collaborative partnering is the first line of defense for an effective 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-

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

around partnering process is designed to resolve the dispute, begin to heal the relationships, and get the project back on track. If a dispute occurs dur-

ing 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 responsibility, and blame, on others. But the project still must be built, whether or not there is a war going on. Turn-around partnering helps set the stage for the project's completion without hostility.

Negotiating

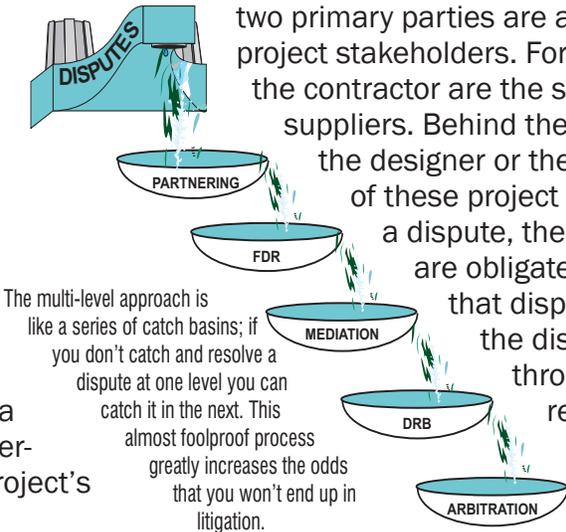
DIRECT NEGOTIATING

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-adversarially - instead, they quickly move to positions and become adversarial. I highly recommend training in this area. Orgmetrics offers non-adversarial negotiation training and coaching to assist teams.

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

STEPPED 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 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 writing if possible. This can simply be an email or “speedy memo” addressed to the next level explaining the agreed-upon 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

concurrence with your position, even if you have discussed the issue previously. This is a negotiation process!

FACILITATED ISSUE RESOLUTION (FIR)

This is typically conducted during a partnering workshop and focuses on an issue that has not yet grown to become a dispute. The skilled partnering facilitator helps the team to resolve the issue. Then the team is held accountable for following through by measuring their progress in the monthly Construction Scorecard™.

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

FACILITATED DISPUTE RESOLUTION (FDR)

This is an extension of the partnering process, bringing together all stakeholders with a trained, neutral facilitator. The session(s) 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.

FDR is one of the best kept secrets in ADR. This powerful process allows the team, those closest to the dispute, to work through the issues and develop “fair, justifiable” resolutions. We have been conducting FDR for over two decades and we’ve never seen a team that could not resolve their own issue. The power of this is that if they get confident in their

ability to resolve this dispute, then they can resolve the next dispute and the next. Until there is a high probability that the project team will resolve all of their issues! We see this all of the time!

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 that the next level truly understands the issue and the points of disagreement, or that there will be automatic

	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

FDR can work well in concert with the DRB. When the DRB ruling is not accepted by the parties. It can be used effectively as the “third party opinion” during an FDR process. This has many times worked to get the dispute resolved.

MEDIATION

Mediation, in construction, typically involves lawyers for each side and a mediator who

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

is also a lawyer. 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.

Dispute Resolution Tools Where a Third Party Decides

DISPUTE REVIEW BOARD/ADVISOR

DRBs (and DRAs) are created at the start 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 nonbinding depending upon the contract or agreement between the parties.

DRB language has become prevalent in construction specifications

In a DRA, there is just one decision maker. DRAs are typically used on smaller projects.

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.

ARBITRATION

Arbitration takes many different forms. 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 as long as litigation and can be just as expensive. Arbitration can be binding or non-binding.

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

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

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 head 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, 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.

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

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 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.

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

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.

If your project is relatively routine and seems to not have a lot of risk, you might want to create a program that includes collaborative partnering, and FDR. 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 resolution, 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.

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

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

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 complete your quality project on time and on budget.

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

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

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

Orgmetrics LLC is the premier thought leader in construction collaboration. For 30 years, our team of professional partnering facilitators has worked on over 2500 projects, saving stakeholders 10-30% in costs per square foot. We have the knowledge and experience to understand what makes projects succeed and what makes them fail. We have helped teams to resolve over one billion dollars in disputes on their projects. We specialize in complex Mega projects. We also have a well-developed special program for smaller projects.

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