**Paper Title: Planned Early Dispute Resolution: The Why and the How**

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**Session Title:**

Show Me the Money – Now! Tips & Case Studies on Resolving Complex Construction, Surety & Insurance Disputes Quickly & Effectively

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After a long career as a construction lawyer with Frost Brown Todd LLC, Scott Gurney recently launched Gurney Dispute Resolution LLC to focus on his true professional calling – resolving construction disputes efficiently and fairly without litigation. As a facilitator, mediator and arbitrator, Scott uses his broad construction law experience to help companies resolve disputes during the project, at project close-out or in litigation. Scott has received mediator training from Pepperdine University and has been an American Arbitration Association (AAA) Construction Industry arbitrator since 2003.

# Planned Early Dispute Resolution: The Why and the How

## Introduction

Protracted disputes remain a major concern for the construction industry where time truly is money. Most disputes – approximately 95% -- are resolved before they get to the trial or arbitration hearing. But they often settle only after many months or years of expensive and distracting "discovery" and other pre-trial activities. Since most cases eventually settle before the trial or hearing, companies and their attorneys should prioritize, plan and implement strategies for resolving disputes as early as possible, before the costs, disruption, and risks mount. This article briefly discusses a process for planned early dispute resolution and how to implement it. [1]

## Some Statistics and Trends

According to the 2019 Global Construction Disputes Report by the global consultancy firm Arcadis, the average time to resolve construction disputes in North America in 2018 was 15.2 months and the average dispute value was $16.3 million. Arcadis reports that the three most common methods of alternative dispute resolution in recent years has been (1) party-to-party negotiation, (2) mediation, and (3) arbitration. Arcadis concludes that in the construction sector

> . . . there continues to be a preference towards negotiated outcomes controlled by the parties involved in the dispute resolution process to avoid formal litigation proceedings. They are realizing that the further along a dispute progresses, the higher the value and cost of resolution will become. Expenses, like interest on the claim and the cost of litigation, can exceed the cost of the original claim itself. This demonstrates the value added when proactive dispute avoidance techniques are employed early in the construction process, which can aid in keeping participants away from formal claim proceedings altogether.

Planned early dispute resolution is a key proactive process for resolving disputes that is quickly gaining momentum.

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[1] Several commentators have previously described the basic principles and concepts of early dispute resolution under a variety of names. Construction attorneys Paul Laurie, Dean Thomson and Bill Geisen are among those who have written about a "Guided Choice" process. See www.gcdisputeresolution.com. The American Bar Association's Dispute Resolution Section has published a paper on planned early dispute resolution. John Lande, Kurt L. Dettmaqn & Catherine E. Shanks, *Planned Early Dispute Resolution*, A.B.A Sec. Disp Resol., www.americanbar.org/groups/resources/planned early dispute resolution pedr.html (2015). Attorney Peter Silverman has also written extensively on early dispute resolution. See, e.g., https://www.shumaker.com/Templates/media/files/pdf/news/events/5slk_tol-2696979-v1-faster_cheaper_better_-_final.pdf.

## The Litigation Paradigm

Most business managers, especially those who have been through a trial, know that traditional litigation is a dysfunctional way to resolve construction disputes. Litigation typically is expensive, slow, distracting, risky, public, and destructive to relationships. And while arbitration can be a better process if administered effectively, it shares some of litigation's drawbacks as an adversarial process. These drawbacks of traditional litigation and arbitration have led to the increasing use of mediation and other collaborative methods for resolving business disputes.

## Creating a "Sweet Spot" for Early Resolution

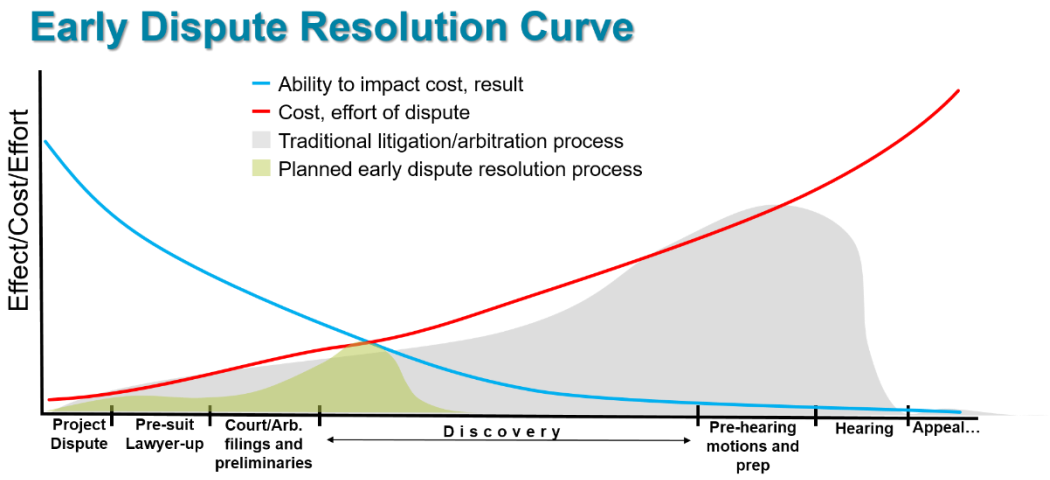
Business managers also know that resolving disputes quickly, either before a lawsuit or arbitration is filed or soon thereafter, reduces the costs of resolving the dispute and may help preserve valuable business relationships. Yet too often parties and their attorneys do not hire mediators until late in the litigation process, after spending months or years and untold dollars in pre-trial discovery and motions. The typical rationale given for delaying mediation is that the parties need more information about the claims before they can make an informed settlement decision. Another frequent assertion – perhaps sometimes true but clearly perverse – is that the parties simply are not ready to settle and need to feel some "pain" of litigation before they will be motivated to make meaningful compromise. So almost by default, litigation discovery and motion practice often take on a life of their own until the parties either become exhausted with the process or otherwise reach a "sweet spot" where they are ready for mediation and serious settlement discussions. Fortunately, there are alternatives to the slow march of litigation.

While the parties clearly need reasonable information about the claims to make an informed business decision on settlement, they simply do not need the detailed information obtained through full-blown litigation discovery. Significantly less information is needed to make an informed settlement decision than to present a case in trial or arbitration. Many attorneys preparing for trial feel pressure to turn over every stone for fear of missing the "smoking gun" or being surprised and second-guessed at trial. But contractors and others involved in the construction process regularly make business decisions on incomplete information. If contractors are willing to give fixed prices or GMPs on incomplete drawings and specifications -- sometimes taking on millions of dollars in risk -- surely they can decide (with some good guidance) to settle a dispute despite incomplete information, and thereby cap or eliminate risk.

Rather than wait for a settlement "sweet spot" to occur through protracted litigation, parties and their attorneys can hire a mediator experienced in early dispute resolution to actively help *create* conditions for a successful early mediation soon after the dispute arises. Depending on the circumstances, the mediator can be hired before or after a lawsuit or arbitration is filed, but the mediator should be hired early

enough to be able to help the parties and their attorneys collaboratively develop a dispute resolution process tailored to their needs and circumstances.

Following is a simple, conceptual diagram contrasting the impacts of the traditional litigation trajectory to the planned early dispute resolution process.[2] The point is to highlight the benefits of shifting the dispute resolution efforts earlier in the timeline than the traditional litigation process.




**Key Features of the Early Dispute Resolution Process**

Although the process should be tailored to the unique aspects of each dispute, there are several key common features of a successful early dispute resolution process.

1. **Agreement to mediate**

Of course, since mediation is a consensual process, the parties must first agree to mediate. The best time to agree on an early dispute resolution process is when negotiating and drafting the dispute resolution clause in the contract while the parties are still in the honeymoon stage. Many industry form contracts require mediation before litigation or arbitration, but they typically do not spell out when the mediation is to occur or the details of the pre-mediation process. To further streamline the process, the parties can also designate a mutually-agreeable mediator by name in the dispute resolution clause.

If there is no mediation clause in the contract, the parties can – and should – agree to mediate as soon as practical after a dispute arises that cannot be resolved by direct negotiations. A request to mediate is not a sign of weakness. Carlos Hernandez, CEO of Fluor and a board member of the independent, non-profit CPR

[2] This basic idea is related to the well-known construction design concept called the MacLeamy Curve. The MacLeamy Curve, developed by HOK CEO Patrick MacLeamy, highlights the obvious but important point that the further you are through the design process, the higher the cost of design change. MacLeamy uses the diagram to show the benefits of "shifting the effort" earlier in the process.

International Institute for Conflict Prevention & Resolution, recently noted that Fluor goes to mediation as soon as they perceive they are not making progress in their own settlement discussions:

> Frequently we don't have the right to mediate, contractually. So we urge the other side to join us. Some may perceive a willingness to mediate as a sign of weakness, but I think it is to the contrary, a sign of strength because I'm willing to put our case in front of a third party neutral.

*Alternatives to the High Cost of Litigation*, CPR International Institute for Conflict Prevention & Resolution, May 26, 2017.

**2. Retention of mediator as early as possible**

Retaining a mediator as early as possible is key to the early dispute resolution process. As stated above, parties and their attorneys too often do not hire mediators until late in the litigation process, after spending months or years and untold dollars in pre-trial discovery, expert witnesses, and motions. At that point, the parties may be ready to negotiate, but the parties' relationship will likely have deteriorated and their positions become further entrenched, making settlement more difficult. Therefore, the parties should retain a mediator experienced in the early dispute resolution process as soon as possible after the dispute arises so the mediator can help the parties and their counsel customize the settlement process for their situation. If one party is reluctant to participate in early dispute resolution, the mediator can confidentially explain why it may be in that party's best interest.

**3. Mediator's confidential fact-gathering and diagnosis**

With the parties' consent, the mediator then works independently and confidentially with the parties and their attorneys to gather important information, review possible roadblocks to settlement and develop an appropriate settlement process. The mediator interviews key players to understand the real dynamics and human behavior issues involved and the underlying settlement needs of the parties, not just the issues raised in legal briefs. The mediator also determines whether there are other parties that need to be involved such as insurers, sureties or subcontractors, and which individuals should attend the mediation session.

**4. Document and information exchange**

The mediator then works with the parties and their attorneys to determine what additional documents and information the parties should exchange to make an informed business decision on settlement. The mediator can help the parties understand why it is in their interest to quickly exchange key information needed for a productive mediation. Again, parties usually need much less information to make a business decision than attorneys need to try or arbitrate a case. For cases in litigation, the parties may agree to postpone expensive discovery, including e-discovery, during the expedited settlement process.

**5. Customizing the settlement process and mediation**

Based on the information learned during the initial review, the mediator works with the parties and counsel to customize the settlement process and mediation session to have the best chance of success. For example, could the issues or gap between the parties be narrowed if the expert witnesses exchanged preliminary reports or met before the mediation session? What topics should be covered in the pre-mediation briefs, and should the briefs be confidential or exchanged between the parties? Should there be joint sessions where the parties and/or their attorneys make presentations so the parties feel they have been heard or had "their day in court"? Or should there be caucus sessions only with the parties separated? Finally, prior to the mediation, the mediator should help the parties anticipate possible roadblocks to settlement and discuss how to deal with an impasse without terminating the settlement negotiations.

**6. Continued involvement of the mediator after suspension of negotiations**

Many disputes that do not settle in the mediation session itself settle sometime thereafter because of the progress made in the mediation. This is especially true where the parties continue to use the mediator to help continue or jump-start negotiations. In many cases, it makes sense for the parties to continue to work with the mediator, either by telephone or in person, to help close any gap remaining after the mediation session.

**7. Customizing an arbitration process for disputes that do not settle**

Finally, the mediator can also help the parties and their attorneys customize an arbitration process for disputes that do not settle in mediation. The mediator can help with the selection of appropriate arbitrators and can suggest procedures for expediting the process, minimizing costs (especially for discovery), and simplifying the hearing. The mediator may also help parties agree to arbitrate where there is no arbitration clause in the contract. With informed consent by the parties, some mediators will agree to change roles and serve as arbitrators to decide disputes that do not settle in mediation. These discussions can occur either before or after an impasse occurs. Even if the parties decide to arbitrate the dispute with a separate arbitrator, they may continue to use the mediator in settlement discussions in parallel with the arbitration process.

## Conclusion

Time is money in construction – and disputes. Since most disputes are eventually settled before they get to the trial or arbitration hearing, it makes sense for companies to attempt to resolve disputes as early as possible before the costs, disruption, and risks mount. With some forward thinking and planning by companies and their attorneys, and the timely retention of a mediator experienced in the early dispute resolution process, parties can resolve disputes better, cheaper and faster and thereby help minimize risk, protect their bottom lines and preserve business relationships.