

**DIVISION 1 OF THE  
FORUM:**

**DEVOTED TO IMPROVING  
DISPUTE AVOIDANCE  
AND RESOLUTION**

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# ***THE DISPUTE RESOLVER***

**The Membership Newsletter  
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Construction Industry**

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## ***The Dispute Resolver is Changing Gears: We're Going Blogging!***

Your Publications Subcommittee is excited to announce that *The Dispute Resolver* is going blogging. That's right, we're changing our format! The blog will allow us to interact on various posts (through a moderated comment section). We believe the blog will facilitate a good dialogue amongst our readers on important issues. In addition, it will enable us to post news regarding important case decisions and legislative actions in more of a real-time setting. We will also use the blog to highlight events at our various Forum meetings, including photographs of breakfast/lunch presentations, dinners, cocktails, and Division 1 Speakers. Overall, the blog will expedite communications and allow us to provide more content.

Not everyone in Division 1 is tech-savvy. As a result, we will still compile an "end-of-month" version for e-mailing to our membership with links to the blog. We hope the blog format increases participation and enhances the utility of *The Dispute Resolver*. If you have any suggestions regarding the blog, now or in the future, please email one of the Publications Subcommittee members.

This article presents George T. McLaughlin's "View from the Field" formed throughout the course of his 30+ year career in the industrial marketplace. 1 Part 1, below, describes the evolution of the delivery systems in large and complex industrial projects.

Parts 1-3 appeared in the April, May, and June 2013 issues of The Dispute Resolver. Part 1 described the significant, game-changing evolution of the delivery systems in large and complex industrial projects. 2 Part 2 addressed the legal implications and Part 3 discussed the impacts on claims, disputes, and resolutions. Here, Part 4 covers the preventative and corrective processes and services that construction attorneys, such as the membership of Division 1, can and should provide to the marketplace to address the major changes facing the industrial projects.

### **Part 4 of 4: Preventive and Corrective Processes and Services**

To assist stakeholders/clients (whether Owner Companies, Owner Project Management Teams (PMTs), Construction Contractors, or Completion Contractors) in implementing preventative and corrective measures, one must focus on specific dynamics to predict the most probable needs. See Figure 1, Claims to Topic / Issue Relationship, in Part 3 which identifies the trends resulting from the emerging execution strategies. The interrelated and integrated relationships add much complexity to claims and disputes, including overlap in quantum. The added complexity requires integrated strategies for management of the issues. Below, Figure A, Claim Types and Interrelationships, depicts the common overlaps when viewed from a quantum or pricing perspective.



1 Since the early 1980's, Mr. McLaughlin has worked worldwide in this industrial marketplace. He serves Owners, Prime Contractors, and Subcontractors. During the past 10 years, Mr. McLaughlin has been Project Manager on three major projects (\$85-330 million USD) and Program Manager on two major programs (\$300+ million USD). Mr. McLaughlin was president and COO of a \$35 million engineering and construction (mechanical, controls and electrical) contractor for five years. For the most part, Mr. McLaughlin's work is performed on-location where the relevant work is being performed hence the title "view from the field." Mr. McLaughlin is a principal of McLaughlin & McLaughlin out of Austin, Texas. In this role, he provides program and project management services as well as litigation support services. His contact information can be accessed at his website ([www.mclaughlinandmclaughlin.com](http://www.mclaughlinandmclaughlin.com)) and blog (<http://projectprofessionals.org/>).

2 Oil and gas, process, power, chemical, pharmaceutical.

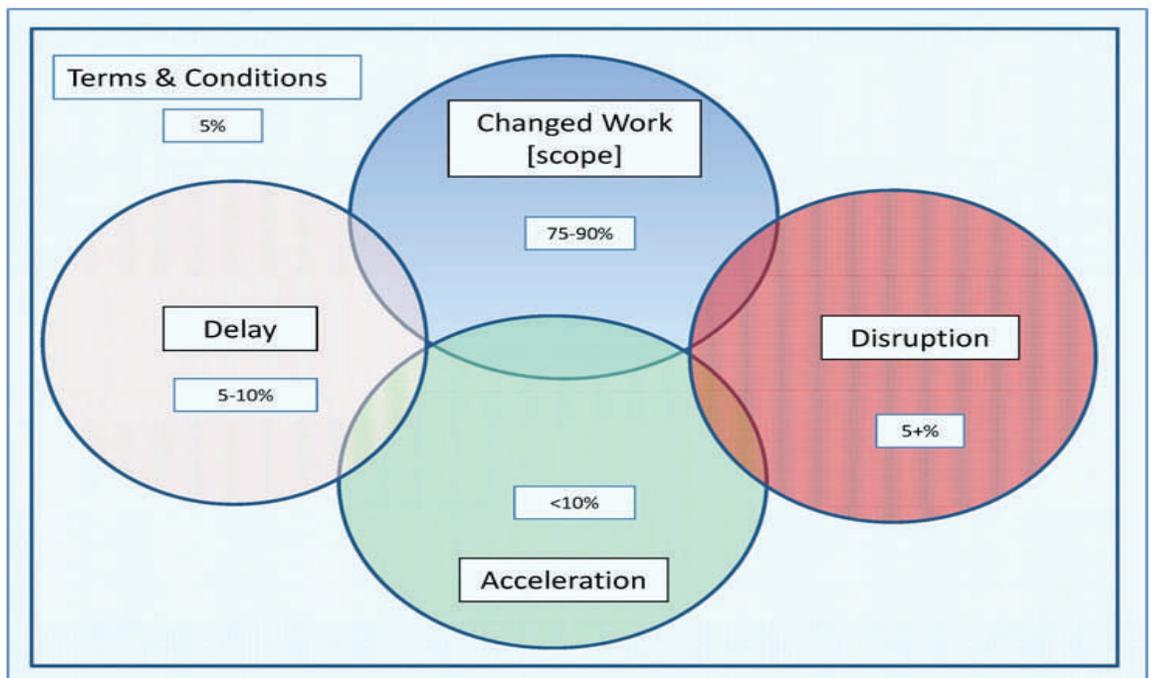


Figure A – Claim Types and Interrelationships

Consider the following qualitative assessments of the claim categories depicted in *Figure A*:

Scope / Changed Work – Scope of Work issues will continue in importance, with increased occurrence and complexity. Since scope definition is cumulative and developed by others, establishing contractual responsibility will be tricky. There will be a premium on the procedures implemented for the Management of Change.

Delay – This will continue in importance but with greater complexity. Delay will not be viewed with the same old arguments over which methodology is best or (presence or absence of) concurrent delay. Rather, complicated analyses with multiple stakeholders and multiple schedules will demand greater sophistication. This degree of sophistication is not readily available in the marketplace. (Joyce) (Ness)

Acceleration – Relevance of acceleration claims will continue, but with lesser importance on projects managed by an Owner PMT. With an Owner PMT Project, claims will be likely be for directed acceleration rather than constructive.

Disruption or Productivity – This occurrence of this category of claims may expand greatly and become commonplace on many projects. Particularly acute are projects in geographic areas where field labor is in limited supply and expensive (\$/MH). Such areas include the U.S. Gulf Coast; Alberta, Canada; Western Australia and other hot spots. Division 1 members may wish to alert their offices in these locations, if they have one.

Terms and Conditions – There is an increased potential for project execution performance issues resulting from the evolved execution strategies and multiple interfaces. A recent study by two ConocoPhillips subject matter experts highlights this challenge (Whiteside and Rogers). These issues are costly, time consuming, and can destroy planned investment financial performance.

New and revised ways-of-working are needed. The legal input and overlay is significant. These (legal services and expertise) can be grouped as (1) Preventive/Proactive and (2) Corrective/Retrospective.

### 1. Preventive/Proactive Tools and Services

Owners and Construction Contractors have a current and intensifying need from construction attorneys (litigator input is highly desirable) to assist them in putting in place ways of working and obtaining tools necessary to address the challenges of the evolving marketplace. The following should be considered as preventative tools and services counsel can recommend to his or her clients:

Claims Management Planning and Plans. Project planning is recognized as a highly important part in the overall project management process (Institute). With these trends, greater attention and upgraded skills will be needed in planning the management of the likely or plausible claims profile and environment that will be present. Project Management Teams (PMTs) will need thorough planning for the specific claims that will be encountered along with processes for resolution. Significant legal advice will be required in the preparation and implementation of a Claim Management Plan (CMP). Logically, this plan would be part of the Project Management Plan (Institute).

Management of Change. Increased number of stakeholders, interfaces and other complexities will intensify the need to have an efficient and effective process for dealing with a myriad of changes. These requirements will include scope (additions and deletions), time, and many others. The essential elements will be the enhanced efficiency and timeliness. Since issues have a “ripple effect” relative to successor parties, the PMTs will need to sort of “pay-as-you-go.” (Steel, Hayley; Riddeck, Laura; Ceoney, Richard A.; Rowan, Vincent; Freeman, Lynne)

Scope of Work Process Audit. With scope-of-work being the most prominent and frequent source of claims and disputes, special attention is required. While largely not a legal function, a thorough audit must be performed to ensure the development and continuity of scope for the various contracts throughout the execution of the project. This process will guide the contracts team regarding needs and types of contracts that may be viable. Further, it will define and confirm the deliverables for predecessor contracts. Legal review for completeness and planning is appropriate.

Time Management Process Audit. Like the scope of work process audit, an audit of the time (schedule) management is needed. With the emerging and more complex execution strategies, the Owner PMT will have substantial (and potentially unfamiliar) responsibilities for time and schedule management. Again, not necessarily a legal function, it will impact contract formation, management and administration. Further, this will morph into disputes and claims related to time (delay, acceleration and disruption).

Interface Audit. As with scope of work and time, the many interfaces (created by the emerging strategies) present structural and managerial challenges. Stakeholders must complete a competent and thorough audit of all events, deliverables, information and other project details that transit across the interfaces. Legal assessment is appropriate and prudent.

Document Management. No, this is not the same old useless “keep good records” advice. With analysis and direction from the legal advisor, the PMTs for all key stakeholders need to have a focused plan to integrate document management with the related contract and the Claims Management Plan. Specific types of documents that are important must be kept and chronicled in a manner that supports efficient legal and PMT review and actions. But, the PMT (with advice from counsel) needs to know the precise subjects so that the files can be assembled in a contemporaneous manner. Timely use of these files is essential.

Configuration Management. This must be a contemporaneous obligation of the Owner’s PMT. The legal advisor should ensure this is planned and executed.

Technology. This is not a matter of developing new technology. Technology abounds and often is well beyond the capabilities of the users. Much of the project technology is simply “a solution looking for problem.” Define the managerial challenge (e.g. Claims Management Plan) and then specify the existing technology that will be used to implement the solution to the challenge.

## 2. Corrective/Retrospective Services

Expect changes in the content of disputes and claims – increased disruption, complicated delay, free-issue equipment and materials impacts, and performance / completion issues will emerge.

Strategies - Claims will become increasingly complex and interrelated (not single issue). This requires expertise in understanding the full comprehensive nature of the entire project and all influences on the performance of individual contracts and work. Clearly, legal thinking and considerations will be required.

Scope of Work – The number of claims increase significantly. Multiple interfaces lead to scope gaps, holes, errors, omissions, timing and other problems (such as impact).

Delay – As stated previously, this is not the “same old stuff” (Joyce) (Ness). Sophistication in analyses and presentation will eclipse simplistic technical analyses (currently commonplace). The analytical expertise must be matched to the project complexities. Owners will share more of the responsibilities since they (Owner PMT) will need to perform over-all project planning and scheduling.

Disruption – As cited earlier, disruption claims and disputes will increase dramatically. This trend will be fueled by issues such as free-issue equipment and materials, gaps in scope, timing of deliverables, non-critical path delays, Earned Value Management approaches and other complications. The strategy and expertise must be consistent with the problems.

Multiple parties – Determination of responsible parties along with cause and effect will be complicated.

Looking for information about Division 1 or trying to find out what Division 1 is all about? Or perhaps you are interested in volunteering with a subcommittee? Do you just want to see who the people are who are responsible for all of Division 1’s activities?

To reach the website, click [here](#) or use your smart phone or tablet to scan the QR code and get involved! We would love to hear from you!



## Conclusions

Major changes in strategies for large and complex project execution are creating new issues as well as opportunities for law firms. The project world or "Field" needs dynamic legal support and help. Perhaps your firm could take an advantageous position by proactively expanding or refining its practice areas. Timely positioning is rather like the surfer that positions his/her surf board in front of the tsunami. Is that a good place for your practice? Positioning your law firm's practice could permit the firm to ride this trend by focusing on unique business adjustments. The evolving and emerging execution strategies represent opportunities for the forward-thinking legal practice. As the potential for claims and disputes increases, the need for professional and experienced legal work expands materially. This is true for both transaction and dispute/litigation specialists. Additionally, in-house counsel should consider and/or reconsider their approach to both transaction and dispute processes.

- Focus on Target Markets – Owners, Owners PMT's and Construction Contractors (in difficult labor markets) and Completion Contractors are all potential target markets.
- Focus on Preventive Services – These are more difficult to "sell" as they are underappreciated until problems arise (Ness). Litigators bring unique skills to this market.
- Focus on Claim Types – Scope of Work, Disruption, Time Management (complex) and Interface Management are all targets. Disruption / Productivity issues have and will become more prominent in the disputes and claims mix. Construction Contractors require skills and methods of working to manage this major risk. This management includes: contractual protection, methods of recognition and process for recovery of impacts/damages that are or begin as the responsibilities of others. Skills in the claim or dispute resolution process must be upgraded and enhanced.

Professional services are often promoted by use of examples. Typical advice is - Tell a story as part of your marketing and promotion plan (Menaker). Should your story to be "we are on the leading edge" or "me too?" Since competence and creditability will not be achieved instantaneously by merely asserting so, it is important to begin now to focus on developing these skills.

In summary, the trends and evolutions in project execution and contracting strategy represent major evolutionary opportunities for law firms in the engineering and construction industry. From a business perspective, your firm may wish to become a leader in this process. Achieving this leadership position will require adjustments to skill-sets and ways-of-working. If this market is attractive, the time to act is now.



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# DIVISION 1 ACTIVITIES IN WASHINGTON DC

Division 1 Dinner: 8 PM  
Thursday, September 26

Our Division 1 Dinner will take place directly after the Welcome Reception. Please watch your e-mail for additional information in the next few weeks.

Division 1 Steering  
Committee Planning Session,  
Friday, September 27, 2-5 PM

The Steering Committee for Division 1 will be meeting in Washington for a planning session and retreat on Friday afternoon. If you have a desire to have input on where Division 1 should be moving as a group, ideas on future breakfast sessions, or just want to be present, please contact any of the Division 1 Steering Committee Members who are listed below. Your input is not only welcomed — it is necessary for the Steering Committee to know so that decisions are made with Division 1's members in mind.

## Steering Committee

Luis Prats (Chair)  
Buzz Tarlow  
Judah Lifschitz  
Kelsey Funes  
Nick Holmes  
Scott Griffith  
Alexis Lockshin  
Anthony Kaye  
Anthony Lehman  
Carla Dillon  
Cassidy Rosenthal



ABA FORUM ON THE  
CONSTRUCTION INDUSTRY

## 2013 FALL MEETING

# CAPITAL PROJECTS: P3s, Design-Build, and Beyond

**Division 1 Breakfast: 7:30 AM, Friday, September 27**

Join us for a panel discussion and joint breakfast with Division 9 — Specialty Trade Contractors and Suppliers. We will be discussing the issues involved with multiparty arbitrations, including the procedural and practical aspects involved with each. The speakers for this breakfast are scheduled to include:

- Tony Lehman of DLA Piper LLP (US) in Atlanta, Georgia
- Jeremy Brummond of Lewis Rice & Fingersh in St. Louis, Missouri
- Roger Jones, Huddles Jones Sorteberg & Dachille in Baltimore, Maryland
- Nicholas D. Siegfried of Siegfried, Rivera, Hyman, Lerner, De La Torre, Mars & Sobel in Coral Gables, Florida

This discussion will include perspectives from project participants that include the owner, the general contractor, the subcontractor/supplier, and the arbitrator. Scott Griffith of Griffith Davison & Shurtleff will serve once again as our moderator for what should prove to be a lively discussion.

## September 26-27, 2013

Omni Shoreham Hotel  
Washington, DC

# Recent Developments in Construction Law

The following are some recent cases of interest related to construction law and dispute resolution. If you have a case you would like to submit, please contact a member of the newsletter editorial board.

## No Need of Injury to Others' Property to be an "Occurrence" under a CGL Insurance Policy

In a July 12, 2013, opinion that could have far-reaching ramifications in the construction industry in the insurance coverage context, the Supreme Court of Georgia ruled that an "occurrence" under a standard Commercial General Liability (CGL) policy may be based on a breach-of-warranty claim and does not require damage to work or property of someone other than the insured. This holding removes one commonly used rationale for insurers to deny coverage in the construction context based on lack of an "occurrence," although insurers may still be able to deny coverage for other reasons. The case is styled *Taylor Morrison Services, Inc. v. HDI-Gerling American Insurance Company*.

In the underlying case, a homebuilder was sued by homeowners alleging faulty construction and fraud in concealing the defects. The builder's insurer filed a separate lawsuit against the builder to establish that the homeowners' claims were not covered by the CGL policy. The CGL policy covered "occurrences" but contained several exclusions, including the "builder's risk" exclusion and other business risk exclusions.

The federal trial court applied Georgia law and ruled in the insurer's favor. It found there was no coverage because the claims against the builder did not involve an "occurrence" because the only property damage was to the work of the insured builder. The builder appealed, and the U.S. Court of Appeals for the Eleventh Circuit certified the pertinent legal questions to the Supreme Court of Georgia.

The Supreme Court rejected the federal trial court's rationale. It held "that an 'occurrence,' as the term is used in a standard CGL policy, does not require damage to the property or work of someone other than the insured." The Supreme Court then held that a claim for breach of warranty alone may constitute an "occurrence" that triggers coverage under a CGL policy, but that "in most cases" a claim must allege something other than fraud to be an "occurrence."

This holding removes one commonly used rationale for insurers to deny coverage in the construction context—the lack of an "occurrence." It could be relied upon by contractors that are denied coverage on a CGL policy based on this rationale. It is important to note, however, that not every "occurrence" gives rise to coverage under a CGL policy. Moreover, an insurer may still be able to avoid coverage of an "occurrence" if it does not cause damage to property of a third party pursuant to the "builder's risk" or other exclusions in a CGL policy.

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