

Implementing the Standing Neutral

A Practitioner's Guide to Understanding & Implementing the Standing Neutral

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EXECUTIVE SUMMARY

*"All complex contracts will be incomplete. There will be errors, omissions, and the like."
Oliver Williamson, 2009 Nobel Laureate in Economic Sciences*

Let's face it. You need not be a Nobel-prize winning economist to know that contracts are inherently incomplete. No lawyer has yet crafted the perfect contract that will anticipate every eventuality. Problems and unexpected events are always around the corner.

Long-term contractual relationships are especially vulnerable to the damage caused by friction in relationships, particularly when this friction turns into a formal dispute. In far too many relationships the parties do not perceive a need to engage in conventional conflict resolution until they begin to experience real pain. By that time, they have blamed each other for their troubles. Unfortunately, this usually means that the parties' relationship has reached a breaking point, which can lead to calling on their respective lawyers who are not typically incentivized or instinctively inclined to resolve conflicts constructively in the way best suited to the preservation of the relationship.

The simple fact is that friction should be expected in any complex contract. Why? In the words of Nobel Laureate Oliver Williamson: "all complex contracts will be incomplete. There will be errors, omissions, and the like."¹ The very nature of complex contracts means it is impossible to predict every 'what if' scenario given today's global and dynamic business environment.

Another Nobel Laureate – Oliver Hart – echoes Williamson's sentiments regarding incomplete contracts. Hart's latest research with John Moore suggests you really should not blame 'the other guy' for what may seem like opportunistic behaviors. Rather it stems from what Hart calls *shading*.² Shading is not opportunistic behavior, but *retaliating behavior* in which a party stops cooperating, ceases to be proactive, or makes countermoves because of disappointment. Shading happens when a party doesn't get the outcome it expects from the deal and feels the other party is to blame for it or does not act reasonably by helping to mitigate the losses.

The concept of shading makes sense, especially with complex deals. In complex deals, a contract will always be incomplete, with gaps, errors or omissions opening the door for shading behavior after the contract is signed. Unfortunately, traditional contracts rarely contain proactive alignment mechanisms to avoid disappointments.

Prevention vs. Resolution

Over the years Alternative Dispute Resolution (ADR) techniques began to be popularized as a way to resolve contractual disputes in a more efficient and less costly manner.^{3,4} While there are a variety of ADR techniques, today the most widely used techniques are mediation and arbitration.^{5,6}

While effective, mediation and arbitration have come under criticism.⁷ A 1994 *Harvard Business Review* article critiqued ADR, stating that "...ADR as currently practiced too often mutates into a private judicial system that looks and costs like the litigation it's supposed to prevent."⁸ Cornell Law School reports this has only worsened over the

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years.⁹ Most recently Hadfield called for new “Rules for a Flat World” in her book examining why humans invented law and how to reinvent it for a complex global economy.¹⁰

But is there a better way?

The answer is yes. The University of Tennessee’s research into conflict prevention approaches has shed light on a technique known as a “Standing Neutral” as a highly effective approach for preventing conflict in strategic business relationships.

What is a Standing Neutral?

A Standing Neutral is an innovative and promising improvement on traditional Alternative Dispute Resolution (ADR) techniques. A Standing Neutral process uses a highly qualified and respected expert, pre-selected - or "standing" - neutral who helps parties resolve issues throughout the life of a relationship. A Standing Neutral process can best be described as a proactive, quick, informal, flexible, adaptable, non-adversarial, neutral, expert, preferably nonbinding, process for preventing and achieving the earliest possible solution to problems and preventing potential disputes. The classic Standing Neutral plays a facilitation role to help the parties see each other's perspectives and, when appropriate, provides a non-binding recommendation.

About This Paper

This paper argues for the proactive use of a Standing Neutral – a trusted, independent expert advisor (or a panel of three advisors) – chosen by the contracting parties at the onset of the relationship with the clear goal to maintain a healthy relationship.

This white paper is purposefully designed to be a practitioner’s guide rather than a more traditional academic white paper. A key goal for the paper is to educate and inspire practitioners to shift their lens from dispute resolution to dispute prevention by adopting a Standing Neutral. To do this we have framed the paper into four parts.

- Part 1: Provides a high-level overview of using a Standing Neutral as a way to prevent conflict and, when needed, an efficient approach for resolving conflict
- Part 2: Gives guidance on how to develop a Standing Neutral program
- Part 3: Illustrates how to put the Standing Neutral design principles into practice using a case study
- Part 4: Shares insights into the benefits of using a Standing Neutral

For More Detailed Information

A deep dive and more traditional white paper on the concept of a Standing Neutral is available in our White Paper, ***Unpacking The Standing Neutral***. Download the white paper (free) from the University of Tennessee’s dedicated website to strategic business relationships at <https://www.vestedway.com/vedsted-library/>.



PART 1: INTRODUCTION – THE WHY & WHAT OF A STANDING NEUTRAL

The concept of using a neutral to prevent conflict is not new. However, the practice began to garner attention from the success in the construction industry using a "dispute review board" (DRB). The first known DRB was formed in 1975 when a group of geological engineers conceived the concept to solve difficult rock and soil problems on a major tunneling construction project.¹¹ The vision of a DRB was to use a trusted three-party panel of independent expert advisors chosen by contracting parties to be immediately available to help resolve disputes that arise between them during their contractual relationship.

By the mid-1980s, owners and contractors on major civil engineering projects further expanded on the concept by developing long-term "trusting" alliances to achieve greater efficiency and cost savings, processes which they called "strategic partnering," which later evolved into "project-specific partnering."¹²

By 1991 the process had been used successfully on over 100 projects requiring expertise in only a single technology, such as tunnels (geotechnical engineering), dams (civil engineering), other massive civil engineering projects, and a few commercial projects. By that time the DRB was recognized as a superior process for keeping the peace on a construction project. The first use of the term "Standing Neutral" to characterize a Dispute Review Board appears to have been in a 1991 CPR Publication "Preventing and Resolving Construction Disputes."¹³

Unlike a neutral used on an *ad-hoc* basis for dispute resolution in mediation or arbitration, a Standing Neutral is a readily-available "fast response" technique, designed to prevent any issues from escalating into adversarial disputes that might otherwise go to mediation, arbitration or litigation. A key feature is that the neutral is "standing" – meaning it is integrated into the parties' continuing governance structure. Another key concept is that the Standing Neutral supports the relationship itself and both parties equally; the goal is to ensure the success of the relationship.

The Role of the Classic Standing Neutral

The role of a Standing Neutral has also been referred to variously as a "Referee," or "Wise-Person," or "The Glue." The primary role of a "classic" Standing Neutral is to serve as a "real-time" dispute-resolver throughout a relationship. Because the neutral is "standing" he or she can act immediately to resolve any potential or actual disputes which the parties cannot resolve themselves. There are several variations of a classic Standing Neutral, but almost all involve these typical steps:

Selection

At the outset of their relationship, parties select one or three persons in whom they have trust and confidence to serve as their dispute-resolver (the Standing Neutral) throughout their relationship. A single Standing Neutral should always be entirely independent. In most cases where there is a multi-member Standing Neutral, each party nominates one member, and the two nominated neutrals will select a third member; in such cases, it is typically required that every panel member be acceptable to both parties and that all panel members be independent and impartial, with no special allegiance to the nominating party.

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As part of the selection process, the parties formalize an agreement with the Standing Neutral which includes determining the Standing Neutral's responsibilities and authority.

Briefing

The parties brief the Standing Neutral regarding the nature, scope and purpose of the relationship or venture. As part of the briefing, the Standing Neutral is usually equipped with a basic set of contract materials and supporting documents.

Continuing Involvement

The Standing Neutral is usually part of ongoing governance where they meet regularly with the parties for a basic review of the progress of the relationship, even if there are no issues. Alternatively, a "Standby Neutral" can be used. In the case of a Standby Neutral the neutral is merely available on an ad-hoc basis, with the contracting parties calling in the Standing Neutral, whenever necessary, to give an advisory opinion.

Dispute Resolution/Admissibility of Recommendation

If the parties have a dispute they cannot resolve themselves after receiving the advice of the Standing Neutral, they may use the Standing Neutral for formal dispute resolution. Depending on the wishes of the parties, the Standing Neutral is given authority to act on issues and disputes by rendering either a nonbinding evaluation or recommendation or a binding decision. If the Standing Neutral is empowered to make only a recommendation, either party may challenge the Standing Neutral's recommendation. However, the recommendation will typically be admissible as evidence in any subsequent arbitration or litigation.

Costs

The parties equally absorb the cost and expenses of the Standing Neutral.

Three Critical Elements of the Standing Neutral Process

There are three critical elements essential to the success of the Standing Neutral technique:

- Early mutual selection
- Continuous involvement by the neutral
- Prompt action on any issues.

Early Mutual Selection

Using a Standing Neutral begins when the parties mutually agree and designate a single neutral (or a board of three neutrals such as a Dispute Board in the construction industry). The parties should jointly select a Standing Neutral where each has high confidence in the neutral's integrity and expertise. A Standing Neutral is typically an expert in the industry in which the parties are involved (e.g., construction, facilities management, IT services).

The Standing Neutral should be jointly selected by the parties *early* in the relationship. If the Standing Neutral plays a role as a deal architect, he or she should be selected *prior* to the parties starting their contracting process. If the Standing Neutral is used primarily in the issue resolution process as part of ongoing governance, the Standing Neutral should be selected *during* the contracting process and before the contract is signed. This allows for the Standing Neutral to be embedded as part of the ongoing governance mechanisms.



Continuous Involvement

Once the Standing Neutral is selected, he or she is briefed on the relationship and furnished with the necessary documents describing the relationship. The Standing Neutral is then formally embedded into the parties ongoing governance (e.g., attending monthly operation reviews and/or more strategic quarterly business reviews).

Prompt Action on Issues/Concerns/Disputes

A key objective of a Standing Neutral process is to preserve cooperative relationships between the contracting parties. The classic Standing Neutral emphasizes "keeping the peace" in a relationship while modern Standing Neutrals focus on a more proactive continual alignment of interests. A good Standing Neutral process is a "fast response/dose of reality" technique emphasizing "real-time" resolution.

The Standing Neutral is expected to be available on relatively short notice to consult with the parties and to discuss issues while misalignment and problems are still new and likely still small. The Standing Neutral has an uncanny ability to help the parties resolve any misalignment because they are a trusted "part of the team." The Standing Neutral reviews an issue while it is in the earliest stage and helps the parties identify ways forward in an informal capacity before issues become disputes.

More Preventive/Modern Variations

Over the years the role of Standing Neutrals has evolved. The University of Tennessee's research reveals creative ways that companies are using a Standing Neutral. For example, the University of Tennessee's popular Vested outsourcing methodology for developing highly collaborative win-win outsourcing relationships embeds a neutral third-party "deal architect" as a coach as part of the contract development. The Standing Neutral as a coach provides an objective view on facts and issues which helps the parties ensure they get to a fair and balanced contract.

Part 2 of this paper provides insights into the roles that Standing Neutral can play with more progressive organizations tapping into a Standing Neutral to help with more preventive approach rather than focus simply on issue resolution.

Why the Standing Neutral Process Works So Well

When parties combine the three elements above into a Standing Neutral process they are, in essence, establishing the "rules" of how they will use the Standing Neutral to prevent or resolve issues early. A well-designed Standing Neutral process embeds its customized rules as foundational components of the parties' ongoing governance.

Standing Neutrals have had a remarkable record of success wherever they have been used. In the vast majority of cases, the parties never look to the Standing Neutral to make any recommendations or decisions. And in the small minority of cases where the Standing Neutral actually makes a recommendation, 95% of the recommendations are accepted by the parties without resort to mediation, arbitration or litigation.¹⁴

Why does the presence of a Standing Neutral have such a powerful impact? The evaluative, but typically non-binding, nature of the Standing Neutral provides a helpful



"dose of reality" to the parties and encourages them to be more objective in their dealings with each other. When differences of opinion arise, the parties' continuous access to the Standing Neutral allows them to quickly use the Standing Neutral as an objective sounding board, obtaining a recommended course of action minimally disruptive to the business relationship.

For these reasons, the Standing Neutral serves as not only a standby "real-time" dispute *resolution* process, but also as a remarkably successful *prevention* process.

Key Steps to Engage a Standing Neutral

Incorporating a Standing Neutral typically involves these steps:

- Start by checking any country or state-specific guidelines that might limit a Standing Neutral to act a third-party neutral. For example, the State of Washington has guidelines for lawyers wishing to work as third-party neutrals.
- Next, the parties design their Standing Neutral program. This can be done using the Design Principles noted in Part 2 of this white paper.
- Once the Standing Neutral program is designed, the parties perform research and compile a shortlist of experts in the field. In considering candidates, they should focus on the individual's expertise, neutrality and integrity. Experience as a Standing Neutral should not be a necessary requirement. Nor does the Standing Neutral have to be a lawyer.
- As part of the selection process, the parties inform the neutral of the purpose and scope of their deal and the contractual relationship. A key part of the selection process is ensuring the potential candidate has no conflicts of interest and that the candidate can support the expected timeline and/or cadence of any regularly scheduled governance meetings he or she is expected to participate in.
- Once the Standing Neutral is selected, the parties brief the Standing Neutral and provide all the documents relevant to the parties' relationship.
- The parties and the Standing Neutral then sign an agreement. It is critical to note the costs of the Standing Neutral is split evenly between the parties so each is equally invested in the relationship. When using a Standing Neutral as part of ongoing governance, we recommend that the role of a Standing Neutral be formally embedded into the parties' contract.
- If the Standing Neutral can no longer fulfill his or her role, the parties will choose a replacement Standing Neutral with the existing Standing Neutral often formally briefing the new person. This should be accomplished without biasing the new Standing Neutral during the transition.



PART 2: DESIGNING A STANDING NEUTRAL PROGRAM

A good dispute prevention and proactive management process does not just happen; it needs to be thoughtfully designed, and there must be buy-in to make the shift to more preventive mechanisms.

Characteristics of a Good Dispute Prevention and Resolution System

Since problems and potential disputes can occur in many different ways and times during a relationship, no one-size of dispute management program fits all problems and disputes. Rather a good system has three general characteristics.

First and foremost, a good dispute prevention process integrates with a company's dispute resolution process – openly acknowledging that possible misalignments can turn into official disputes which need to go through a more traditional dispute resolution process. For this reason, you should think in terms of an integrated dispute prevention and resolution system which uses a “stepped” approach, with parties agreeing on a process that:

- Includes resourcing for neutral assistance (use of a Standing Neutral) throughout the life of the contractual relationship – not just when a dispute arises
- Establishes a cooperative relationship that fosters a spirit of working together to solve problems without the need to escalate them
- Sets up processes that prevent and de-escalate misalignment
- Designs mechanisms to resolve potential misalignment issues in real or near real-time.
- Links to the more formal dispute resolution techniques, such as mediation, if prevention and real-time resolution approaches have not worked.
- Includes a backstop method of achieving final and binding resolution through arbitration if needed

Second, a good system does not just happen. Rather it results from a conscious effort to design a program that optimizes your unique business needs. University of Tennessee research points to nine design principles of a good program (see Figure 1 on the following page and Part 3 which illustrates how each design principles is put into practice using a case study).

Third, a good system should be agreed upon at the beginning of the contracting relationship and is ideally formally embedded into the parties' contract, often in the form of a contract Schedule that clearly outlines the intent of the program and processes that the parties agree to use. Formally incorporating the program into the contract acknowledges the reality that misalignments will occur and contractually obligates the parties to use a pre-defined process deemed fair and efficient by all parties.

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Figure 1: Nine Design Principles and Options of a Standing Neutral Program

Design Principles	Options for Your Standing Neutral Program			
Timing of Involvement	Pre-Contract Signing (e.g., Deal Architect)		Post-Contract Signing	
Number of Neutrals	One		Three	
Skills Required	Deep SME / Industry Experience	Facilitation/Soft Skills	Project Management	Legal/Lawyer
Level of Involvement	Continuous involvement – Standing Neutral (embedded as part of ongoing governance)		Ad-hoc – Standby Neutral (only when called upon)	
Depth of Engagement	All levels of governance	Mid-levels of governance	Only the highest levels of governance	
Role/ Authority	Expert Evaluator Advice only	Ombudsman Makes formal recommendation (non-binding)	Mediator Non-binding decision	Arbitrator Binding decision
Fact-Finding Latitude	May only receive information and evidence provided	May investigate personally	Ability to hire outside experts	
Types of Support	Pre-Contract Support: *Deal Architect Post Contract Support: *Transition support *Risk Management *KPI/Performance Mgmt. Alignment *Project Management Support *Onboarding Support /Training *Strategic Reviews *Relationship Health Monitoring Dispute Resolution: *Issue Resolution *Mediation *Arbitration			
Reference in Contract	Formal: Reference in Contract (may be an appendix or Schedule)		Informal: Not Referenced in Contract	



Sample Standing Neutral Agreement Terms

A typical Standing Neutral agreement for ongoing governance support should do the following:

- Outline the Standing Neutral's purpose, role and authority (using the nine design principles Figure 1)
- Establish the ongoing commitment of the Standing Neutral, including which meetings the Standing Neutral should regularly attend and the availability expectations for ad-hoc needs
- Provides guidance on the frequency and manner in which the parties are to periodically update the Standing Neutral on the progress of the project/relationship, such as periodic management reports and any incident reports
- Provide guidance on if the Standing Neutral's advice and decisions are admissible evidence in any subsequent arbitration or litigation
- Define the compensation model by which the Standing Neutral will be paid

See **Appendix 1** for sample language for a Standing Neutral contract



PART 3: THE DESIGN PRINCIPLES IN PRACTICE: A CASE STUDY

The best way to illustrate the design principles is through a case study. We have selected a case study from a Fortune 500 company using a Standing Neutral program with key construction supplier relationships. For purposes of this white paper, we refer to the company as SemiCo – a global semiconductor company. Below we work through each of the nine design principles and illustrate how SemiCo’s current program is designed when compared to the nine design principles (SemiCo’s program features are highlighted in orange).

Timing of Involvement

Design Principles	Options for Your Standing Neutral Program	
Timing of Involvement	Pre-Contract Signing (e.g., Deal Architect)	Post-Contract Signing

UT’s research into Standing Neutrals illustrates many examples of how companies are using Standing Neutrals to design and manage complex contracts. While the majority of organizations using Standing Neutrals focus on the neutral’s role in post-contract signing activities, there is a trend to shift to even more preventive use of Standing Neutrals pre-contract. For example, companies like BP and JLL used a Standing Neutral as a Deal Architect Coach to facilitate the parties in creating global facilities and real estate management agreements.¹⁵

How SemiCo’s Program Works

SemiCo limits the use of the Standing Neutral to post-contract signing. In the case of SemiCo, Standing Neutrals begin working on a construction project post-contract signing but with an immediate presence on the project at its earliest stages.

SemiCo’s early Standing Neutrals got involved with projects after they had already started. However, SemiCo ideally seeks to engage the Standing Neutral from the earliest engagement. A good example of an ideal situation is how SemiCo brought in a Standing Neutral early into a \$billion+ project. The Standing Neutral conducted a Risk Workshop at the onset of the project, all before any significant amount of the work had begun.

Number of Standing Neutrals

Design Principles	Options for Your Standing Neutral Program	
Number of Neutrals	One	Three

As previously described, the Standing Neutral process typically either involves one or three members – but never an even number. While a Standing Neutral program can include three neutrals most programs use only one neutral.



How SemiCo’s Program Works

SemiCo has always used just one Standing Neutral for each of its major construction projects. The original Standing Neutral program was launched with just one neutral that worked on a multi-project construction program at a large manufacturing site. An important part of the program is that SemiCo and its general contractors *mutually agree and hire* additional neutrals to work on various projects around the world. Over the past six years, SemiCo, with its general contractors, has involved a total of five different Standing Neutrals supporting various construction initiatives around the world.

Skills

Design Principles	Options for Your Standing Neutral Program			
Skills Required	Deep SME / Industry Experience	Facilitation/Soft Skills	Project Management	Legal/Lawyer (in some cases)

UT’s research shows the general consensus among those using Standing Neutrals is that the Standing Neutral is ideally **deeply familiar with the type of work** being contracted. Possessing profound experience in the subject matter helps build a deeper sense of credibility and trust between the Standing Neutral and the project teams.

In addition to deep industry knowledge, it is critical a Standing Neutral have substantial soft skills. Organizations adopting Standing Neutrals suggest companies seek neutrals with the following **soft skills**:

- A Coach/Mentor mindset
- Facilitation Skills
- Excellent communication skills (listening, empathy)
- Perspective (ability to see the viewpoint of each party – been in similar roles)

Some organizations recruit Standing Neutrals with **project management skills**. Project management skills help with shepherding issues through the formal dispute resolution process if needed. In cases where the focus on what is under contract is complex (such as a complex construction project), a history of managing complex projects is very helpful.

Among the many skills a Standing Neutral needs, **being a lawyer** is not one of them. UT’s research shows it is not uncommon to use Standing Neutrals typically that are not lawyers. Being a lawyer is not required because the majority of the time is *not* spent on legal matters. For example, in construction projects typical misalignment stems from budget misalignment between the owner and the contractor – often due to changes made either because of new information, regulatory changes, or even unexpected factors, such as when Covid stalled work on major projects in 2020.

While a Standing Neutral need not be a lawyer, some legal background can be beneficial when questions arise that are legal in nature.

How SemiCo’s Program Works

SemiCo’s Standing Neutral program does not officially state if a Standing Neutral should be a lawyer or not. Of the five Standing Neutrals SemiCo has engaged since the inception of the program, only one of them is a lawyer.

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SemiCo seeks out Standing Neutrals who are experts in construction projects. For SemiCo – whose scope of work includes complex mega construction projects – a good Standing Neutral should not just have construction experience but have experience with projects that are complex.

SemiCo also follows the rules of thumb regarding the suggested soft skills. Selecting the right Standing Neutral largely depends on balancing their experience in construction projects and their communication skills. Interpersonal and presentation skills are considered a top priority.

Level of Involvement

Design Principles	Options for Your Standing Neutral Program	
Level of Involvement	Continuous involvement – Standing Neutral (embedded as part of ongoing governance)	Ad-hoc – Standby Neutral (only when called upon)

A key design principle is to determine the level of involvement of your Standing Neutral. There are two approaches when determining the level of involvement. The first is to have the Standing Neutral have continuous involvement. This approach means embedding the Standing Neutral as part of the ongoing governance structure, with the Standing Neutral sitting in key project or governance meetings. The second approach is less preventive in nature and uses an ad-hoc Standing Neutral that is only used when called on. We refer to this type of Standing Neutral as a “Standby-Neutral.” The preferred approach is a Standing (versus a Standby) Neutral.

How SemiCo’s Program Works

SemiCo’s Standing Neutrals have continuous involvement in their construction projects – making them a Standing Neutral versus a Standby Neutral. This means SemiCo’s Standing Neutrals are embedded as part of the ongoing governance of the project and meet with teams during planned governance meetings.

SemiCo’s Standing Neutrals have close and continuous involvement at all governance levels. A member of the SemiCo legal team describes the Standing Neutral’s role as “mostly informal – sitting at the table with team members and facilitating discussions on an issue and sharing opinions like a village elder.” He adds, “because the SemiCo Standing Neutrals have continuous involvement, they have firsthand knowledge of the work taking place. Their ongoing involvement also helps them build trust with the project teams they work with.”

Depth of Engagement

Design Principles	Options for Your Standing Neutral Program		
Depth of Engagement	All levels of governance	Mid-levels of governance	Only the highest levels of governance

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When an organization designs its Standing Neutral program, they need to determine the depth of engagement the Standing Neutral will have. A Standing Neutral’s involvement can range from participating in all levels of governance (e.g., tactical level) to only participating at the highest level of governance (strategic/executive level). Typically, it is best to engage a Standing Neutral at all levels of governance where they can have the greatest impact on prevention.

How SemiCo’s Program Works

The meeting cadence is – by design – meant to integrate the Standing Neutral into the project team’s governance through an ongoing cadence. The meeting types and frequency are deliberately scheduled in a way that prevents the Standing Neutral’s role from being ad hoc (Standby Neutral) but in continuity with the work at hand. For example, the Standing Neutrals do monthly site project visits. While there, the neutral sits in on project meetings at various levels (e.g., the field, superintendent, and management levels). At the conclusion of the visit, the Standing Neutral issues a written trip report that contains observations and thoughts on risk and the health of the relationships. During the visits, the Standing Neutral facilitates discussions about how the parties are managing and mitigating the risks on a joint risk register, in and of itself an innovation. As part of the discussions, the neutral provides their opinion – and, when asked – provides a formal recommendation to the team on how to manage the risk.

Each Standing Neutral and project team determines the most appropriate meeting and cadence for the neutral to attend. For example, in one construction program, which consists of a number of separate projects, the Standing Neutral meets with the project team about once a week. Although the topic is predominantly about project management, the floor is open to discussing all ranges of issues, from schedule changes and delivery to unexpected changes that are surfacing.

While the contract calls for a minimum number of visits with the project team, there is flexibility to meet as needed based on what is happening in the project. For the Standing Neutral, this equates to being onsite three to five days a week based on the phases of the projects.

Role/Authority

Design Principles	Options for Your Standing Neutral Program			
Role/ Authority	Expert Evaluator Advice only	Ombudsman Makes formal recommendation on (non-binding)	Mediator Non-binding decision	Arbitrator Binding Decision (small claims <\$250,000)

Preemptively determining the scope and authority of the Standing Neutral helps both the buyer and the supplier feel comfortable with how they should work with their Standing Neutral. A Standing Neutral’s role can range widely. Typically, a Standing Neutral’s authority can span up to four levels of authority.

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- **Expert evaluation:** When organizations engage a Standing Neutral on an ongoing basis (such as SemiCo), the primary role is that of an expert evaluator. The Standing Neutral typically sits in governance meetings, facilitates team collaboration, and provides advice to the team (e.g., village elder).
- **Ombudsman:** Standing Neutrals may be given the authority to play the role of an ombudsman, where they make formal non-binding recommendations.
- **Mediator:** Companies using a Standing or Standby Neutral often give their neutral the authority to be a mediator. This is a common role when the neutral is a Standby Neutral. The benefit of using a Standby Neutral over a traditional mediator is that the neutral is pre-selected. Because both parties have agreed in advance on who the neutral is, it saves them significant amounts of time. In addition, having a defined process and pre-selected neutral often means parties with an issue are often more willing to call on their neutral to mediate a dispute before they are locked into positions and emotions become heated.
- **Arbitrator:** If a dispute cannot be resolved by the companies where a Standing Neutral is involved, the final step in the dispute prevention and resolution process is often to ask the Standing or Standby Neutral to be an arbitrator to make a binding decision.

It is very common for companies to design a Standing Neutral program where the neutral has multiple roles and levels of authority. For example, the neutral may be skilled as a professional arbitrator, but the focus of the program is for the neutral to use their skills in a facilitative role working with the team using preventive (versus resolution) techniques. The neutral will only play an arbitrator role as a last resort. Giving the Standing Neutral multiple levels of authority enables the neutral to manage an issue throughout its lifecycle. It is important to note that not all Standing Neutral programs give their neutrals mediation or arbitration authority. Simply put, just because a Standing Neutral is working with the team does not mean they are always the mediator or arbitrator on an unresolved issue.

When designing a Standing Neutral program, it is important to align the neutral's authority levels to a pre-defined process for how the parties agree to work with the neutral. The SemiCo example below provides a good example of how authority is interwoven with the process, and more advanced authority levels, such as mediation and arbitration, are "triggered" by the process.

How SemiCo's Program Works

SemiCo's Standing Neutral program has evolved over time, and today SemiCo's Standing Neutrals have authority in all four "buckets." While the primary focus for their neutrals is to play an informal advisory role in preventing disputes – SemiCo's Standing Neutrals are empowered to serve as a mediator and arbitrator if needed.

Because of the prevention focus, the primary role of SemiCo's Standing Neutrals is that of an advisor – both in terms of providing expert advice and (when needed) giving formal recommendations on how to deal with a specific situation. This works because the Standing Neutral is literally part of the project team. For example, one feature of SemiCo's Standing Neutral program is the inclusion of a Senior Management Risk Committee. The Senior Management Risk Committee is comprised of two representatives from the prime contractor, two representatives from SemiCo, and the Standing Neutral. It may also include two representatives of the design professional if that firm is under a direct contract with SemiCo. The Standing Neutral facilitates the meeting and helps the parties work through risks before they become issues or formal claims.

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SemiCo’s Standing Neutral program also includes a pre-defined process for how to handle issues that are not resolved in the Senior Management Risk Committee. The process outlines two paths for resolving disputes – one for small claims (under \$250,000) and one for large claims (over \$250,000)

Fact-Finding Latitude

Design Principles	Options for Your Standing Neutral Program		
Fact-Finding Latitude	May only receive information and evidence provided	May investigate personally	Ability to hire outside experts

One of the design principles of a Standing Neutral program is to determine the fact-finding latitude you will give your Standing Neutral. Are you giving them the power to personally step in and investigate an issue to help learn more – or will they be relying only on the information you have shared? In complex contracts with a high dollar value, some companies even give the Standing Neutral the ability to hire outside experts to provide additional information.

How SemiCo’s Program Works

SemiCo’s Standing Neutral program gives their Standing Neutral the power to not only do a personal investigation – but also to hire outside experts if needed. For example, on one mega-project, SemiCo and its contractor used the Standing Neutral to informally resolve a number of subcontractor pass-through claims. Some involved sophisticated issues of contract interpretation, and had any of the claims moved into the formal large claims process; the Standing Neutral was prepared to retain a construction lawyer to advise her on those legal issues.

Types of Support Roles

Design Principles	Options for Your Standing Neutral Program	
Types of Support	Pre-Contract Support: *Deal Architect Post Contract Support: *Transition support * <i>Risk Management</i> *KPI/Performance Mgmt. Alignment * Project Management Support *Onboarding Support /Training * <i>Strategic Reviews</i> *Relationship Health Monitoring Dispute Resolution: * <i>Issue Resolution</i> * <i>Mediation</i> * <i>Arbitration</i>	

* *Indicates a Support Role used by SemiCo*

UT’s research reveals Standing Neutrals provide a variety of support services ranging from highly preventive pre-contract signing support all the way to classical dispute resolution support services. Companies using a Standing Neutral report that using a neutral for more preventive support services significantly reduces the time and cost of managing conflict and disputes. It also reduces the number of issues that escalate to a

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formal dispute resolution. Below we share a high-level overview of the most common types of Standing Neutral support services.

Pre-Contract Support: The most proactive and preventive approach is using a neutral as a Deal Architect. Here, the neutral helps facilitate the parties through the deal-making phase (negotiations and contract signing). Deal Architects may also help with facilitating and advising the parties on best practices for developing key aspects of their agreement, such as support in developing the pricing model and baseline or designing the appropriate governance structure for their relationship.

Post-Contract Support: The most common support functions Standing Neutrals provide are post-contract support services. This includes:

- *Transition support* – assist the teams in fostering a collaborative environment showing them how to use collaborative mechanisms the parties have designed
- *Risk Management/Mitigation* – facilitating risk management workshops to identify, manage and mitigate risks
- *KPI/Performance Management Alignment* – facilitating discussions between the teams to ensure a common understanding of the intent of the agreed KPI, and a mutual agreement on the performance against those standards
- *Onboarding/Training Support* – provide ongoing advice and guidance on Vested relative to new managers joining the relationship from either party
- *Relationship Health Monitoring* – measuring the overall health of the relationship, including how all parties are living up to the stated intentions, how well the governance bodies are supporting the business, and monitoring trust, compatibility, and the effectiveness of communication
- *Project Management* – provide neutral project management services to buyer and supplier. For example, manage contract change orders or contract dashboards and root cause analysis events
- *Facilitate Strategic Reviews* – prepare for and facilitate strategic reviews such as Monthly Management Reviews and Quarterly Business Review meetings

Dispute Resolution: Using neutrals to solve disputes – especially for mediation and arbitration services – is not new and is considered the “classical” approach of using a neutral. However, using a neutral in a more informal and preventive way is also a viable approach that is often overlooked.

- **Issue Resolution** – facilitating parties to solve issues, typically while the issue is small. Typically, when a Standing Neutral is used in issue resolution, it is in the form of an **Expert Evaluator** or an **Ombudsman** where the neutral makes informal, non-binding recommendations. If the issue is not resolved, the parties may choose to go to mediation and/or arbitration.
- **Mediation** – The American Bar Association (ABA) defines mediation¹⁶ as: “A private process where a neutral third person called a mediator helps the parties discuss and try to resolve the dispute. The parties have the opportunity to describe the issues, discuss their interests, understandings, and feelings, provide each other with information, and explore ideas for the resolution of the dispute. While courts can mandate that certain cases go to mediation, the process remains voluntary in that the parties are not required to come to an agreement. The mediator does not have the power to make a decision for the parties but can help the parties find a mutually acceptable resolution. The only people who can resolve the dispute in mediation are the parties themselves.”



- **Arbitration** – The American Bar Association (ABA) defines arbitration¹⁷ as: “A private process where disputing parties agree in writing that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments. Arbitration is different from mediation because the neutral arbitrator has the authority to make a decision about the dispute. The arbitration process is similar to a trial in that the parties make opening statements and present evidence to the arbitrator. It is usually conducted under the procedural rules of an established dispute resolution organization such as the American Arbitration Association, CPR, JAMS, or a similar international organization. Compared to traditional trials, arbitration can usually be completed more quickly and is less formal. For example, often, the parties do not have to follow state or federal rules of evidence, and if the parties agree, the arbitrator is not required to apply the governing law. After the hearing, the arbitrator issues an award. Some awards simply announce the decision (a “bare-bones” award), and others give reasons (a “reasoned” award). Awards are not public records. The arbitration process may, if agreed upon, be either binding or non-binding. When arbitration is binding, the decision is final, can be enforced by a court, and can only be appealed on very narrow grounds. When arbitration is non-binding, the arbitrator’s award is advisory and can be final only if accepted by the parties.”

How SemiCo’s Program Works

As mentioned above, the primary focus is a more preventive approach. For this reason, SemiCo’s Standing Neutrals provide a variety of support services with the goal of preventing disputes. SemiCo’s Standing Neutral program has evolved over the years, with SemiCo adding more support services to the role of the Standing Neutral.

It is important to understand there is no cookie-cutter “one-size-fits-all” program. SemiCo’s Standing Neutral program is no exception. This allows the SemiCo-contractor team to work with their Standing Neutral in the most appropriate way. Below we highlight the various Standing Neutral services that SemiCo uses in its program and describe how it is being used.

Risk Management/Mitigation

SemiCo views risk management/mitigation as one of the most valuable services provided by Standing Neutrals. The idea of “Risk Management Workshops” emerged when the Standing Neutral was being interviewed for a mega-project, just as SemiCo and the contractor were kicking off their project. The Standing Neutral seized the opportunity of shifting up the dispute prevention continuum by bringing in risk management approaches. The Standing Neutral facilitated SemiCo and its contractor through a full-day initial workshop where each party identified risks to the project.

Onboarding/Training Support

SemiCo’s Standing Neutral training support is limited to training people on the Standing Neutral program. The Standing Neutrals will often use a PowerPoint training program in their initial meeting with project teams and may thereafter use it again if the need for a “refresher course” to onboard new team members in how the program works and how team members should work with them as a neutral.



Relationship Health Monitoring

A core function of SemiCo's Standing Neutrals is to actively monitor the relationship health between SemiCo and the contractors. This is done by observing the interaction and behaviors of project personnel and how project teams are functioning. Their observations are then documented in the formal monthly Trip Report.

Facilitate Strategic Reviews

As shared earlier, Standing Neutrals often facilitate strategic reviews for contracting parties, such as Annual Strategic Reviews, Quarterly Business Reviews, or even Monthly Management Reviews. While SemiCo's Standing Neutral program does not take this broader "business" perspective, the program has integrated the Senior Management Risk Committee as a key component of the program.

The Senior Management Risk Committee is attended by the two senior leaders from the contractor, two senior leaders from SemiCo, and two from the design professional if it is under a direct contract with SemiCo. The Standing Neutral facilitates the meeting to ensure all parties fully understand the risks and what teams are doing to mitigate the risks. The companies are expected to put the proper emphasis on helping project teams work through risks – breaking down barriers and providing resources if needed to prevent a potential risk item from getting out of control.

The SemiCo legal team rep gives the credit for Risk Management Workshops to the Standing Neutral. "The formation of the Senior Management Risk Committee was a ground-breaking idea. Previously, these were people who were so high level on the project or one step above the project that there was a disconnect. There was this idea that, with enough altitude, they wouldn't get stuck in the weeds of what was going on in the project. One argument for this is that it could potentially allow some degree of objectivity; in practice, that distance actually created far more expensive problems than upper-level involvement via the Senior Management Risk Committee. When the Standing Neutral started to think more holistically about risk and how to most effectively manage and mitigate it – we really began to see the time and ease of closing out issues increased."

One team member commented on the effectiveness of not just having lower-level Risk Workshops – but also including a Senior Management Risk Committee as part of governance. "Ultimately, you want to empower people to resolve issues. The senior management team also functioned as a senior management-level team in the escalation process. Previously, if people on project teams became deadlocked about an issue, it would have ended up in front of them anyways. So, it's far better to have it end up in front of them – with a neutral facilitating discussion between them – than to be blindsided later.

Issue Resolution (facilitation and formal and informal advisory opinions)

SemiCo's Standing Neutrals provide both formal and informal advisory opinions. The original program was centered around formal written opinions regarding claims. However, over time the program evolved to also include more informal advice. For example, think about Covid. There was nothing SemiCo or the contractors could do to foresee the impact of Covid and the many issues that stemmed from short-term government regulations around Covid.

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Because the primary function of SemiCo's Standing Neutral program is around dispute prevention, SemiCo's Standing Neutrals also actively work with teams and facilitate issue-specific workshops when an issue does arise. By helping teams efficiently and effectively work through issues head-on, they have been highly successful at keeping issues from snowballing and becoming a claim. As one attorney put it, "A Standing Neutral really is dispute avoidance, because you never get to a formal dispute."

As the program evolved, some project teams began asking the Standing Neutral for their informal advisory opinion on issues. Teams like having their Standing Neutral's opinion so much that the Standing Neutral program evolved to formally acknowledge the Standing Neutral's authority to issue these informal advisory opinions.

The SemiCo legal team rep – once again – likes the innovativeness of how the program evolved. "What makes this stand out is that it was the project staffs of both SemiCo and the contractor in concert with the Standing Neutral – not Legal – who came up with the idea of informal advisory opinions. The original Standing Neutral program didn't have that outlined in the contract as a preventive technique – but teams saw the need. It was fun seeing how the Standing Neutral's trust building and responsiveness paved the way for even quicker joint solutions and mutual benefit."

Mediation

SemiCo's Standing Neutrals are empowered to provide mediation services if needed. A good example was the first project in which a Standing Neutral was deployed. SemiCo had a significant claim against its design professional. The Standing Neutral took control of the resolution in her role as mediator and convened a single large meeting attended by representatives from both parties. In the course of the two-hour meeting, the Standing Neutral facilitated the successful negotiation of a resolution of the claim.

Arbitration

As mentioned previously, SemiCo's Standing Neutrals are empowered to provide arbitration services if needed. The Standing Neutral program embeds baseball arbitration as the final step for solving small claims (claims less than \$250,000). The pre-defined process – if triggered – takes less than 40 days and, once settled, forms the foundation for a contract change order.

Baseball arbitration is where each party submits their position to an arbitrator. The arbitrator picks the solution that they deem is most fair.

The Standing Neutral program uses a different pre-defined process for **large claims** – which is defined as a claim over \$250,000. Here the parties have a choice on how to use one of two adjudicative roles. The first entails the Standing Neutral gathering information and rendering a decision as a written recommendation. The second option is to have a hearing at the project site where the parties make presentations (lawyers are not permitted to make presentations).

In both cases, the Standing Neutral working with SemiCo and the contractor provides the adjudicating role, and the recommendation is informal (non-binding). As mentioned previously, the prevention focus of SemiCo's Standing Neutral program has been so successful that since the inception of the program SemiCo has had only one claim escalating to a formal dispute resolution using arbitration and outside counsel.



Integrating Concepts into the Contract

Design Principles	Options for Your Standing Neutral Program	
Reference in Contract	Formal: Reference in Contract (may be an appendix of Schedule)	Informal: Not Referenced in Contract

The University of Tennessee highly recommends formally referencing the Standing Neutral program into contracting documents. The best practice is to reference the program in the Master Agreement and provide the details in a contract Schedule. The Schedule should provide an overview of the program and contractual obligations to follow the processes outlined in the Schedule.

How SemiCo’s Program Works

One thing that SemiCo was adamant about was formalizing the Standing Neutral program by incorporating it into the actual contracts with contractors. This was done by embedding a “General Requirement for Concurrent Claims Resolution” clause into the contract. The clause includes the following sections and spans eight pages.

- Standing Neutral Selection and Replacement
 - Standing Neutral Qualifications
 - Standing Neutral Selection Process
 - Standing Neutral Replacement Process
- Standing Neutral Responsibilities
- Buyer/Supplier Program Commitments
 - Process for managing informal issues and formal claims
 - Funding and Payment of neutral



PART 4: COSTS/BENEFITS OF USING A STANDING NEUTRAL

As Louis M. Brown – known as the father of preventive law – aptly noted, “It usually costs less to avoid getting into trouble than to pay for getting out of trouble.”¹⁸ Part 4 gets to the heart of Brown’s advice by focusing on the costs and benefits of using a Standing Neutral.

A Hard Look at The Hard Cost of Disputes

While you may never end up in a formal dispute, if you do, it is likely to be costly. How costly can disputes be? Professor Gillian Hadfield compiled some of the best data and estimates about the cost of disputes in her book *Rules for the Flat World*.^{19,20} Below are some highlights:

- 2013 National Center for State Courts study (employment lawsuits) – the median cost of an employment lawsuit is \$90,000²¹
- 2012 American Intellectual Property Law (IP patent suits – combined cost of the parties)
 - \$700,000 for cases less than \$1 million
 - \$6 million for cases between \$1 million and \$25 million
 - \$11 million for a case worth over \$ 25 million.
- Kip Viscusi’s Vanderbilt University study (personal injury): 75% of award fees goes to legal fees and costs.

Hadfield cites the high hourly rates of lawyers as just one factor that makes the legal system costly; the time to work through legal processes and costs associated with the “discovery” process is also a significant burden. Figure 2 illustrates the relative transaction costs of different dispute resolution methods.²²

Figure 2: Relative Transaction Costs of Different Methods of Dispute Resolution

Judicial Proceedings	\$
Arbitration	\$
Mini-Trial	\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$
Mediation	\$\$\$\$\$\$
Expert Advisory Opinion	\$\$\$
Standing Neutral	\$

While ADR techniques such as arbitration and mediation are more cost-effective than litigation, each step on the road to dispute resolution involves incremental transaction costs. What might start with bringing in an expert advisor on-board can often lead to a mediator that can then progress to an arbitration situation.

Empirical Evidence of the Benefits of a Standing Neutral

So, are there really benefits of using a Standing Neutral? The answer is an unequivocal YES.

Since the first Dispute Review Board (the classic example of a Standing Neutral) was created in 1975, thousands of construction projects have used Standing Neutrals. While there is limited

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research outside of the construction industry, the Dispute Review Board Foundation (DRBF) offers significant empirical evidence supporting the benefits of using a Standing Neutral. The DRBF has gathered information about dispute boards since 1982; its records show that since 1996, the process has been employed on over 2,700 projects, aggregating some \$275 billion in construction costs.²³ The Foundation reports:

- 58% of the projects that used Dispute Review Boards were “dispute free,” with no disputes submitted to the DRB.
- 98.7% of the disputes submitted to a DRB for hearing resulted in settlement of the dispute with no subsequent arbitration or litigation.
- In the handful of cases where a party challenged a DRB decision in arbitration or litigation, most were either not pursued to a conclusion or failed.

Cheryl Chern’s comprehensive research has led to a book, “Chern on Dispute Boards,” now in its third edition. According to Chern, Dispute Boards result in even the most strenuous dispute being resolved with a between a 95% to 99% success rate for preventing costly arbitration and litigation.²⁴

A closer look at the SemiCo case study also reveals significant success. The Standing Neutral program has been in place for over six years, with only one incident using the pre-described arbitration process and outside counsel. For comparison, before the Standing Neutral program, two of SemiCo’s larger construction contracts suffered from a stifling stack of claims. One project had \$30 million in claims on a \$220 million project, and a second had \$50 million in claims on a \$1.3 billion project. Some claims took over five years to settle, with one particularly pesky claim going to a six-week trial. While the case settled outside of court in three weeks, SemiCo spent over \$15 million in outside legal fees, expert opinions, and discovery costs. And that \$15 million did not include the internal cost or the employee’s time redirected to support the litigation.

By 2022, the Standing Neutral program grew to include five prime contractors spanning almost \$20b in large and complex projects. Since the program started, there has been only one claim escalated to the pre-described, post-project formal arbitration process. Prior to the program, team members described the dispute resolution process as “painful and protracted” and as a “complete and utter waste of precious time and resources.” Today team members use words like “fast and fair” and “a smart process that should become an industry standard.”

Non-Cost Benefits of Using a Standing Neutral

The following outlines many of the common-sense non-cost benefits from using a Standing Neutral.

Reduced Time to Resolve Issues

Common sense indicates the longer it takes to resolve a disagreement, the more emotionally attached an organization gets to their “position.” And the longer the issue goes on, the greater the costs – especially for those issues that turn into a formal dispute or litigation. As such, the primary benefit of deploying a Standing Neutral is a significant reduction in the time to resolve an issue.



Improved Clarity and Alignment

A Standing Neutral can improve clarity and alignment – especially when used during the pre-contract phase of a relationship. Let's take the case of Telia – the Swedish Telcom who used a Standing Neutral for implementing a Vested outsourcing agreement with their supplier Veolia. The outsourcing agreement was vast – spanning multiple facilities and maintenance services in over 16,000 locations across the Nordics. The Standing Neutral helped the parties to fairly define the scope and baseline of the agreement and clearly articulate the desired outcomes, objectives and measures included in the actual contract.

Improved Collaboration and Trust

The third benefit is hard to quantify: the value of increased collaboration and trust due to more proactive and preventive communications. Using a Standing Neutral helps preserve cooperative relationships between the contracting parties. A Standing Neutral is used very early when parties are in misalignment. The highly collaborative nature allows the parties to construct their own solutions to problems, strengthening their relationship and creating trust and confidence. In short, it helps teach the organizations how to use transparency and fact-based problem-solving versus more conventional negotiation approaches when looking at differences in opinion.



CONCLUSION: THE MAKING OF A MOVEMENT

Louis Brown is credited as the founding father of “preventive law.” His early work inspired a growing cadre of followers who have researched and expanded on every facet of the concept of preventing disputes. Today there is a clear and unmistakable evolving trend toward incorporating proactive approaches for preventing and managing disputes into all business relationships. This recent trend is aptly termed “the Prevention Movement.”

The use of a Standing Neutral in business relationships – especially a modern Standing Neutral who focuses on helping the parties stay in continual alignment – proves the adage “An ounce of prevention is worth a pound of cure.”

While there are skeptics, the Prevention Movement is taking hold as evidenced at the 2017-2018 Global Pound Conferences held worldwide. During the conference major stakeholders in the dispute resolution field (users of dispute resolution services, their advisors and lawyers, providers of both adjudicatory and non-adjudicatory services, and the researchers and educators who influence the users of dispute resolution services) revealed the following consensus:

- Dispute resolution should be conceived and practiced earlier in the trajectory of risks that can develop into conflict, escalating from differences of opinion to arguments, aggression, and finally disputes that have to be dealt with through formal dispute resolution efforts
- Pre-dispute or pre-escalation techniques are the most promising and valuable methods for improving the future of dispute resolution and should prevent disputes
- Where possible, risks should be understood and addressed in advance so problems never arise
- Where efforts to prevent problems fail, steps should be initiated to deescalated, contain, or provide “real-time” resolution of conflicts so the costs, hostilities and delays of formal dispute resolution can be avoided.

The conclusions from the Global Pound Conferences demonstrate that the Prevention Movement is no longer just an aspiration of a few visionaries, but one seen as needed in today’s modern economy.

Our goal for this paper was to educate and inspire practitioners to shift their lens from dispute resolution to dispute prevention by adopting a Standing Neutral. We hope the examples we have shared inspire how a Standing Neutral can be incorporated into all facets of a business relationship – ranging from pre-contract signing all the way through formal dispute resolution techniques much more effective than traditional mediation and arbitration.

We challenge you to join the Prevention Movement and incorporate a Standing Neutral into your strategic relationships. To learn more, read on in the Appendix for a deeper dive.



APPENDIX 1: SAMPLE LANGUAGE FOR SELECTING STANDING NEUTRAL SERVICES

The parties will, either in their contract or immediately after entering into their contractual relationship, designate a Standing Neutral who will be available to the parties to assist and recommend to the parties the resolution of any disagreements or dispute which may arise between the parties during the course of the relationship.

Appointment and Roles. The neutral will be selected mutually by the parties. The neutral should be experienced with the kind of business involved in the parties' relationship, and should have no conflicts of interest with either of the parties. The neutral will have the following roles and authority (leverage Figure 1 with the nine design principles)

Briefing of the Neutral. The parties will initially brief the neutral about the nature, scope and purposes of their business relationship and equip the neutral with copies of basic contract documents. In order to keep the neutral posted on the progress of the business relationship, the parties will furnish the neutral periodically with routine management reports, and may occasionally invite the neutral to meet with the parties, with the frequency of meetings dependent on the nature and progress of the business venture.

Dispute resolution. Any disputes arising between the parties preferably should be resolved by the parties themselves, but if the parties cannot resolve a dispute, they will promptly submit it to the neutral for resolution.

Conduct of hearing and recommendation. As soon as a dispute is submitted to the neutral, the neutral will set an early date for a hearing at which each party will be given an opportunity to present evidence. The proceedings should be informal, although the parties can keep a formal record if desired. The parties may have representatives at the hearing. The neutral may ask questions of the parties and witnesses, but should not during the hearing express any opinion concerning the merits of any facet of the matter under consideration. After the hearing the neutral will deliberate and promptly issue a written reasoned recommendation on the dispute.

Acceptance or rejection of recommendation.

Within two weeks of receiving the recommendation, each party will respond by either accepting or rejecting the neutral's recommendation. Failure to respond means that the party accepts the recommendation. If the dispute remains unresolved, either party may appeal back to the neutral, or resort to other methods of settlement, including arbitration (if agreed upon by the parties as their binding method of dispute resolution) or litigation. If a party resorts to arbitration or litigation, all records submitted to the neutral and the written recommendation will be admissible as evidence in the proceeding.

Fees and expenses. The neutral shall be compensated at his or her customary hourly rate of compensation, and the neutral's compensation and other reasonable costs shall be shared equally by the parties.

Succession. If the neutral becomes unable to serve, or if the parties mutually agree to terminate the services of the neutral, then the parties will choose a successor Standing Neutral.



ABOUT THE AUTHORS



Kate Vitasek is an international authority for her award-winning research and Vested® business model for highly collaborative relationships. Vitasek, a Faculty member at the University of Tennessee, has been lauded by *World Trade Magazine* as one of the “Fabulous 50+1” most influential people affecting global commerce. Her work has led to 7 books including *Vested: How P&G, McDonald’s and Microsoft Are Redefining Winning in Business Relationships* and *Getting to We: Negotiating Agreements for Highly Collaborative Relationships*. Vitasek is known for her practical and research-based advice for driving transformation and innovation through highly collaborative and strategic partnerships. She has appeared on Bloomberg, CNN International, NPR, and Fox Business News.



James P. Groton is a retired partner of the Atlanta law firm of Sutherland, Asbill and Brennan (now known as Eversheds-Sutherland LLC), where he headed its Construction and Dispute Prevention and Resolution practice groups. Groton has conducted research and written extensively on processes used in the construction industry and other relationship-based businesses to prevent and de-escalate disputes (see www.jimgroton.com). In his work for the Global Pound Conference (see www.jimgroton.com) he advocated for broader use of these processes. He holds degrees from Princeton University and the University of Virginia Law School.



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Howard Carsman retired from Intel Corporation in 2022 as its Global Construction Claims Manager. Prior to his time at Intel, he practiced construction law in Portland, Oregon, for 35 years, where he served as an arbitrator and mediator for construction and insurance disputes. He now lives in Salt Lake City, Utah, where, in between fly fishing and skiing, he provides consulting services on the design and deployment of dispute management programs for construction projects and capital programs.

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FOR MORE INFORMATION

The University of Tennessee is highly regarded for its Graduate and Executive Education programs. Ranked #1 in the world in supply chain management research, researchers have authored seven books on the Vested business model and its application in strategic sourcing.



We encourage you to read the books on Vested, which can be found at most online book retailers (e.g., Amazon, Barnes and Noble) or at www.vestedway.com/books.

For those wanting to dig deeper, UT offers a blend of onsite and online courses including a capstone course where individuals get a chance to put the Vested theory in practice. Course content is designed to align to where you are in your journey ranging from Awareness to Mastery. For additional information, visit the University of Tennessee's website dedicated to the Vested business model at <http://www.vestedway.com/> where you can learn more about our Executive Education courses in the Certified Deal Architect program. You can also visit our research library and download case studies, white papers and resources. For more information, contact kvitasek@utk.edu.



* Prerequisites for *Creating a Vested Agreement* class are:

Five Rules, Is Vested Right?, Getting Ready, and the Vested 3-Day Executive Education Course



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ENDNOTES

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²¹ Based on median hourly rates (\$300 for the senior attorney on the case, \$195 for the junior attorney, and \$110 for the paralegal) at the median amount of time on case (375 hours) = \$82,515. Plus \$5,000 on expert witnesses. Plus, court filing fees, copying, and other costs.

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