

### Sobering Numbers

In 2005, a study conducted by the [Construction Industry Institute](#) estimated that the industry spends \$10-12 billion per year on just the transactional costs of resolving its disputes. This is in addition to the costs inflicted directly on the project by the underlying dispute. To put this in perspective, \$12 billion is equivalent to:

- 2.5% of the total value of all U.S. non-residential construction in 2005 (U.S. Census Bureau).
- \$145,000 per year for every member of the AIA; or \$522,000 for every architectural firm in the United States.
- Approximately 25% of the total net income of all construction companies in the U.S.

It's bad enough that many architects now sarcastically suggest that there is a new final phase to the delivery process: mediation, arbitration, and/or litigation. In fact, what does it say when, still today, [the second largest and fastest growing committee](#) of the American Bar Association's Litigation Section is **construction**?

### The Basic Problem

The forces arrayed against achieving a problem-free project are formidable. For example:

- Successful construction requires collaboration and cooperation among parties who are often working together for the first, and probably last, time;
- Every project includes an extensive, and often overwhelming, web of interdependent documents, activities, and relationships;

- The dizzying array of tasks, sub-tasks, and linkages are likewise interdependent and critically time sensitive, allowing even a small hiccup to throw a project off track;
- The issues that arise are seldom one-dimensional, and are most often comprised of various helpings of design, construction methods, law, finance, insurance, etc.;
- Performance tolerances are incredibly tight, and margins for error are thin;
- And, unfortunately, there is still an underlying culture of adversarial behavior.

### **Past Solutions**

Historically, the construction industry has been a leader in combating these forces through mediation and arbitration, but success has been frustrated by several factors:

- They take too much time.
- The cost is often as high as litigation.
- They are disruptive to ongoing projects.
- The resulting impacts on the parties and the project are often not perceived as fair, which can in turn lead to distrust and the likelihood of additional disputes.
- They often take place during closeout, causing the expenditure of unanticipated resources and leaving the issues further complicated by the passage of time.
- Mediation is too often treated as perfunctory, and is therefore ineffectual.

- It is difficult for an outside mediator, arbitrator, or judge—parachuting into a problem—to fully understand or break down the chemistry of documents, activities, and relationships that underlie a dispute.

### Neutral Solutions

Even many lawyers are frustrated...

“The AEC industry continues to be plagued by disputes and inefficient mechanisms for resolving controversy. While mediation has proven somewhat effective, it usually occurs after the parties have expended considerable resources disputing their differences. Arbitration has become more cumbersome and litigation is often worse. In general, disputes arise too often and are resolved too late. A more organic process is needed; where most disputes are resolved close in time to their origin by persons most knowledgeable about the circumstances.” American Bar Association's Forum on the Construction Industry, [Under Construction, August, 2007](#).

These are the the *transactional* lawyers talking. They represent owners and AEC firms on a daily basis and are concerned about protecting their clients from conflict. As if to respond to that concern, both the AIA and AGC have embraced the incorporation of on-site Neutrals in their 2007 contract revisions. The answer is, really, just common sense: Utilize persons who are knowledgeable about both the subject-matter and the project and are in a position to quickly and objectively attack and solve problems...while they are still **just** problems.

### Real Time Solutions

The industry overwhelmingly agrees with a simple, common sense, proposition: The further a problem gets from the field level, the more

expensive, time-consuming, and aggravating it becomes. The prominent author, Malcolm Gladwell, [has similarly observed](#) that successful financial systems, airlines, and even insurgents operate in “real time”, as opposed to “batch processing” issues and allowing gaps to occur between the event and the treatment of that event.

As an independent third party, the Project Neutral (typically one to three individuals) monitors all activities and documents from concept to completion. When an issue arises, it's not necessary to waste precious days, weeks, or months getting up to speed—he is at speed always. There are no gaps, no batch processing. The Neutral can act literally within hours—whether it is informally sorting through problems, warning of potential issues, issuing advisory opinions, conducting full-out mediations, or rendering “initial decisions”.

The Neutral's duty is to serve the project in real time.

### **Fair Solutions**

Aside from speed, the reason behind the emergence of Neutrals is obvious—the desire to secure truly fair and impartial solutions rather than allowing one or more parties to dominate or overly influence the result. But fair solutions are important not just for their own sake. Think about it: No matter how distasteful a solution might be, if it's fair, and *perceived* to be fair, the risk/reward calculation discourages opposition—and the likelihood of disruption to the project or adversarial proceedings becomes greatly reduced.

In fact, if perception is reality, the controlling factor becomes the parties' *belief* that they were treated fairly. Because a Neutral is by definition unbiased, his actions carry a presumption of fairness that

both supports and stimulates that belief.

Fairness Sticks. It disarms conflict. And the presence of a Neutral not only results in fair solutions, but the all-important perception of fairness as well.

### **Bonus**

Some of the indirect benefits that can be achieved by the use of Neutrals are:

- A culture of fair play is emphasized, by which the project becomes more appealing to potential team members and because of which parties are more likely to be forthright and fair with one another rather than adversarial.
- The project team stays in control of the problem, with no outside intervention.
- The likelihood of achieving incentives or success fees is increased.
- Dispute resolution becomes a budgeted project cost, as opposed to a surprise expenditure, and may therefore be part of the overall financing and/or constitute a reimbursable project cost under some governmental programs.
- It may result in a decrease in insurance premiums, including controlled insurance programs (so-called "Wrap-ups").
- Neutrals can be utilized as sounding boards and informal advisors for brewing or potential problems.
- Overall project and individual stress is lowered.