Emerging Trends in ADR

ADR Grows Up: Designing Dispute Systems for Modern Construction Projects

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Introduction

Alternative Dispute Resolution (ADR) has been part of the construction industry for more than four decades. What began in the 1980s as an "alternative" to litigation has evolved into something far more central: a core component of modern project governance and risk management. Today, ADR is no longer merely a back-end mechanism for resolving disputes after relationships have failed. At its best, it is an integrated system—planned in advance, tailored to the project, and capable of addressing conflict early, efficiently, and intelligently.

This paper explores how ADR in construction has matured, why that evolution matters to owners, contractors, insurers, and sureties, and how dispute resolution mechanisms can be intentionally designed to improve outcomes. We argue that the most successful projects are not dispute-free. They are dispute-ready.

ADR has grown up. The challenge now is to use it thoughtfully.

I. ADR Did Not Arrive Overnight—It Evolved

Construction disputes have always existed. What has changed is how the industry responds to them. In the 1980s and early 1990s, litigation was the default dispute resolution mechanism for construction conflicts. ADR—primarily mediation and arbitration—was introduced as an alternative to court proceedings that were slow, expensive, and often ill-suited to technically complex projects. Over time, mediation proved particularly effective, and arbitration became embedded in many standard construction contracts.

As ADR demonstrated its value, it gradually ceased to be "alternative." Today, mediation is the primary resolution mechanism for most construction disputes, and arbitration is widely used by agreement. Litigation, in many cases, has become the fallback rather than the first choice.

This shift occurred because construction disputes are uniquely complex. They involve technical issues, layered contractual relationships, insurance and surety considerations, and ongoing business relationships. Traditional litigation often struggles to accommodate those realities. But the real evolution of ADR is not simply about replacing litigation. It is about recognizing that conflict is inevitable in complex projects and designing systems to manage it productively.

Partnering: The Idea We Took for Granted

A. How Partnering Emerged

Project partnering emerged in the construction industry in the early to mid-1980s as a practical response to deeply adversarial contracting practices. Owners, contractors, and public agencies were spending too much time and money fighting, often over issues that could have been addressed earlier and more efficiently.

In the United States, the Construction Industry Institute (CII) played a central role. In 1991, CII published *In Search of Partnering Excellence*, building on pilot projects that explored whether structured collaboration could reduce disputes. Around the same time, the U.S. Army Corps of Engineers began using partnering on selected projects, not as a feel-good

exercise, but to keep work moving and claims under control. Partnering gained traction because it addressed a reality everyone recognized but few talked about openly: complex projects are going to have disagreements, and pretending otherwise just pushes those disagreements downstream.

B. Why Partnering Worked (When It Did)

At its best, partnering did not promise harmony. It promised a way to deal with conflict without immediately reaching for formal claims or lawyers. Early partnering efforts focused on a few simple ideas:

- Getting the right people in the room early;
- Aligning expectations before positions hardened;
- Creating clear, agreed escalation paths for issues; and
- Using neutral facilitators when conversations stalled.

On many projects, these basics produced meaningful reductions in claims and litigation. Not because everyone suddenly agreed—but because problems were addressed sooner and at lower levels.

C. The Partnering Paradox

Partnering's success also explains why it faded as a distinct concept. As collaborative practices became more common, partnering workshops and charters were absorbed into everyday project management. Partnering became something projects said they were doing, even when discipline around it slipped.

A recent academic re-examination confirms what many practitioners already sense. Despite decades of discussion, questions remain about how consistently partnering is actually practiced. Researchers point to familiar problems: vague definitions, uneven buy-in, cultural resistance to collaboration, and difficulty tying partnering directly to measurable outcomes. In other words, many of the same challenges identified decades ago are still with us.

D. Evolution Toward More Structured Collaboration

As partnering matured, the industry moved toward more structured collaborative models. Delivery methods such as Integrated Project Delivery (IPD), and other relational contracting approaches, embed collaboration directly into the contract rather than relying solely on non-binding charters. These models hard-wire incentives, transparency, and shared responsibility in ways traditional partnering often did not.

The point is not that partnering was naïve or misguided. It was an important step in the industry's learning curve. Newer models simply reflect a desire for clearer commitments and stronger alignment mechanisms.

E. Partnering Today: Still Relevant, Often Invisible

Partnering has not disappeared. Some public agencies continue to use formal programs with documented success, while others rely on alternative delivery methods that incorporate collaborative elements without using the partnering label. Many of partnering's core ideas—early alignment, structured communication, disciplined escalation—now show up elsewhere: standing neutrals, dispute boards, guided mediation, and integrated project delivery frameworks. In that sense, partnering may be a victim of its own success. Its principles are everywhere, even when the name is not.

F. Why Partnering Still Matters

In a world where mediation, neutral evaluation, and dispute boards are well-established, partnering's original dispute-avoidance role may seem less distinctive. But its central insight still holds: disputes are easier to manage when relationships, expectations, and processes are addressed before positions harden. Partnering did not fail. What sometimes failed was the discipline to remember and use it when problems arose.

From Boards to People: Standing Neutrals as Project Infrastructure

A. The Simple Idea Behind Standing Neutrals

One of the simplest—and most underutilized—tools in construction dispute resolution is also one of the least complicated: before the project starts, the parties identify a specific person (or small firm) they agree to call when a problem arises. That is the entire concept.

No formal panel. No monthly meetings. No binders of procedures (though any of those can be added if the project warrants). Just a shared agreement that when the project team hits a snag it cannot resolve in the normal course, someone picks up the phone and calls the standing neutral before claims letters are drafted or threats are made.

This individual might be a respected construction executive from another company, a construction attorney with deep ADR experience, a professional mediator, or a long-time industry professional trusted by both sides. Titles matter far less than credibility and availability.

What matters are three things:

- The neutral is identified and agreed upon before the project begins.
- Both parties respect the neutral and are willing to listen.
- When the call comes—and it almost always does—the neutral is available and understands the role.

B. How Standing Neutrals Actually Work

When a disagreement arises that cannot be resolved through ordinary project management channels, the standing neutral is contacted. The conversation usually starts informally: "We have a problem, and we need to talk about it before it gets worse." Depending on the issue, the standing neutral may:

- **Facilitate conversation.** Often, simply allowing both sides to explain their positions to a neutral third party—and to hear the other side's reasoning rather than their formal position—changes the dynamic. Many disputes soften once parties realize the disagreement is narrower than they assumed.
- **Ask clarifying questions.** A good standing neutral asks the questions neither side wants to ask itself: Did we actually review that report? Who approved that assumption? What does the contract really say about this condition? Sometimes one honest answer resolves the issue.
- **Suggest a practical path forward.** The neutral may propose a way to move ahead without assigning blame: one party does X, the other does Y, and the group checks back in two weeks. No ruling—just momentum.
- **Help structure a settlement.** If money is involved, the neutral may help frame solutions that neither party would propose directly—splitting cost but adjusting time, deferring payment until milestones are met, or sequencing work to manage risk.
- **Make a binding decision (if authorized).** In some contracts, the standing neutral has authority to make binding decisions on limited categories of issues. Even then, binding decisions usually come after discussion and facilitation, not as a first step.

C. Why Standing Neutrals Work

Standing neutrals work because they address human and project realities early, before positions harden.

First, relationships matter. Once a conflict escalates into a formal claim, communication deteriorates and defensiveness sets in. Calling a neutral who was agreed upon before anyone was angry lowers the barrier to engagement.

Second, context matters. Because standing neutrals are engaged early, they deal with issues while facts are fresh. They are not reconstructing events years later from emails and expert reports; they are addressing problems in real time.

Third, ego matters. It is often easier to hear hard truths from a neutral with no stake in the outcome than from the opposing party. The neutral allows people to adjust positions without losing face.

Finally, cost matters. On smaller projects, a standing neutral might cost a few thousand dollars over the life of the job. On larger projects, perhaps tens of thousands. Either way, that cost is typically a fraction of a single mediation or arbitration—and many times it prevents disputes from reaching that stage at all.

The Self-Monitoring Effect

Beyond resolving disputes reactively, standing neutrals serve a powerful preventive function. Research in organizational behavior has documented what scholars call a "self-monitoring" effect: the mere presence of a neutral third party creates an inherent incentive for parties to moderate their own conduct. (See Kate Vitasek et al., "Unpacking the Standing Neutral," University of Northern Iowa, 2022.) This dynamic discourages the gamesmanship, posturing, and tit-for-tat negative spirals that often escalate manageable disagreements into formal disputes.

The effect operates much like a referee in sports: the neutral's ongoing presence curbs problematic behaviors before they manifest. Parties who know that a trusted neutral is watching—and available to weigh in—tend to approach disagreements more constructively from the outset. This preventive benefit is often the standing neutral's greatest value, even when the neutral is never formally called upon to resolve a dispute.

Three Critical Elements for Success

The scholarly literature on standing neutrals consistently identifies three elements essential to success:

- **Early mutual selection.** The neutral must be jointly selected by the parties at the beginning of the relationship—not after controversy arises. This creates a collaborative atmosphere and avoids the adversarial jockeying and delay associated with selecting a mediator or arbitrator in the heat of a dispute.
- **Continuous involvement.** The neutral should be part of ongoing project governance—available on short notice and ideally meeting periodically with the parties to stay current on the project, even when no disputes are pending. This familiarity allows the neutral to act immediately when issues arise and builds the trust necessary for effective intervention.
- **Real-time action.** The standing neutral must be empowered to address issues and concerns in real time—before they escalate into formal disputes. Swift involvement ensures problems are resolved while they are still small and facts are fresh, avoiding the need for expensive reconstruction of events months or years later.

When these three elements are combined into a well-designed standing neutral process, the result is a foundation for effective dispute prevention—not merely dispute resolution.

D. Who Can Serve as a Standing Neutral

The standing neutral role is flexible and should be matched to the project. Depending on the circumstances, the neutral might be:

- A respected construction executive from another firm;
- A construction attorney with substantial ADR experience;
- A professional mediator or facilitator specializing in construction;

- An engineer, architect, or construction professional with industry standing; or
- A former judge or arbitrator experienced in complex disputes.

The primary factor is not the resume itself, but rather trust. Both parties must have confidence that the neutral party possesses a comprehensive understanding of the industry, the project, and the practical challenges associated with successful project completion.

E. Standing Neutrals as the Foundation for Other ADR Tools

The standing neutral concept is foundational. It addresses the most common trajectory of construction disputes: a small disagreement turns into a claim letter, which becomes a counterclaim, which ultimately leads to arbitration or litigation.

Standing neutrals interrupt that trajectory. They exist for the moment when someone needs to say, "This is exactly why we named you—let's talk about this while we still can."

Dispute Review Boards formalized this same insight by adding structure, regular meetings, and written procedures. But projects do not need a full DRB to benefit from the principle. Often, simply naming a trusted neutral in advance is enough to prevent disputes from becoming expensive problems.

Mediation: From Event to Process

A. The Traditional Mediation Model

For many years, mediation in construction followed a familiar pattern: the parties assembled for a single day, exchanged position statements, caucused, and hoped to settle. Sometimes it worked. Often it did not.

B. The Modern Mediation Model: Guided Choice in Practice

Over the last decade, and especially since COVID accelerated experimentation, many construction professionals have gravitated toward what is often described as **Guided Choice Mediation**. The label is less important than the shift it represents. Guided Choice captures a simple but powerful idea: mediation works best when it begins as an early, diagnostic process—not as a last-ditch settlement conference after positions have hardened and money has already been spent.

At its core, Guided Choice reflects a recognition that most construction disputes do not fail to resolve because the parties are irrational or stubborn. They fail because something essential is missing: information, authority, trust, alignment, or a shared understanding of risk. Traditional, late-stage mediation often arrives too late to fix those problems efficiently. Guided Choice is designed to surface and address them early.

Impediments to settlement frequently involve human factors such as perceptions of loss, anger, overconfidence, and both conscious and unconscious cognitive biases. They can also involve heuristics unique to the parties regarding how individuals or corporate cultures make decisions. These obstacles are difficult for a party to recognize or objectively understand through internal investigation or lawyer-to-lawyer communication alone.

Confidential discussions between each party and a neutral mediator are often needed to surface and address these barriers before any formal negotiation begins.

The process typically begins with an unambiguous commitment in the contract. The parties agree in advance that if a dispute arises, they will attempt to resolve it through mediation before pursuing arbitration or litigation. This is not tentative or conditional language. It is a clear expectation that mediation is part of the project's dispute-resolution infrastructure, not an optional add-on once things go wrong.

The second—and more important—step is timing. Under a Guided Choice approach, the mediator is retained early, while the dispute is still fresh and before formal claims positions are fully formed. This is where many organizations miss the opportunity. They wait until they believe they are "ready to negotiate," which often means after months of internal positioning, expert retention, and lawyer-driven correspondence. Guided Choice turns that instinct on its head. The mediator's initial role is not to demand numbers or force compromise, but to diagnose why the dispute has not resolved naturally through ordinary project management.

A key insight underlying Guided Choice is that the information a business needs for settlement is typically far less than what lawyers need to prepare for trial. Settlement requires enough information to make a rational business decision; litigation preparation requires comprehensive discovery designed to eliminate surprise. By helping parties identify the minimum necessary information exchange for settlement purposes, a Guided Choice mediator can often shortcut months of expensive discovery—including the burdensome exchange of electronically stored information—that would otherwise delay resolution. (See Paul M. Lurie, "Guided Choice Mediation: Early Dispute Resolution Using the Best Practices of Commercial Mediation and Arbitration.")

That diagnosis happens through confidential, one-on-one conversations. The mediator speaks separately—with project managers, executives, counsel, insurers, and technical experts—to understand not just the stated dispute, but what is actually blocking resolution. Frequently, what emerges is more nuanced than the formal claim suggests. A payment dispute may really be about precedent risk. A scope disagreement may be driven by uncertainty about downstream impacts. A refusal to negotiate may reflect missing information, internal authority constraints, or simple miscommunication rather than bad faith.

Once those real obstacles are identified, the mediator helps the parties design a resolution process tailored to the dispute at hand. This is the heart of Guided Choice. The process is not formulaic. Depending on what the diagnosis reveals, the mediator might recommend targeted information exchange instead of broad discovery, a focused meeting between technical experts to narrow factual disagreement, or structured executive discussions to align risk tolerance and authority. In some cases, the mediator may suggest neutral evaluation of a discrete legal or technical issue to give decision-makers a credible external reference point. In others, the mediator may recommend sequencing steps—information first, negotiation later—so that parties are not negotiating blindly.

One concrete technique that distinguishes Guided Choice is "What If" scenario planning. Before negotiations begin, the mediator works with each party confidentially to anticipate potential impasses and plan how they might be addressed. This contingency planning might address questions such as: What if an impasse develops over a key legal issue? What if an insurer disagrees with a proposed settlement? What if a participant claims lack of authority to move? Discussing these scenarios privately with the mediator before they arise makes parties less likely to treat their occurrence as a reason to terminate the mediation. The result is a more resilient negotiation process that can absorb setbacks without derailing entirely.

Importantly, mediation under a Guided Choice framework is not a single event. The mediator remains engaged as the process unfolds, available to reconvene sessions, reassess obstacles, and adjust the path forward as new information emerges. Negotiations may pause while data is gathered or experts weigh in, then resume without the friction of starting over. Settlement becomes a progression rather than a cliff.

The results are consistent and predictable. Disputes resolve earlier, at significantly lower cost, and with less damage to working relationships. Because the mediator becomes involved before positions calcify, and because the real barriers to resolution are addressed directly rather than papered over, outcomes are achieved in weeks or months rather than years. Arbitration and litigation become true last resorts rather than default destinations.

Guided Choice mediation has proven particularly effective on complex construction and infrastructure projects, where layered relationships, technical uncertainty, and insurance dynamics make late-stage, single-day mediation inefficient. But the principles apply broadly. Treat mediation as an early, intentional process; use the mediator as a diagnostic resource; and design the path to resolution rather than assuming one will emerge on its own.

C. Multi-Party Mediation and Double-Blind Techniques

Multi-party construction disputes are where traditional mediation structures are most likely to fail—and where carefully designed processes make the greatest difference. Allocation fights, insurance dynamics, reputational concerns, and simple human psychology often overwhelm otherwise rational settlement discussions. Double-blind mediation is one of the most effective tools for managing that complexity.

At its core, double-blind mediation means that no party knows what any other party is offering or contributing—except the mediator. The plaintiff knows only the aggregate defense number. Defendants know only their own contribution and, at most, the remaining gap between offers and demands. Individual contributions, internal authority limits, and final settlement allocations remain confidential.

This deliberate use of confidentiality fundamentally changes the negotiation dynamic. Instead of focusing on who is paying more or less, parties are forced to focus on a simpler and more productive question: *What is this dispute worth to me, given my risk?*

Why Double-Blind Works in Construction Cases

Multi-party construction mediations routinely stall not because parties disagree about the overall settlement value, but because they disagree—sometimes vehemently—about relative responsibility. Contractors argue over scope. Designers worry about precedent. Insurers worry about signaling. Subcontractors fear becoming the deep pocket by default. In an open negotiation, these concerns quickly dominate the room.

Double-blind mediation removes that distraction. Because no one sees anyone else's number, proportionality arguments largely disappear. Parties no longer posture to avoid being perceived as the first mover or the largest contributor. Instead, each party makes a private, internal decision about what it is willing to pay to buy peace.

This structure also neutralizes extreme positions. A nominal or token offer that would derail an open mediation simply becomes part of the aggregate number. It does not insult the plaintiff, provoke co-defendants, or poison momentum. Likewise, early over-contributions by motivated parties can create progress without locking them into an unfair final allocation. The mediator manages the sequencing, allowing contributions to rebalance as the case narrows.

Benefits Across the Table

For plaintiffs, double-blind mediation provides freedom to move. Demands can be reduced toward true settlement authority without fear that a concession will be weaponized later or become a public benchmark. Plaintiffs gain better information about whether settlement is realistically achievable—because they see the total defense number—without needing to referee allocation fights they cannot control.

For defendants and insurers, the benefits are often even greater. Contributions can be made without setting precedent for other cases or signaling valuation to co-defendants. Design professionals and specialty trades can participate without reputational exposure. Insurers can deploy limits strategically without disclosing policy structures or internal authority. Everyone negotiates the case at hand, not the next one.

For mediators, double-blind techniques provide control and momentum. The process reduces emotional reactions, curbs brinkmanship, and allows the mediator to manage pacing deliberately. Instead of refereeing arguments over fairness, the mediator focuses parties on closing the gap. In large cases, this often saves hours—or days—of unproductive debate.

Variations and Applications

Double-blind mediation is not a single rigid format. Variations include:

- **Aggregate-only disclosure**, where only the total defense number is shared;
- **Gap-based negotiation**, where defendants are told only how far the parties are apart;
- **Bracketed ranges**, which signal progress without revealing precision; and

- **Double-blind mediator's proposals**, where parties respond yes or no without knowing how others responded.

Escrow mechanisms can be layered in when even the fact of payment must remain confidential. Virtual platforms have made these approaches easier to administer, particularly in large, insurer-driven cases.

Limits and Judgment

Double-blind mediation is not appropriate for every dispute. Coverage-driven cases may require transparency. Some disputes benefit from open alignment among defendants. And the process demands discipline—one leak can undermine trust entirely. But in the right cases—particularly multi-party construction disputes with layered insurance and allocation risk—double-blind mediation aligns incentives, reduces noise, and dramatically improves the odds of resolution.

Used thoughtfully, it reflects the broader theme of modern ADR: less posturing, better decisions, and outcomes driven by risk rather than ego.

Neutral Evaluation: Adding Data Without Picking Winners

A. What Neutral Evaluation Is—and Is Not

Neutral Evaluation occupies the space between mediation and arbitration. It is not binding. It is not a verdict. It is a structured way to add a credible, independent data point to the decision-making process.

B. Forms of Neutral Evaluation

Neutral Evaluation may be:

- Contractually mandated.
- Voluntarily agreed to by the parties.
- Recommended by a mediator to address a specific factual or legal issue.

C. When Neutral Evaluation Works Best

Neutral Evaluation is particularly effective for:

- Technical disputes (scope, repair methodology, cost).
- Discrete legal questions.
- Coverage or allocation issues.

Neutral Evaluation does not resolve disputes by itself. It improves the quality of the decisions that resolve them.

Neutral Evaluation is the right tool when the dispute turns on a **discrete, outcome-driving question** that is preventing rational negotiation—such as the viability of a legal theory, the credibility of a damages methodology, the reasonableness of a repair approach, or the likely interpretation of a key contract provision. In those situations, parties are often

stuck not because they are unwilling to compromise, but because they lack a shared reference point for risk. A focused neutral evaluation can supply that reference point quickly and at modest cost. It is *not* the right tool when disputes are primarily relational, authority-driven, or emotional, or where the facts are so undeveloped that any evaluation would be speculative. Used selectively and early, neutral evaluation sharpens judgment; used indiscriminately or too late, it simply adds another layer of process.

Arbitration Is an Agreement—Act Like It

Arbitration exists for one reason: the parties agreed to it. That sounds obvious, but many construction arbitration clauses read like they were cut-and-pasted at 11:30 p.m. to "check the box," with little thought given to how arbitration should actually function on a live project.

A well-designed arbitration clause (and broader dispute-resolution system) should do two things at once: (1) preserve momentum on the project, and (2) provide a credible, fair forum for issues that truly need a decision.

A. Coordinate the Dispute System (Upstream and Downstream)

Most of the arbitration problems we see are not "arbitration problems." They are sequencing problems. Projects sometimes create multiple dispute tracks—partnering meetings, executive escalation, standing neutrals or DRBs, mediation, and then arbitration—without clearly defining how they fit together. That can lead to:

- Delay (everyone argues over which step comes first);
- Duplicative effort (the same witnesses and experts "re-try" the dispute in multiple settings);
- Multiple venues (parallel proceedings with inconsistent interim outcomes);
- And, in the worst cases, litigation over whether a pre-arbitration step was "satisfied."

Multi-tier dispute escalation clauses are common in construction precisely because they can resolve issues early—but they only work when the steps are clear, time-limited, and written to keep the project moving.

Practical drafting point: If you use escalation → neutral involvement → mediation → arbitration, put real timeframes on each step, identify who participates, and define what happens if a step fails (or is ignored). "We'll talk later" is not a process.

B. Be Intentional About Arbitrator Qualifications (Before You Need Them)

Construction disputes are technical. Many turn on schedule logic, productivity, means and methods, design coordination, cost accounting, or coverage/flow-down dynamics that can take weeks to explain to someone who has never lived inside a project.

If the parties choose arbitration, they should be intentional about what kind of decision-maker they want. Consider spelling out some qualification criteria in the clause, such as:

- Substantial construction industry experience (not just general commercial work);
- Experience with complex scheduling/delay claims;
- Familiarity with multi-party construction disputes and insurance issues; and/or
- A requirement that the chair (or sole arbitrator) have prior construction arbitration experience.

This is not about "rigging the tribunal." It is about making sure the tribunal can get to the core issues without spending half the case learning the vocabulary.

C. Rethink "You Pick One, I Pick One, and They Pick a Third"

The traditional three-arbitrator model—each side appoints one arbitrator, and those two select a chair—can work well. But it also carries predictable risks.

Pros:

- Parties feel heard (each side selects someone it trusts);
- Party-appointed arbitrators can help ensure the tribunal understands the realities of each side's business;
- The two appointed arbitrators can select a chair who will run an efficient process.

Cons (where it goes wrong):

- The "party-appointed" role can drift into advocacy in subtle ways;
- Chairs can be chosen through negotiation among the two wing arbitrators rather than through a clear set of efficiency and neutrality criteria;
- Costs increase materially with three arbitrators; and
- In smaller disputes, a three-arbitrator panel can be procedural overkill.

A useful alternative in many construction disputes is a single arbitrator with strong construction experience, selected through a list/strike process. Another option is a three-arbitrator panel with strict neutrality expectations (including explicit language that all arbitrators, including party-appointed arbitrators, are independent and impartial).

The main point: do not default to the three-arbitrator structure just because "that's what we always do." Match the tribunal to the dispute.

D. Administered vs. Ad Hoc Arbitration (and Why Institutions Have Improved)

Parties also need to decide whether arbitration will be administered by an institution (AAA/ICDR, JAMS, CPR, ICC, etc.) or conducted on an ad hoc basis.

Ad hoc arbitration can work when:

- The clause is well drafted;
- Counsel are experienced and cooperative; and
- The dispute is simple enough that the parties can agree on procedure.

But ad hoc arbitration is also fragile. When the clause is vague—or when cooperation breaks down—parties can end up litigating procedural disputes in court, undermining the very efficiency arbitration was supposed to provide.

Administered arbitration adds cost in the form of administrative fees, but often buys:

- A reliable appointment process;
- Rules and procedures tailored to the dispute;
- Support for scheduling, deposits, and case management;
- Better infrastructure for multi-party issues (such as joinder and consolidation); and
- A backstop when procedural fights emerge.

In the construction world, administered arbitration has become more sophisticated. Major institutions have invested heavily in construction-specific rules, case management resources, and specialized panels. Their processes—and the quality and depth of their neutral rosters—have improved substantially over the past decades.

A practical way to say it: if you want arbitration to behave like a predictable business process rather than an improvised negotiation over procedure, administration helps.

E. Fit Arbitration Into the Larger ADR System

Arbitration should not sit in isolation. It should be aligned with earlier steps (partnering, executive escalation, standing neutrals/DRBs, neutral evaluation, mediation) and it should reflect the project's needs.

A few intentional design questions help:

- What disputes need a decision fast to keep work moving?
- What disputes are better suited to early neutral input or evaluation?
- When should mediation occur (early, late, or both)?
- When does arbitration become the right tool—and what is its scope?

If we would not allow boilerplate to design a project schedule, we should not allow boilerplate to design dispute resolution.

Technology as a Force Multiplier

A. Virtual Platforms: From Stopgap to Strategy

The most visible technological shift in ADR over the last five years has been the normalization of virtual platforms—principally Zoom and Microsoft Teams. What began as an emergency workaround during COVID has matured into a durable, and often superior, way to conduct mediation and other ADR processes in construction disputes.

Before 2020, many construction lawyers and clients assumed that anything beyond a simple two-party mediation required in-person meetings, professional videographers, dedicated war rooms, and expensive technical support. Expert presentations were carefully choreographed, often at significant cost, and mediation briefs were almost always written documents circulated in advance.

That assumption no longer holds.

Virtual platforms have fundamentally lowered the barrier to effective participation. Experts can appear for thirty focused minutes instead of losing an entire day to travel. Decision-makers who once "called in" for fifteen minutes from an airport lounge now sit in front of their screens for meaningful discussions. Exhibits, schedules, models, and repair options can be shared, annotated, and revised in real time—often more effectively than around a physical conference table.

Microsoft Teams has also changed how disputes are managed *before* mediation. Project teams now collaborate, share documents, and flag emerging issues on the same platforms that later host dispute discussions. The line between project management and dispute resolution has blurred—in a good way. Issues are identified earlier, information is centralized, and escalation is easier to manage without dramatic hand-offs.

That said, the technology itself is only a tool. Five years in, we are still watching the industry learn—slowly—how to use it well.

Some parties are drifting back to in-person mediations out of habit rather than necessity, even when virtual would clearly be more efficient and inclusive. Others insist on virtual formats for disputes that would benefit from face-to-face interaction. The lesson is not that one format is better than the other; it is that format choice should be intentional, not reflexive.

Equally striking is how uneven virtual advocacy skills remain. Many participants still pay less attention to lighting, microphone quality, camera placement, and background than they once paid to the tie they chose for court or mediation. Poor audio, distracting environments, and dim lighting undermine credibility in subtle but real ways. In a virtual setting, presence is performance.

We also continue to default to written position statements, even though technology now allows something far more powerful. Short, well-prepared virtual presentations—featuring the actual voices and faces of the people involved in the project, including project managers, executives, or experts—can humanize disputes, clarify intent, and narrow issues

far more effectively than another thirty-page brief. This is not about theatrics. It is about communication.

Virtual mediation has not diminished seriousness. It has redistributed it. The question is no longer whether the technology works—it does—but whether we are willing to adapt our habits to use it intentionally.

The platforms will continue to evolve, incrementally rather than dramatically. Breakout room management, document integration, and security tools improve each year. But the bigger opportunity is cultural, not technical: treating virtual ADR as a distinct medium that deserves the same preparation, discipline, and professionalism that in-person advocacy once demanded.

Why This Matters to Risk, Insurance, and Surety

For owners, contractors, insurers, and sureties, dispute resolution provisions are not academic. They directly influence claim frequency, claim severity, defense costs, and the timing and predictability of loss development. Yet ADR clauses often receive far less scrutiny in underwriting and risk review than other contractual risk provisions—despite their outsized impact once a project encounters trouble.

A. ADR Clauses as Risk Allocation Tools, Not Boilerplate

Dispute resolution clauses are frequently treated as boilerplate—copied forward from prior contracts or accepted without meaningful review. That is a missed opportunity. Poorly designed clauses can increase volatility by accelerating disputes into litigation, multiplying defense costs, fragmenting multi-party cases, and forcing sureties and insurers into reactive postures. Well-designed clauses do the opposite: they buy time, slow escalation, and create structured opportunities to resolve issues before they harden into claims.

From an underwriting perspective, ADR provisions function much like other risk-transfer mechanisms. They shape *how* losses emerge, not just whether they emerge. A contract that requires early executive negotiation, standing neutral involvement, mediation, or dispute board review before arbitration or litigation is materially different from one that allows immediate resort to court. The difference often shows up not in whether a claim is asserted, but in how large, expensive, and disruptive that claim becomes.

B. Empirical Signals the Industry Should Not Ignore

Data from public-sector and infrastructure projects underscore the point. Projects that meaningfully implement partnering programs have reported reductions in claim frequency of up to sixty percent. Dispute Review Boards resolve the vast majority of issues brought to them—often more than eighty-five percent—without the need for arbitration or litigation. Standing neutrals, when empowered and used early, resolve most issues raised before they evolve into formal disputes.

These outcomes are not accidental. They reflect systems intentionally designed to surface and address problems early. For insurers and sureties, those systems translate into fewer surprise claims, lower legal spend, and better control over loss development. In a

market where claim severity is rising even as frequency remains relatively stable, that distinction matters.

The Dispute Review Board Foundation has gathered data on dispute boards since 1982. According to Foundation records, the process has been employed on over 2,700 projects aggregating some $275 billion in construction costs. The Foundation reports that 58% of projects using Dispute Review Boards were "dispute free"—meaning no disputes were ever submitted to the board. Of the disputes that were submitted, 98.7% resulted in settlement without subsequent arbitration or litigation. These statistics underscore the point: thoughtfully designed dispute resolution systems do not merely resolve disputes differently—they prevent disputes from arising in the first place.

Cost data is equally instructive. According to DRBF records, total costs for a three-member Dispute Board typically range from about 0.05% to 0.15% of project costs—and can be as low as 0.01% on larger projects. Even accounting for the investment in ongoing governance, the return on investment is substantial when measured against the cost of a single arbitration or piece of complex litigation.

C. Mediation as a Force Multiplier for Risk Management

Mediation deserves particular attention from risk professionals. Whether contractual, court-ordered, or voluntary, mediation is one of the most consistently effective tools in construction dispute resolution. Used well, it resolves the vast majority of disputes, often preserves working relationships, and allows creative, non-binary outcomes that courts and arbitrators cannot provide.

For insurers and sureties, mediation is a force multiplier. It accelerates resolution, reduces defense costs, and allows earlier, more rational assessment of exposure. Importantly, mediation can occur at multiple points—before construction is complete, after a claim is asserted, or even after litigation has begun. Contracts that mandate or encourage early mediation materially improve the odds that disputes will resolve before costs spiral.

D. The Value of ADR Literacy in Underwriting and Production

One of the industry's underutilized advantages is the insight of insurance and surety professionals who understand ADR. Underwriters and producers who can identify problematic dispute resolution clauses—or suggest better ones—add tangible value to their accounts. Asking whether a project includes partnering, a standing neutral, a dispute board, or a meaningful escalation ladder is not second-guessing the project. It is risk management.

This is not about pessimism or lack of confidence in the project. It is the construction equivalent of personal protective equipment. Thoughtful ADR provisions protect contractors and sureties from day one. Accounts that understand and embrace this tend to perform better over time.

E. Making ADR Part of the Risk Conversation

The most effective risk professionals normalize these discussions early. Simple questions can have outsized impact: Would the owner consider a standing neutral? Is there

an opportunity for partnering on a complex project? Does the arbitration clause specify venue, rules, and qualifications clearly? Are there escalation steps that encourage resolution before positions harden?

Treating ADR as a standard component of risk review—rather than an afterthought—aligns underwriting, claims, and production around a shared goal: fewer disputes, lower losses, and faster resolution when problems inevitably arise.

ADR provisions may not appear in underwriting models or actuarial tables. But they appear, repeatedly, in claim files. The projects that perform best are rarely dispute-free. They are dispute-ready.

F. Insurance Company Involvement in Early Mediation

One of the practical challenges of early mediation in construction disputes is obtaining meaningful participation from liability insurers. Standard commercial general liability (CGL) policies typically provide that the insurer's duty to defend arises when a "suit" is filed. Many policies define "suit" to mean a civil proceeding in which damages are sought—language that, on its face, does not encompass pre-litigation mediation.

This creates an awkward dynamic. Parties seeking early resolution may find that the insurer most affected by the outcome has no formal obligation to participate—or even to respond—until litigation is commenced. The absence of the insurer from early settlement discussions can delay resolution, distort negotiation authority, and ultimately force parties into litigation simply to trigger coverage obligations.

But the duty to defend and the duty to indemnify are distinct obligations under most policies. Even where the duty to defend has not yet been triggered, an insurer may still have an obligation to indemnify covered damages that are resolved through settlement—provided the settlement falls within the policy's coverage terms. This distinction is often underappreciated. Insurers who refuse to engage before "suit" may nonetheless be obligated to fund or reimburse settlements reached through early mediation, assuming proper notice, cooperation, and consent provisions are satisfied.

The practical implication is that parties seeking early mediation must actively engage their insurers—not passively assume they will participate. This means:

- **Early notice.** Insureds should provide notice of claims and potential claims as early as policy terms require—ideally before mediation is scheduled. This preserves coverage rights and creates a record of cooperation.
- **Direct communication.** Insureds and their counsel should communicate directly with claims professionals to explain the mediation process, the potential for early resolution, and the benefits to the insurer of participating. Many insurers will engage voluntarily when they understand that early resolution may reduce defense costs and overall exposure.
- **Settlement consent protocols.** If mediation proceeds without formal insurer participation, insureds should establish clear protocols for obtaining consent to any

proposed settlement. Most policies require insurer consent before settlement; proceeding without it risks jeopardizing coverage. Even informal participation—such as an adjuster monitoring the mediation remotely—can help preserve the relationship and expedite consent.

- **Mediator coordination.** Skilled mediators using Guided Choice techniques recognize the importance of insurer involvement. Part of the mediator's diagnostic role includes identifying whether insurers, sureties, or other third parties need to be brought into the process—and helping structure communications to make that happen. (See Paul M. Lurie et al., "The Guided Choice Process for Early Dispute Resolution.")

The bottom line: the absence of a formal duty to defend before litigation does not mean insurers cannot or should not participate in early mediation. It means that participation must be sought affirmatively. Parties who wait for insurers to show up on their own often wait too long.

Practical Tools and Aspirational Language

The sample provisions that follow are not offered as "model clauses," and they are not intended to replace project-specific legal advice. They are included to illustrate how dispute avoidance and resolution can be addressed intentionally and early, rather than left to boilerplate or last-minute drafting.

Experienced construction counsel will correctly note that some of these concepts are broad, require judgment, and may raise concerns about process, rights, or leverage. That reaction is understandable—and expected. The challenge is not to reject these ideas, but to revise and refine them without losing the central theme of this paper: disputes are inevitable, but costly escalation is not.

If a clause can be improved while still promoting early engagement, clarity, and efficient resolution, it should be. If it cannot, it is worth asking whether the alternative truly serves the project's interests—or simply preserves familiar positions.

A. Partnering Option 1: Light-Touch Partnering Requirement (Foundation Clause)

Purpose: Establish expectations without overcommitting.

Partnering:

The parties agree to conduct the Project in a collaborative manner and to make reasonable, good-faith efforts to resolve issues at the lowest practicable level. At the outset of the Project, the parties shall participate in a partnering session to establish communication protocols, escalation paths, and issue-resolution procedures. The partnering session is intended to facilitate project performance and issue resolution and does not modify the Contract unless expressly agreed in writing.

Why it works:

- Sets tone without binding outcomes
- Low resistance from counsel

- Works well on smaller or traditional delivery projects

B. Partnering Option 2: Structured Partnering with Process Commitments (Recommended)

Purpose: Create real expectations without over-engineering.

Partnering and Early Issue Resolution:

Within thirty (30) days of Notice to Proceed, the parties shall participate in a facilitated partnering workshop involving key project representatives. The purpose of the partnering process is to establish mutual project goals, communication protocols, and a structured approach to identifying and resolving issues before they escalate into formal disputes.

The parties agree to use the partnering framework, including agreed escalation paths, in good faith throughout the Project. Partnering activities are intended to supplement, not replace, the dispute-resolution procedures set forth elsewhere in the Contract and shall not alter contractual rights or obligations unless expressly agreed in writing.

Why it works:

- **Requires a real workshop**
- **Integrates partnering into dispute system**
- **Preserves contractual protections**
- **Aligns perfectly with standing neutrals and early mediation**

C. Sample Escalation Ladder

Issue Escalation:
Disputes or disagreements shall first be addressed at the project management level. If not resolved within ten (10) days, the matter shall be escalated to senior representatives of each party with authority to resolve the issue. If unresolved within an additional ten (10) days, either party may request involvement of the Standing Neutral, mediation, or neutral evaluation as provided below. Failure of any party to participate shall not delay progression to the next step.

C. Standing Neutral Clause

Standing Neutral:
The parties designate [Name or Organization] as Standing Neutral for this Project. In the event of a *dispute that cannot be resolved through normal project management channels, either party may request that the Standing Neutral facilitate discussion. The parties agree to make themselves reasonably available for a conference with the Standing Neutral within forty-eight (48) hours of such request.*

The Standing Neutral may facilitate discussions, ask clarifying questions, suggest non-binding paths forward, or, at the request of the parties, serve as a mediator, facilitate the selection of a mediator, provide or recommend another person or entity to issue a non-binding evaluation.

D. Neutral Evaluation Clause (Standalone or Add-On)

> **Neutral Evaluation:**
> *At any time after a dispute arises, either party may request neutral evaluation of a discrete factual, technical, or legal issue that is materially impeding resolution. Upon agreement, the parties shall jointly select a neutral evaluator with relevant subject-matter expertise.*
>
> *The evaluator's role is limited to providing a written or oral, non-binding assessment of the specified issue. The evaluation shall not be admissible in arbitration or litigation except by agreement of the parties.*

E. Early Insurance and Surety Involvement Clause

> **Early Insurer/Surety Participation***Each party shall provide timely notice to applicable insurers and sureties of disputes that may give rise to covered claims. The parties agree to cooperate in good faith to facilitate insurer and surety participation in early mediation or neutral evaluation, recognizing that early involvement may reduce defense costs and overall exposure.*

Why it matters: This clause does not expand coverage obligations—but it creates an expectation of early engagement and avoids later arguments about lack of notice or consent.

X. Conclusion

Disputes are inevitable. Poor outcomes are not. The most successful construction projects do not avoid conflict. They plan for it. They design dispute systems with the same care they apply to schedules, budgets, and safety programs. ADR has not merely expanded. It has matured. The challenge now is to use it intentionally.

The best projects are not dispute-free. They are dispute-ready!

About the Authors

Steve Nelson *practiced construction and surety law in Dallas, Texas for 19 years as the head of a large law firm's Construction Practice Group. He was the Chief Executive Officer of one of the largest commercial building contractors headquartered in Texas. He has been in the surety business as Executive Vice President & Senior Director, Surety Claims for Markel Surety for 25 years. In 2024, he stepped out of his claims role and began concentrating 100% of his time to something that has been his passion for nearly fifty years…providing ADR solutions for third parties.*

Steve has served as the Chair of the Construction Law Section of the Dallas Bar Association, the Construction Law Section of the Austin Bar Association, and the Construction Law Section of the State Bar of Texas. He is a Fellow of the American College of Construction Lawyers, a Fellow of the Center for Public Policy Dispute Resolution at the University of Texas, a Distinguished Fellow of the International Academy of Mediators, a Distinguished Credentialed Mediator by the Texas Mediator Credentialing Association, Past-Chairman of the Central Texas Chapter of the Association of Attorney-Mediators, and an Adjunct Professor at the University of Texas at Austin Graduate School of Engineering, where he teaches a graduate course in construction industry dispute avoidance and resolution. He served for nearly twenty years as the Legislative Chairman and member of the Executive Committee of the Texas Building Branch-AGC. Most of his mediation skills were developed by hunkering down with his son in a house with a wife and three daughters.

Lee Shidlofsky *is a founding member of Shidlofsky Law Firm PLLC where he formerly headed up the Policyholder Insurance Law Practice Group. He has handled a wide variety of first-party and third-party insurance claims in state and federal courts at both the trial and appellate court levels. Lee's current practice includes mediation of multi-party construction defect and design cases as well as mediating complex insurance coverage matters. In addition, Lee serves as an independent neutral arbitrator for insurance coverage matters.*

Lee is a Fellow to the American College of Construction Lawyers and currently serves on the AGC-TBB Legal Affairs Committee. He is a Past Chair of the Insurance Law Section and is currently the Incoming Chair of the Construction Law Section of the State Bar of Texas. Lee is the author of numerous articles and seminar papers and is a frequent speaker at continuing legal education seminars in Texas and across the country. Chambers USA ranks Lee as a Star Individual for Insurance ADR and Band 1 Construction ADR. He also has been named a "Super Lawyer" by Texas Monthly Magazine since 2004, including a ranking as a Top 50 attorney in the Central and West Texas Region since 2007 and a Top 100 attorney statewide since 2016. He is ranked as a top insurance coverage and construction lawyer by Best Lawyers in America;® Chambers USA and Who's Who Legal. Lee was named a Top Notch Lawyer for Insurance Law by Texas Lawyer and was a finalist for Go-To Lawyer in 2012.

Most of his mediation skills were developed by following Steve around mediations even when he was supposed to be sitting quietly in his breakout room. This is how Lee got the nickname, "The Weasel." It's better than it sounds.