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ADR NEUTRALS

Business needs to make more effective use of the standing neutral. The concept of a trusted neutral overseer isn't new, but it's not as well known as it should be, writes **James P. Groton**, of Atlanta. The mere presence of a standing neutral has an effect on the parties' negotiating stance—frequently heading off conflicts before they blow up. A sample agreement form is provided..... **Page 177**

CPR NEWS

The full list of contributors for last month's Corporate Leadership Award Dinner is provided, as well as the remarks on ADR's value to business by the honorees, Dupont's **Thomas L. Sager**, and Pfizer's **Amy W. Schulman** **Page 178**

WORLDLY PERSPECTIVES

The international ADR profile column by **Giuseppe De Palo**, of Rome, and **Mary B. Trevor**, of St. Paul, Minn., this month visits Syria. They provide the scoop on internal business and conflict resolution developments that many outsiders don't know about **Page 179**

ADR BRIEFS

Riccardo Buizza, of Milan, Italy, updates the status of legislation on new Italian class action and mediation laws. Also: a new Texas-sponsored hurricane relief mediation program opens..... **Page 185**

DEPARTMENTS

CPR News..... **Page 178**
Subscription Info..... **Page 178**
ADR Briefs..... **Page 185**
Cartoon by Chase..... **Page 186**



INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION

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The Standing Neutral: A 'Real Time' Resolution Procedure that also Can Prevent Disputes

BY JAMES P. GROTON

Any business that is spending large sums of money litigating, arbitrating or mediating business-to-business disputes would be wise to consider investing a small amount of time and money up front to achieve "real time" resolution of those disputes through use of a standing neutral as an element in structuring contractual relationships.

The standing neutral process is one of several techniques developed in the construction industry to keep the peace on construction projects. It has achieved remarkable success in keeping disputes from disrupting continuing business operations. It practically guarantees that any disputes that develop between contracting parties will be resolved promptly and economically. It also has turned out to have the beneficial side effect of reducing—and frequently eliminating—disputes, as well as helping to maintain good relations between contracting parties.

This particular ADR process, although relatively unknown in the business world, should be ideally suited to controlling and preventing disputes in many other kinds of contracting relationships and corporate governance settings.

A standing neutral is simply a trusted neutral expert selected by the parties at the beginning of their contracting relationship to be readily available throughout the life

of the relationship to assist in the prompt resolution of any disputes. The primary objective in appointing a standing neutral is to get disputes resolved economically at the earliest possible time, while facts are fresh, so that the parties can continue with their business relationship.

This article will first review how the standing neutral real-time dispute resolution process is created, and how it works in resolving disputes promptly. Next it will explore some of the side effects and unexpected dividends that this process can produce because it leads the parties into

dealing with each other realistically, fairly and constructively—thus actually helping to reduce or entirely eliminate disputes.

The result of the process almost invariably is to convert what initially appears on the surface to be simply a method for immediately resolving disputes into a remarkably effective dispute reduction and prevention device.

TYPICAL CREATION STEPS

There can be a number of variations of the standing neutral concept, but in its simplest form it involves the following typical steps:

Selection. At the outset of a business relationship, usually when the parties enter into their contract, they select a neutral expert person in whom they have trust and confidence to serve as their dispute resolver throughout the course of their relationship.

Briefing. The neutral initially is given



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(continued on page 181)

The Standing Neutral

(continued from page 177)

a basic briefing on the nature, scope, and purpose of the business relationship, and equipped with the basic contractual documents that define the relationship.

Continuing Involvement. The neutral is kept informed on a continuing basis about how the parties' relationship is progressing. The neutral may be invited to meet occasionally with the parties to get a better feel for the parties' relationship even if there are no disputes to be dealt with at the time. The neutral may be asked on occasion to give an advisory opinion to the parties on some forthcoming action.

Dispute Resolution. If the parties have a dispute that they are unable to resolve by themselves, that dispute is immediately referred to the neutral for an informal hearing and a prompt, reasoned, written nonbinding recommendation.

Admissibility of Recommendation. In the event that a party wishes to challenge the neutral's nonbinding recommendation, that recommendation will typically be admissible as evidence in any subsequent arbitration or litigation.

Costs. The expenses of the neutral are generally absorbed equally by the parties.

An illustration of how the typical process for establishing a standing neutral is implemented in the context of a contracting relationship is described in some detail in the sample "Form of Agreement for Standing Neutral." [See box on page 184.]

ADAPTING THE PROCESS

Dispute prevention and resolution processes ideally should be adapted to the parties' particular needs and relationship. The standing neutral process is versatile; it can be modified easily to suit the parties' needs and preferences. Some of the variations that are possible are listed below; the parties may well create other variations.

Number. If the resolution of disputes arising out of the underlying contractual relationship could require experience in different disciplines, and if the parties consider the additional expense justified, they can select as their neutral a board of three persons with a wide range of expertise. (This is commonly done in the construction industry on multi-disciplinary projects.)

Degree of Neutral's Involvement. There are advantages to having the neutral continually available and involved to some degree with the parties' activities. Nevertheless, depending on the circumstances, the perceived dispute prevention and resolution demands of the particular enterprise, and the amount of resources the parties wish to expend on the process, the parties can specify whether the neutral will have

role is preferred. A facilitative or mediated process that calls for mutual agreement is considered too slow and uncertain for the construction process. But other business relationships may not require the kind of speed or certainty in their dispute resolution mechanisms that a construction project does. So they may well prefer a more facilitative resolution method.

Neutral's Factfinding Latitude. In cases where the neutral's role is to make a decision or recommendation, whether nonbinding or binding, the neutral may be given any of a wide range of possible degrees of latitude in making his or her determination, such as the ability to hire outside experts, or make a personal investigation—as distinguished from merely receiving information and evidence produced by the parties. Or the parties could agree to frame the issues to be determined by the neutral in a "baseball arbitration" format, where the neutral must choose between two alternative proposals made by two parties

Whether the Recommendation Should be Nonbinding or Binding. The typical standing neutral practice of a nonbinding recommendation, coupled with the fact that that such recommendations generally involve only entitlement and not quantum, reduces the adversarial aspects of the process. The nonbinding approach gives the parties the opportunity to take charge of the dispute resolution process themselves after receiving the recommendation by negotiating the final resolution. It then becomes "their" solution rather than one imposed by a third party.

If the parties decide to have a binding decision and shift ultimate control of the dispute to a third party, lawyers are likely to become involved, tending to add expense, delay, and escalated adversarial attitudes. Nevertheless, in some situations the parties may consider that having an immediately binding decision is worth the risk of escalating adversarial relationships. Also, some parties may feel that it is necessary to have a requirement for a binding decision in order to make the process robust enough to withstand the unusual pressures that can be exerted on the process by high-stake disputes that might threaten the economic future of one or both parties.

Variation of a Nonbinding Recommendation. The parties can elect whether, if the neutral renders a nonbinding recommendation, (continued on next page)

Effective—and 'Unknown'

The practice: Hire a 'wise uncle' to oversee the disputes you expect your project to generate.

A key effect: The standing neutral's mere presence as part of the deal pushes parties to better relationships that frequently eliminate disputes.

So why not? It's an ADR process that a lot of sophisticated business people don't know exists.

fairly close and continuous involvement with the parties, or have only occasional contact, or serve merely in a standby role.

Dispute Resolution Role. The neutral's dispute resolution role, if called on for assistance after a disagreement has arisen, could fall anywhere along a wide spectrum of nonbinding and binding functions. These functions could range from serving in a strictly facilitative capacity (such as acting as a standing mediator), to an expert advisory role (such as rendering a professional advisory opinion on a technical or specialized matter). Or the neutral could take a broader advisory or adjudicative role (rendering either a nonbinding recommendation or a binding decision).

Facilitative vs. Adjudicative Role. Whether the neutral should have a facilitative or adjudicative role depends upon the degree of speed and certainty that the parties seek. In the construction industry, where the parties need an objective reality check to achieve early resolution of a problem so that construction can proceed without delay or uncertainty, an adjudicative

The Standing Neutral

(continued from page 181)

mentation, that recommendation should be admissible in a later arbitration or litigation.

Variation of a Binding Decision. The parties can elect whether the decision of the neutral will be immediately final and binding, or binding only until the decision is overturned by a later arbitration or litigation.

There can be an infinite variety of modifications to the standing neutral process to adapt it to meet the parties' needs. By carefully calibrating such changes the parties can mold the process to achieve their dispute resolution goals. But in making these adaptations, the parties would be well advised to keep in mind the three critical elements that have been shown to be essential to the proper functioning and success of any standing neutral process:

1. Early mutual selection and confidence in the neutral;
2. Continuing involvement of the neutral, and
3. Prompt action on any submitted disputes.

EMPIRICAL EXPERIENCE

Potential users of a new process such as the standing neutral need to be convinced that it actually has worked in practice, and that there is sufficient likelihood that it will achieve a beneficial reduction in disputes and dispute resolution costs to justify the initial investment of effort, time and money.

The standing neutral process has been in use for almost 35 years. There is a great deal of empirical evidence of its benefits. Most of this experience has been in the construction industry where, because of the technical nature of construction, the "neutral" is typically a three-person panel of expert construction professionals selected by the parties, called a Dispute Review Board, or Dispute Resolution Board—the DRB—or simply Dispute Board ("DB").

Based on empirical data from years of construction industry experience, it can be said that the standing neutral, as exemplified by the DRB, has proved to be by far the single most effective approach that has yet been developed for early resolution of disputes.

Worldwide DRB Use. Since the first DRB was created in 1975, thousands

have been used on construction projects. Worldwide DRB use is growing in excess of 15% per year, and through the end of 2006 it was estimated that more than 2,000 construction projects with a total value in excess of \$100 billion had used some form of DRB. See Dispute Resolution Board Foundation Manual (2007) 1.3, page 3; see also www.drb.org/manual_access.htm for information on the DRB Foundation's database.

DRB Foundation Data. According to a data base of more than 1,200 projects maintained by the DRB Foundation,

- 58% of the projects were "dispute free," with no disputes submitted to the DRB.
- 98.7% of the disputes that were submitted to a DRB for hearing resulted in settlement of the dispute with no subsequent litigation or arbitration.
- Most of the small handful of cases where a party has challenged a DRB decision in arbitration or litigation are either not pursued to conclusion, or fail.

ASCE study. In 1994, the American Society of Civil Engineers conducted a study of 166 projects with DRBs. Those DRBs heard 225 disputes, and resolved 208. The only dispute that actually proceeded to litigation was eventually settled. "Industry Pounds Away at Disputes," *Engineering News-Record* 24 (July 11, 1994).

Costs. In view of the simplicity of the standing neutral process, it is obvious that even though some initial expense is involved in the process of selecting, appointing, initially orienting, and periodically keeping the neutral informed about the relationship, the costs are relatively minimal, even in those rare cases where the neutral has to be called on to resolve disputes. This is true even especially when compared to the potential costs of resolving a dispute in litigation, arbitration, or even mediation.

The following empirical data from the Dispute Resolution Board Foundation, and two of the author's personal experiences, illustrate how modest standing neutral costs can be, especially when compared to the potential costs of resolving a dispute in litigation, arbitration, or even mediation:

1. According to the Foundation's records of thousands of DRBs, DRBs are remarkably inexpensive, even though they

are three-member, rather than one-member, panels. DRB members typically charge an hourly rate commensurate with their experience. These charges and out-of-pocket expenses are typically split between the parties. DRB agreements require that expenses be reasonable and well documented. According to the Foundation, total costs for a three-member DRB range from about .05% of final construction contract cost for a relatively disputes-free project, to about .25% for so-called "difficult" projects with a number of disputes and DRB hearings. Dispute Resolution Board Foundation Manual (2007) 1.4.2, page 3.

2. In 1991 and 1992, this author participated in a Construction Industry Institute study of a three-person DRB on a \$20 million office building project near Atlanta. The board received monthly reports, including progress photos, and met at the project site for half a day every two months during construction. The parties resolved all potential disputes, so there were no DRB hearings. The total DRB cost was \$7,000—.04% of the construction cost. Construction Dispute Review Board Manual (1995), page 117.

3. In 1992 the owner of a home renovation project who had attended a CPR Institute lecture on DRBs by the author suggested to her contractor that they engage a local architect to serve as their standing neutral to resolve any dispute on the project that the parties could not resolve within 48 hours. They paid the architect a retainer fee of \$100. No disputes were ever referred to the architect.

As demonstrated by the preceding information, perhaps the greatest source of cost savings in relationships that use a standing neutral is the virtually certain reduction, and possibly total elimination, of disputes.

REASONS FOR SUCCESS

Based on many years of experience and various studies about the uses and applications of standing neutrals, typically in the form of DRBs, the following observations and evaluations can be made about the dispute resolution advantages to contracting parties that have been and can be achieved by establishing and using a standing neutral:

1. *Resolution is promptly achieved, because:*

- The appointment of the neutral before any disputes have arisen avoids the usual delays and problems where neutrals have to be identified, selected and appointed after a dispute has developed.
 - The neutral's immediate availability, familiarity with the progress and current status of the underlying business avoids learning curve problems.
 - The facts are fresh and all relevant witnesses are readily available, so there is no need for discovery.
2. *The quality of the recommendation is superior, because:*
 - The neutral was voluntarily selected by the parties because of their trust and respect for the neutral.
 - The neutral has expertise in the subject matter of the parties' business.
 - The neutral has the benefit of familiarity, continuity and accumulated experience with the parties' business relationship.
 - The parties are more likely to accept the recommendation as fair because they have confidence in the neutral's expertise, knowledge and integrity.
 3. *The recommendation achieves immediate practical and economic benefits because:*
 - The dispute is resolved before it becomes adversarial.
 - The disruptive effects on business efficiency of deferred and accumulated unresolved disputes are avoided.
 - The parties save money because the dispute resolution process is efficient and the parties share the costs between them.
 - The heavy expenses, uncertainties and risks to the parties of litigation and arbitration proceedings are avoided.
 4. *The process improves attitudes and performance of the parties because:*
 - It requires the parties to identify problems early and deal with them promptly.
 - It encourages the parties to evaluate their positions realistically.
 - It encourages straightforward dealing and discourages game-playing and posturing.
 - The certainty that every problem will be dealt with promptly and fairly by the neutral usually encourages the parties to seek a mutual solution to their problem without even involving the neutral.

COLLATERAL DIVIDENDS

The last-mentioned advantage—the tendency of the parties to resolve their problems themselves rather than taking them to the neutral—has turned out to be an unforeseen and serendipitous byproduct of the standing neutral process. It is also one of the best-kept secrets about this process.

Statistics and documented reports on the business relationships and construction projects that have used standing neutrals reveal that when a standing neutral is in existence, the parties submit relatively few disputes to the neutral. In most cases, the parties have resolved all problems themselves without ever referring any dispute to the neutral.

What explains this phenomenon?

One construction industry group that monitored the track record of dispute review boards for many years has explained the psychological effect that a standing neutral can have on the parties:

Experience has shown that the very existence of a DRB fosters a cooperative relationship between the parties and often provides the impetus for settlement of disputes without formally taking them to the DRB. The knowledge that trustworthy experts are familiar with the project and will recommend a fair settlement reduces the posturing and gamesmanship that occurs in conventional dispute resolution processes. If a dispute develops, neither party will be inclined to engage in a battle of wits which might possibly prevail in courts but could hardly deceive an experienced board.

“Avoiding and Resolving Disputes During Construction,” Technical Committee on Contracting Practices of the Underground Technology Research Council, American Society of Civil Engineers (1991).

Another investigator of the DRB process has commented on the boards' preventive aspects:

The preventive component of the concept stems from the fact that Boards are required to meet regularly from the start to the end of the project regardless of whether or not there are any disputes. The prospect, or threat, of an upcoming visit forces the disputants

to meet and attempt to resolve issues so they need not be raised during the Board visit. This paces the process and ensures that the parties involved keep working to resolve differences in opinion and effectively eliminates unnecessary delaying tactics. The standing and status of the Board members together with the knowledge they accumulate during successive visits ensures that issues raised have merit and eliminates speculative ventures.

“Dispute Review Boards—Not Just Another Alternative Dispute Resolution Method,” M. C. Vorster, Construction Industry Institute (1992).

CREATING A NEW ATMOSPHERE

The establishment of a standing neutral—which appears at first to be merely an efficient technique for achieving early resolution of disputes—creates a dynamic situation in which the participants in the business enterprise change their relationship and their attitudes toward each other.

The changes usually are an evolution, rather than a conscious effort. At first the parties may feel that they are simply choosing an expert neutral mechanism for resolving contests between them promptly. But as the neutral begins to become more familiar with the business enterprise and interact with the parties, and as the parties develop a greater sense of confidence in the neutral and his or her ability to move quickly to resolve any disputes, the parties become more conscious of the neutral's competence.

As the business relationship progresses, the parties are unconsciously influenced by their perceptions of how the neutral would react to their conduct during the course of their business relationship. This causes the parties to temper their actions and attitudes. These changes can, by themselves, reduce tensions and eliminate the causes of some disputes.

Then, when problems and disagreements occur, each party, being conscious of the neutral's existence and “omnipresence,” tends to go through the following thought processes:

“If my negotiations with my opposite party this week are not successful, then next week our disagreement will be pre-
(continued on next page)

The Standing Neutral

(continued from page 183)

sented to the neutral. I know that this expert and respected neutral, when presented with the dispute, will seek out all the facts, analyze them objectively, reach an informed conclusion as to the source of the problem, and will promptly make a fair recommendation of a solution.

"Both my opposite party and I know that the neutral, being an experienced

professional familiar with the business relationship, will not be influenced by game-playing, stonewalling, bluffing or posturing by either of the parties. In fact the neutral is likely to lose confidence in any party who engages in such tactics. Therefore I should try not to use such tactics with my opposite party; and if he or she tries to use such tactics on me, I can frustrate them by simply referring the dispute directly to the neutral for a prompt hearing and decision.

"Under the circumstances the smartest thing I can do is to deal with the dispute and with my opposite party in the same way that the neutral would deal with the dispute, that is realistically, objectively and fairly."

When both parties go through these thought processes, they end up dealing with each other in a realistic, objective and fair manner, and almost invariably reach agreement among themselves, without having to refer any disputes to the neutral.

Form of Agreement for the Standing Neutral

Here are typical clauses that parties can use to establish a standing neutral process:

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. 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.

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 should preferably 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 has been submitted to the neutral, the neutral will set an early date for a hearing at which each party will be given an opportu-

nity 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.

* * *

The language above outlines the most basic kind of Standing Neutral arrangement. If the parties have any special wishes concerning the Standing Neutral's role, or any special procedures that they wish to follow regarding referral of disagreements or disputes to the neutral, they can include them at this point in the agreement. If the parties wish to incorporate and adapt a standard set of procedures into the agreement, they can insert the following language, which refers to a standard set of American Arbitration Association Guide Specifications for construction projects (which are available at www.adr.org/sp.asp?id=28761):

Reference Procedures. The procedures for resolution of disputes by the neutral shall in general follow those established by the Dispute Resolution Board Guide Specifications of the American Arbitration Association, dated Dec. 1, 2000, using Section 1.02D, the Alternative Procedure for Selection of a Single-Member Board, substituting "the Standing Neutral" in every place where there is a reference to the Board; treating every reference to "the Contract" as a reference to "the contract relationship between the parties;" and, in every case where there is a reference to such matters as "construction activity," "job site," "plans, specifications, drawings, contract documents" or other terms peculiar to the construction industry, applying those procedures to activities under the contract relationship between the parties. 

Through such a cooperative process they tend to develop mutual respect, trust and confidence in each other.

Because of the parties' mutual selection and respect for the expertise and integrity of the neutral, the neutral generally acquires a special status in the eyes of both parties. Regardless of the particular role that the parties have assigned the neutral to perform, the neutral may come to be regarded by the parties as, variously, a source of reason, a voice of wisdom, a person of authority, an expert impartial resource, and a calming influence. Or they may see the standing neutral as someone who can provide much-needed "adult supervision." It has even been said that a good standing neutral is sometimes looked on as a wise uncle, or "grandfather." Or a "mensch." These intangible characteristics have much to do with the success of the standing neutral concept.

Therefore, just the mere existence of the neutral can create an unusually therapeutic and prophylactic effect on the parties' relationship.

The dynamics of the standing neutral process encourages the parties to deal fairly with each other. The parties are propelled into a problem-solving, cooperative, almost "partnering" kind of relationship. This transformation in attitudes between parties—who originally may have sought merely to find an expeditious way to resolve disputes—into a relationship of trust and confidence, is one of the most promising side effects of the standing neutral process.

* * *

The standing neutral is the most successful and versatile of the many innovative techniques that the construction industry has developed to "keep the peace" on a "real time" basis during the course of a construction project.

Its immediate objective is to provide a method for the earliest possible resolution of any disputes between the parties and keep disagreements from escalating into

disputes that would require more formal and expensive dispute resolution processes. But it also helps to preserve cooperative relationships between the contracting parties. It has the collateral beneficial effect of reducing—and perhaps totally eliminating—disputes between contracting parties. In short, the standing neutral concept is one of the best examples of the old adage, "An ounce of prevention is worth a pound of cure."

It is an ideal dispute prevention and resolution device to use in any continuing long-term contractual relationship between businesses, such as joint ventures, outsourcing relationships, and long-term supply or service contracts. It also could have a role in improving corporate governance relationships. Businesses are urged to use this process imaginatively, and to share their experiences with their peers. ■

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ADR BRIEFS • ADR BRIEFS • ADR BRIEFS

TEXAS LAUNCHES NEW HURRICANE INSURANCE MEDIATION PROGRAM

BY RUSS BLEEMER & ERICA JAFFE

A year after Hurricane Ike landed near Galveston Island, Texas, the state's insurance department has launched a pilot mediation program.

The program is off to a slow start, and Linda Olden-Smith, the executive director of an ADR provider firm that won the contract to administer the program, isn't happy. She has vowed to take on the promotion tasks that she says the state isn't doing, in order to encourage more property owners to make mediation claims.

The insurance department's move to deal with the Sept. 13, 2008, storm's destruction focuses ADR on claims by residential property owners against their insurers.

Three marquee insurers—Los Angeles-

based Farmers Insurance Co., AAA-Texas, of Irving, Texas, and Allstate Insurance Co., of Northbrook, Ill.—volunteered

Disaster Mediation, Again

The program: Texas's state insurance department awards a provider contract for a pilot program with three insurance companies.

The claims: Residential property damage in the wake of September 2008's massive Hurricane Ike.

The startup: Slow going. The provider vows to push the program. Other insurers could join later.

erty insurance writers are not part of the program. The participants, according to a *Houston Chronicle* article, only account for slightly more than one-quarter of the state's property insurance. Purva Patel, "Free State Program Helps with Ike," *Houston Chronicle* (Nov. 5, 2009)(available at www.chron.com/disp/story.mpl/headline/biz/6703990.html).

The state awarded the program administration contract to Truce Dispute Resolution Firm LLC, of Frisco, Texas—just north of Dallas—after issuing last spring a 45-pge RFP estimating that 20,000 insurance claims had been filed.

Truce Executive Director Linda Olden-Smith says the state told Truce to be ready for about 1,300 monthly mediations, and she says the firm has 165 trained mediators ready. Truce, she says, was "expecting a lot of cases."

It hasn't started out that way. Smith says that at press time last month, since the Sept. 1 program launch, Truce had mediated three cases, all of which resolved.

The slow start is characteristic of other (continued on next page)

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to participate in the mediation program, which also is voluntary for policyholders.

Still, the majority of the state's prop-