

# Forum

## DRBs & Partnering—The Working Relationships Between DRBs and Facilitators

by

**Tom Brascher and Marsha Bailey  
Team Technologies, Olympia, WA  
and ADRWorks, Inc., Sacramento, CA**

**“The role of a partnering facilitator is to lead process and discussions effectively. . . . The role of the DRB is to advocate and lead the issue resolution process with the project team.”**

More and more DRBs are being implemented on projects that are also incorporating partnering. With the growth of the Dispute Review Board process and use in more public works contracts, partnering and DRBs, combined, offer an unprecedented opportunity for dispute prevention and resolution.

The relationship between the DRB panel and Partnering strategies provide an ideal situation for a project team to bring out the best in both management tools. The partnering facilitator manages team process while the DRB manages content of issues. Clearly defining and separating out the different focus of process and content is critical.

DRBs and partnering facilitators need to understand each other’s roles and responsibilities, and then work together as a team to educate and optimize the use of both systems.

The collective goal is to help the project manager team on the job achieve a successful project without any unresolved claims at contract completion.

The Partnering process is the ideal strategy to develop professional trust/respect relationships. Implementing partnering on a job creates the environment to optimize the use of the DRB panel to resolve issues as they occur on the job. The direct result of this is a project team that makes timely and fair decisions on disputed issues. Timely issue resolution helps keep the change order process current and cash flow healthy for the project parties.

Combining partnering and DRBs seems so straightforward and self evident, it has been a puzzle to industry advocates why there is such great resistance to partnering, DRBs and/or both on jobs. The fast answer most often heard is: “The processes are too expensive!”

In addition, both partnering and DRBs suffer from the “I know what it is,” (but I

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# President's Page

With just a few months to go before our Annual Meeting in Orlando, Florida, I'd like to take the opportunity to review some of the actions taken by the Foundation since our last Annual Meeting in Las Vegas:

- Broadened our Board of Directors to properly reflect our International constituency
- Redesigned the website (www.drb.org)
- Changed our name to the Dispute Resolution Board Foundation
- Appointed a Membership Director and created a Global Member Acquisition Network
- Increased and refined our Training Programs
- Finalized our new Logo
- Perpetuated the Annual "Al Mathews Award"
- Created "on-line" BIOS for our members
- Drafted a "Code of Ethics" planned to be adopted at the Annual Meeting

All of these initiatives have helped position the Foundation to achieve its goal of furthering the use of DRBs worldwide.

At our very successful International Annual Meeting in Rome, Italy, this past May, the message from the attendees was that the use of DRBs is growing not only in Asia, but is spreading to European countries as well. We had over 60 attendees from 16 countries. One of the attendees, and now new member, was the retired Chief Justice of the Pakistani Supreme Court. Mr. Justice Khan's interest in the DRB process caused the convening of over 100 interested State Officials at a meeting on June 29th in Islamabad to examine how to increase DRB usage in Pakistan.

As our membership increases (and our income increases), we will be able to continue our growth and Member Benefits.

It is always appropriate to remind each of our Members, that we are a volunteer organization, and our energy source is the time, commitment and creativity of our membership. Please be sure that you are contributing to our cause and goals!

**Jack**

Jack J. Woolf  
Phone: 704 541 0065  
Fax: 704 544 2859  
Email: jjwoolfconstsol@aol.com

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**Editor: Larry V. Rogers**

Editorial and subscription address: Dispute Resolution Board Foundation, 6100 Southcenter Blvd., Suite 115, Seattle, WA 98188-2441, 206-248-6156 206-248-6453 (FAX) Toll free (US only) (888) 523-5208, E-mail: home@drb.org. Web site: www.drb.org

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## From the Editor

We have talked a great deal in the workshops over the past two years about the interplay between DRBs and partnering. Tom Brascher provides us with an analysis from the partnering perspective in this issue of the *Forum*.

When Peter Chapman puts on a conference you had better hang on to your hat. Reading the report on the International Conference in Rome it is hard to believe that it all took place in just one day. It is good to see that the international meetings are becoming as popular as the annual meetings here in the US. You should strongly consider going to next year's international meeting where ever it will be held.

Steve Fox, incoming President Brison Shipley and the Board are hard at work on the 6th Annual Meeting and Conference in Orlando. Now is a good time to make your plane reservations. It is amazingly inexpensive to fly to Orlando right now. Brison has created another great program..

Information about the conference and a registration form is in the special pull-out section of this *Forum*.

Another thing that has been needed for some time is a Code of Ethics and Brison has provided one for your review. Please take time to read it and the accompanying comments and be sure to send Brison your comments. We really do want your ideas.

Most of you are aware that Kathleen Harmon has been working on her dissertation concerning DRBs. Please be sure to fill out and return the survey that will be coming to you in August. We really need to start the process of developing empirical data concerning the cost savings associated with DRBs so that we can do a better job of convincing people to use them.

See you in Orlando. □

**Larry Rogers**

## Letters and E-mail to the DRBF

### Growing Interest in DRBs in Europe

This is to inform the readers of the DRB Foundation journal that the DRB procedures are interesting more and more practitioners in Europe, in common law countries as well as in civil law countries. I have been asked to speak in 3 recent conferences which may be worth mentioning:

1. The International Construction Law Conference in London on 25/26 March 2002, organised by Judge Humphrey Lloyd QC and David Wightman. The topic presented was "The Growing Interest in Dispute Boards in International Contracts."
2. The conference of the "Swiss As-

sociation of Lawyers & Advocates" in Lausanne on 7/8 June 2002. The topic was "La procédure des Disputes Boards" (The Procedure of Dispute Boards).

3. The ICC has issued at the intention of the National Committee the "Report on the Introduction of ICC of Dispute Boards in the Prevention and Resolution of Disputes."

**Pierre M. Genton**

# A Proposed Code of Ethics for Dispute Resolution Board Members

by  
**Brison Shhipley**

Since the annual meeting last October in Las Vegas, the DRBF has been developing a draft Code of Ethics for DRB members and chairpersons. The notes taken during the break-out sessions in October were reviewed, along with (1) the DRB Guide Specification and Three-Party Agreement found in the DRB Manual, (2) the Code of Ethics for Arbitrators in Commercial Disputes (American Arbitration Association), and (3) a code developed with DRBs specifically in mind by the American Consulting Engineers Council of New England. With respect to the latter, a subcommittee headed by Gary Brierley conducted a thorough review of other ethical codes developed for not only arbitrators, but attorneys and judges as well. The text of that code is reprinted nearby.

A few comments: The principles enunciated in the draft DRBF code can all be found in different places in the Guide Specifications and Three-Party Agreement. They are set forth in the Code as simple, broad statements. Those members who are familiar with the codes for arbitrators, lawyers, and/or judges, will note that this draft does not contain lengthy explanatory text. These other codes have been in effect for decades and even centuries, and reflect the experiences of thousands of practitioners. A wholesale incorporation of such material by the Foundation without benefit of extensive review and comment would, in my opinion, be a mistake.

**Your comments on this first draft are earnestly solicited – they will greatly assist in producing a viable code for DRB members. Please direct your comments to me at bshiple@attbi.com. A portion of the annual meeting will be devoted to this matter.**

## Code of Ethics for Dispute Resolution Board Members

In order to ensure the integrity of the Dispute Resolution Board (“DRB”), each DRB member should take personal responsibility for adhering to the following Code of Ethics:

**Cannon 1.** The DRB should consider fairly and impartially, the disputes referred to it. Each member should act impartially and independently in the consideration of facts, contract provisions, and conditions surrounding any dispute.

**Cannon 2.** A DRB Member should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias. The obligation to disclose is a continuing obligation.

**Cannon 3.** A DRB member is in a relationship of trust to the contracting parties and should not use confidential information acquired during DRB proceedings for personal advantage or divulge such information to others.

**Cannon 4.** A DRB member in communicating with the parties should avoid impropriety or the appearance of impropriety. Ex parte communications regarding the Project should be avoided.

**Cannon 5.** A DRB member should conduct the proceedings in an expeditious, diligent, fair, and impartial manner.

\*\*\*\*\*

**American Consulting Engineers Council of New England Code of Ethics for DRB Members.** Source: Subcommittee chaired by Gary Brierley Reference: Subsurface Conditions: Risk Management for Design and Construction

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Management Professionals, David J. Hatem, Esq., Editor; Chapter 9 “Dispute Resolution Mechanisms for Differing Site Conditions Claims” by Hugh Caspe.

**Canon One—Financial Separation**

The members of a DRB should perform their duties while maintaining financial separation from both parties in accordance with the following framework:

- A DRB member should refrain from any financial or business dealings that may reflect adversely on his/her impartiality or involve him/her in business transaction with persons or businesses likely to be involved in disputes presented to the DRB.
- DRB members shall be compensated for the time and expenses incurred in the performance of their duties. DRB members should, however, avoid engaging in communications concerning compensation that create an appearance of impropriety. Likewise, DRB members should terminate their involvement if compensation is used in an attempt to compromise judgment.
- If a DRB member becomes aware of questionable financial conduct by any party involved in the DRB process, then he/she should report this information to both the owner and the contractor.

**Canon Two—Impartiality**

A DRB member should be impartial, fair, and independent in accordance with the following guidelines:

- DRB members must disclose to all parties the existence of interests or relationships that are likely to affect their impartiality or that might create an appearance that they are biased against either party. Both parties have the freedom, however, to agree on whomever they choose as a DRB member. When the contracting parties, after full disclosure of a person's interests and relationships, nevertheless desire that individual to serve as a DRB member, then that person may properly serve.
- A DRB member should disqualify him/herself from serving if he/she has:
  - A personal bias or prejudice concerning a party.
  - Personal knowledge of disputed evidentiary facts concerning the proceedings.
  - A financial or property interest that could be affected by the outcome of the proceedings.
- A DRB member shall not exhibit, in the per-

formance of his/her duties, bias or prejudice including but not limited to that based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

**Canon Three—Confidentiality/  
Communications**

A DRB member is in a relationship of trust to the contracting parties and should not use confidential information acquired during DRB proceedings for personal gain, to adversely affect the interest of another, or to damage the reputational interests of the parties.

- The DRB should accord all persons the right to be heard in full accordance with the established DRB agreement. At no time, however, should a DRB member participate in private interviews or communications outside of an officially sanctioned DRB hearing. Any attempt by either party to institute such discussions by individuals associated with either contracting party should be immediately reported to and discussed with other members of the DRB.
- DRB members should refrain from public discussion or publication of opinions and views as they may relate to specific issues, claims, or disputes pending before a DRB.
- A DRB member should not discuss the decision-making process of the Board with others or inform anyone of a recommendation in advance of the contracting parties. Once a recommendation is made, then no member of a DRB should try to influence any action of the contracting parties unless specifically required to do so in conformance with established DRB procedures.
- The ethical obligations of a DRB member begin upon acceptance of an appointment and continue even after a recommendation has been given to the parties.

**Canon Four—Adherence to the Contract Documents**

DRB members should act within the confines of their jurisdiction and issue recommendations based upon and consistent with the requirements of the contract document.

- The DRB's source of authority to hear disputes and to issue recommendations derives from an agreement between the Owner and the Contractor. The contract document typically defines the process by which the respective contracting parties may assert claims or disputes and the procedures by which those claims or disputes shall be evaluated and adjudicated. DRB members should be mindful of the limitations placed upon their jurisdiction as expressed in the agreement

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empowering them. This admonition has two important dimensions: (1) the DRB should decide only those issues actually presented to it in accordance with the requirements of the contract document; and (2) the DRB should not supplant or otherwise interfere with the respective rights, authorities, duties and obligations of the Owner, the Designer, and the Contractor as defined in the contract document.

- In making recommendations, the DRB must acknowledge the centrality of the contract document and should never propose a resolution which ignores, disregards, or significantly undermines the intention, requirements, economic allocation of risk, or work specified in the contract document.

**Canon Five—Conduct of Hearing**

DRB members should attend to the conduct of a hearing as expeditiously as possible

- The DRB should facilitate the prompt accumulation and distribution of appropriate project records and should assemble to hear a dispute as quickly as possible.
- DRB members should make certain that all hearings are conducted in an evenhanded and dignified manner. A DRB should make all reasonable efforts to prevent delaying tactics, harassment of participants, or other abuse or disruption of the DRB process.
- To the greatest possible degree, the DRB should decide a claim on the basis of factual data and direct observation. DRB members are free to request additional information when it is felt that a dispute presented to the Board is incomplete. DRB members should not, however, attempt to assemble documents or conduct investigations relative to a dispute independently of the contracting parties.

**Canon Six—Recommendations**

DRB recommendations should be expressed in writing and in a manner which respects and acknowledges the DRB jurisdiction, acknowledges the respective positions of the parties and demonstrates fair and impartial consideration of the pertinent evidence.

- A DRB recommendation should be clearly stated and succinct. As a minimum, the recommendation should include the following: a statement of the issue(s) presented for resolution; a brief statement of the progression of the dispute so as to demonstrate that all conditions precedent to DRB consideration of the dispute have been satisfied; a recitation of the DRB's understanding of the respective parties' posi-

tions; an identification and description of the relevant evidence or information considered by the DRB; an evaluation of that evidence or information in the context of the specific dispute presented; and a clear and logical discussion of the DRB's reasoning supporting its recommendation.

- In making a recommendation, the DRB should only consider information presented by the parties in the common reference documents, the parties' respective position papers, and/or observations or other information jointly obtained by and shared with all DRB members. Information, perceptions, or observations of a DRB member which are personal to that member and not disclosed to other members should not be used to form the basis of a recommendation.
- Requests for reconsideration of a recommendation should be sparingly entertained and granted only in those circumstances in which the petitioning party demonstrates that the existing recommendation disregarded relevant evidence; is inconsistent with the contract document; is based upon fraud or other misconduct of a party; and/or exceeds the jurisdiction of the DRB. In addition, requests for reconsideration may be entertained in circumstances in which new evidence is discovered which could not have been discovered by a party through the exercise of reasonable diligence prior to the issuance of a recommendation. £

**Construction Dispute Review Board Manual by Matyas, Mathews, Smith and Sperry**

An essential reference for all construction professionals, this book shows you how to use Dispute Resolution Boards to solve construction disputes on the job, avoid claims and thereby reduce project costs. This definitive manual provides all the procedures required to employ the DRB process, and fully explains the benefits and pitfalls of DRBs. Whether you're an owner, contractor, construction manager, attorney or construction lender, this time- and money-saving sourcebook offers you the most complete guidance now available on the successful establishment and practice of a DRB during construction.

**\$45.00 plus \$4 postage/handling. Contact the Foundation to order.**

**Member resumes on-line**

**Go to the Foundation website and get your resume on line**

**Just go to [www.drb.org](http://www.drb.org) and click on "Member Resumes" and "add resume"**

**TO CONTACT THE DRBF OFFICE**

Dispute Resolution Board Foundation  
6100 Southcenter Blvd., Suite 115  
Seattle, WA 98188-2441

206-248-6156  
206-248-6453 (FAX)  
888-523-5208 Toll free (US only)  
E-mail: home@ drb.org.

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really don't have a clue) syndrome. This condition blossoms when people have just enough information to get a hint of what the processes are, then proceed to use the terminology on the job in ways they were never intended. In this way the project parties can avoid the expense of retaining quality facilitators and DRBs. When faced with project representatives who have had this experience on past projects, the facilitator and/or DRB has to perform damage control measures to salvage the reputation of the partnering or DRB processes.

**Partnering Needs DRBs**

The focus of the partnering strategy is the continual search for the answer to this question: "How are we going to work together to build a successful project for all team members?" To accomplish this, part of the answer must address working through disagreements fairly and timely. The partnering strategy works with the project team to "agree in advance how to resolve issues fairly". To do this, the partnering team must implement an issue resolution process as a part of the partnering strategy.

Partnering contains eight core principles, which must be in place and regularly monitored in order to optimize the process. One of these core principles is the Confrontation Process.

If partnering does not have an effective issue resolution process that helps the partnering team confront and resolve issues timely and fairly, the partnering will implode and self-destruct. This is why we believe the DRB process provides a vital survival tool to the partnering strategy that is needed in order to keep it from falling apart when a job is hit by tough dispute issues.

**The Partnering Confrontation Process**

The basic partnering process for resolving dispute issues involves the use of the matrix, escalation or elevation process. There are many names for the partnering method in use in the industry today. The concept involves the development of core teams at different levels of the project team to resolve the issue. Each team is allowed to take a more objective or fresher look at the issues.

The partnering resolution method creates core teams that are identified across contract lines at the field, project management and executive levels on the project team. If the team closest to where the work is being performed cannot resolve dispute issues they are to elevate the issues up to the next team.

The field level team usually is in need of a "go" or "no go" decision on direction of work performance. The resolution of how much it costs, who owns the work and how it is apportioned between the parties becomes the responsibility of the project manager team. At this point, if the issue is disputed, the core project management team faces a business level contract dispute.

The critical factor for this process is how long does the core Project Management (PM) Team hold onto an issue before it elevates it to the core Executive Team? If the PMs hold onto the issue too long, cash flow and relationship damage will end the partnering effort and begin seeding adversarial relationships.

One of the greatest causes of partnering failure is the mismanagement of unresolved dispute issues. The greatest cause of breakdown of the partnering confrontation process is holding on to issues too long and not using the matrix process as designed. If the parties do not allow the confrontation process to run "concurrently" with the formal contract provisions, the issues may be held hostage and delayed from being resolved for months.

To correct this problem, partnering facilitators push the project executive and project management teams to calendar regularly scheduled meetings at the jobsite, to specifically review all eight partnering principles (in particular unresolved dispute issues). In so doing, they create the rule that if there are any unresolved dispute issues at the project manager team level not resolved prior to the joint executive/PM meeting, the core PM team must elevate and present the issues to the executive team.

**Partnering Confrontation and DRB rules**

When partnering is first implemented on a project, the partnering facilitator should meet with the project team and the DRB. They discuss the formal and informal rules for the use of the DRB and the partnering confrontation process. The Executive and Project Manager Teams need to agree on the rules of confrontation and the use of the DRB on the project.

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# Other News

## Florida Chapter Formed

On March 9, 2002, thirty-five members of Florida DRBs met in north Florida to discuss issues relating to Dispute Review Boards for construction projects in Florida. Jimmy Lairscey chaired the meeting and presented the agenda.

Among discussion items were upcoming training sessions and conferences in Florida as well as briefings on the improved DRBF website, the change of name for the Foundation and ways of measuring the success of DRBs in Florida.

Specific issues related to Florida DRBs were discussed including an FDOT Inspector General audit of the DRB process in Florida, whether the Florida Sunshine Law applies to DRB hearings and the establishment of six Regional DRBs to hear disputes on projects without established DRBs.

It was decided to request permission to form the Florida Chapter of the Dispute Resolution Foundation (FCDRBF) and to request that the Foundation allow Florida members to pay an additional \$20.00 a year membership fee to be held in a Trust Fund by the Foundation for Florida expenses.

## Bios Now Available on Website

Foundation members may now have their bios posted on the Foundation website. We have added a new section to the website allowing members to post information about their availability to serve on DRBs. By going to the home page and then clicking on "Member Resumes", then clicking on "Add Resume", you can add your information to the website.

Any information submitted will first be checked to assure that the individual submitting information is, in fact, a member in good standing of the Foundation and any attendance at Foundation sponsored workshops will be verified. Following review of this information your bio will be added to the data base and will be available to those coming to the website in search of prospective DRB members.

## Spreading the Word

Bob Rubin and Dan Meyer spoke about DRBs at the Moles May 1st Business Meeting at the Hilton Hotel in New York City. They report that they were enthusiastically received. There were about one hundred members in attendance.

Jack Woolf will be a panel member at International Construction conference in October sponsored by the Mid Atlantic States Local Association of the Institution Civil Engineers and the World Bank. **See page 17 for more information and how to register—ed.**

Larry Rogers has been asked to make a presentation on DRBs to the 5th Annual Damage Prevention Convention in San Diego in December. The Convention is sponsored by *Underground Focus Magazine* and is directed primarily at the underground utility industry. He made a presentation to the group two years ago at their convention in Long Beach.

Larry will also be on the faculty for the 9th Annual Washington Construction Law seminar in Seattle in September. The two-day seminar covers all aspects of construction law from successfully bidding thru successful completion of projects without litigation. £

## DRBF Regional Representatives

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(California, Nevada, Arizona, Hawaii)

**If you've got news we'd like to hear it.**

**Deadline for the next issue is September 15, 2002.**

## Survey Coming in August

One of our members, Kathleen Harmon, is preparing a survey related to construction conflicts and the effectiveness of Dispute Review Boards. The information obtained from this survey will be a part of her dissertation, but more importantly, it will be published in industry journals to spread the news about the DRB process and its effect on reducing costs related to protracted disputes.

She will be mailing the survey out to all current DRBF member in later August. For the survey data to be valid, she needs **all** our members to promptly complete and mail back the survey. As some of you will remember, she handed out a pilot survey at our annual meeting in October. Partial results have already been published in the AAA newsletter *Currents*.

We would encourage every member to complete this survey. It will be the first empirical data on the DRB process and as such will be considered more seriously by owners than anecdotal evidence currently available.

**Please help this effort.**

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Many projects decide to allow the core PM Team to use the DRB informally to air their disputes verbally in “what if..” scenarios. The PM Team receives coaching or guidance from the DRB on how to proceed with analyzing the issues, preparing interpretations, generating support data and developing a decision on their own. If they still do not resolve the issue, the PM Team is prepared to elevate the issue at their next regular meeting with the core executive team.

In this way, the core PM team elevates recommendations and options for solution to the executive team rather than just pass on a disputed issue.

The rules for the DRB and the partnering elevation method are designed to be engaged early on in the dispute and move quickly. If the specifications call for a slow complex method of compliance to review claims, we end up with a racehorse that is forced to walk instead of run. The specifications need to be written to allow the processes to work as designed.

The greatest barrier is when the contract provisions are in conflict with the concept of using the DRB expeditiously. The solution to this problem is to get the executive team to allow the partnering and DRB methods to be used concurrently with the change order process. Only after the Change Order process is exhausted, then engage the claim provisions of the contract. With this understanding, the DRB can be involved at the project manager and/or the executive levels of the partnering elevation resolution method.

### Challenges

Both DRBs and Partnering must have meaningful commitment from both the executive and project manager levels of the primary contract parties. If this is achieved, the two processes face challenges in the following areas:

•**Follow Through:** Establishing regular meetings for walk-through and project assessment. The primary barrier is money. The party’s see reducing or canceling these meetings as a means to save money.

•**Leadership:** Gaining support and leading the education of others on the project. The Project Manager Team must recognize and use situations on the job, for utilizing the partnering and DRB processes. They are the team leaders. At a minimum, the primary owner and constructor representative must champion

and advocate the use of partnering and DRBs in order to optimize the use of these processes.

•**Dilution:** Discounting the processes when parties want the benefits with out doing the work to achieve it. The best way for this to happen is to water down the frequency of meetings/site visits and put off using the tools. The solution is to “walk the talk”. To actually conduct the meetings, work the issues, and bring in the Partnering Facilitator and the DRB to work the process. The project representatives must want to use the processes and want them to work!

•**Consistency of Process:** If the DRBs or facilitators are not trained and educated about the back ground, history and evolution of the processes they can not pass it on to others. Without this training and consistency, they can invent what they want the partnering or DRB process to be. Poorly trained DRBs and facilitators use bits and pieces of what they know and what best suit them. They then make up their methodology and call it DRB or Partnering. This generates poor results and bad experiences by the project parties. When asked later if they advocate DRBs or Partnering, the response is negative and the project parties discount of the process. This situation does great damage to the DRB or partnering reputation in the industry. This applies far more to partnering than it does to DRBs. This is because the DRB Foundation has been formed and helps protect the integrity of the process through education materials, training and membership advocacy. Unfortunately, partnering has suffered over the last fifteen years by not having a home. As a result, every facilitator conducts his or her own brand or method of partnering. There is no Partnering Foundation or support organization for partnering facilitators.

### Working Together

The facilitator and DRB develop their roles and responsibilities for working together by meeting with the project team. Then talk through the three timeframes that issues develop on the project: past, present and future issues. Each of these time frames needs to be dealt with differently by the facilitator and DRB.

### Past Issues – History Issues

The partnering facilitator asks the PM Team to meet on a regular basis, to identify issues that are unresolved and disputed. Specifically identify issues that need to be resolved timely,

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or the (lack of resolution) result will negatively impact the partnering team's cost, schedule, quality, and/or safety. This periodic assessment generates a list of issues to put into the confrontation process. If the issues are not resolved within agreed upon time frames, they are elevated to the executive team at the next regularly scheduled session between the executive and PM Teams.

The facilitator asks the PM Team to notify and invite the DRB to the assessment meeting. The DRB observes and gets a true picture of the project status of unresolved dispute issues and hear the discussions first hand.

After the identification phase of the dispute issues is concluded, the DRB works with the core PM team to layout the use of the informal and/or formal rules to schedule the meetings to make sure the issues are resolved timely.

### **Present Issues**

The partnering team conducts regular follow up assessments. The partnering facilitator works with the PM Team to identify problem areas with contract administrative systems, change orders, submittals and other processes. As a part of this assessment the project team identifies what issues are currently developing on the project and are still ongoing.

The role of the partnering facilitator is to help the team exchange communications, ideas, options, assess consequences, risks and benefits through directed discussions.

The partnering facilitator works in a way to avoid offering advice, recommendations and getting directly involved with the content of an issue topic while facilitating problem solving processes.

The problem solving facilitation focuses on resolving the technical side of the problem and getting direction to proceed with the work. The team also works to minimize the damage and impact, so whom ever has to pay for the work benefits by least cost payment for damages.

During these discussions, the DRB can help the PM team by participation in the facilitated problem solving discussions and by advising methods to document disputed work areas. In the event the issue later becomes an unresolved contract dispute, and while the work areas are still exposed, the DRBs advise may help the project team document and quantify the scope of work. In addition, it is of great benefit to the DRB to see the issue as it is unfolding. This first hand knowledge may be of value at a later time.

Facilitating problem-solving discussion with the DRB present and observing the project team interaction provides a clear distinction between the roles of the facilitator running process and the DRB's focus on the content of the issue(s).

The DRB may choose if and when it is appropriate to interact in discussions with the project team.

### **Future Issues**

The partnering facilitator, working with the project team, conducts regularly scheduled project look ahead sessions to identify and problem-solve potential opportunities or risks facing the project. By anticipating and problem solving in advance, this allows the PM Team to manage the issues for minimum impact and/or complete avoidance of the issues occurring. This is the pro-active side of the partnering strategy lead by the core PM Team.

The core PM team may invite the DRB to attend these sessions at the jobsite. This gives a two-fold benefit. First, the DRB observes the team working together. Second, the DRB is accepted as a part of the project team. The DRB involvement is optional and they generally come periodically.

### **Roles and Responsibilities**

The role of a partnering facilitator is to lead process and discussions effectively. The facilitator must not get involved with positions between the parties when it relates to contract dispute issues. If they become biased they are no longer a project advocate and they may lose the ability to lead the partnering effort for the team.

The role of the DRB is to advocate and lead the issue resolution process with the project team. They do get directly involved with the content of the issues. At some point, they explain to the team who owns the risk and what their opinion is for apportionment of scope and dollars. Interpretation and quantification evaluation and findings is the primary role of the DRB.

If the facilitator sticks to process and allows the DRB to work with the team on the disputed issues, there is a clear separation of duties and together they complement each other's services.

When project issues are proactively identified as happens in the future look ahead session, the facilitator takes the lead and uses problem-solving processes to generate solutions. If the issues have already occurred (history issues) and/or are in dispute, the facilitator becomes an advocate for the resolution process and asks the project team to use the DRB's services for resolution of the dispute.

*(Continued on page 12)*

# **CALL FOR NOMINATIONS FOR THE AL MATTHEWS AWARD**

The Dispute Resolution Board Foundation (DRBF) shall present annually the “Al Matthews Award” to a DRBF member who has given exemplary service in advancing the use of the dispute resolution board concepts, and the DRBF.

## **NOMINATIONS**

Nominations shall be solicited from the membership in the April edition of the *Forum*, and by the President from the Board of Directors.

## **NOMINATING COMMITTEE**

A nominating committee for the annual recipient of the Award shall be appointed by the President. The President shall serve as Chair, and shall appoint four additional members from the general DRBF membership.

The Nominating Committee shall present its recommendation to the Board for consideration at the June meeting of the Board of Directors.

## **THE AWARD**

The Award will be presented to the recipient at the annual DRBF meeting and conference generally held in October.

The Award will consist of a framed proclamation and a trophy with the recipient’s name and date of award engraved thereon.

Send your nominations, including an explanation of why you think the nominee is deserving of the award to:

**Award Nominations  
DRBF  
6100 Southcenter Blvd.  
Suite 115  
Seattle, Washington 98188-2441**

**Postmarked not later than 8/31/02.**

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### Summary

There are two primary topics for mutual understanding that provide enhanced areas of effectiveness for both the DRB and the Partnering strategy.

First, a quality partnering strategy on a project provides an environment, which promotes good faith and fair dealing between all contract parties. The partnering strategy and systems are designed to build teams who advocate the building of professional trust-respect working relationships. If DRBs can be introduced on a project, which support and foster fairness between contract parties, the DRB process can be utilized as an integral part of that teams management philosophy.

At the same time, partnering cannot survive long term without a rock solid issue resolution process. The partnering team will fall apart if they do not have an effective means of resolving issues timely and fairly. The teaming up of the partnering and DRB systems makes sense.

Second, the roles and responsibilities of the facilitator and DRB complement each other and allow for them to work together as a team. The facilitator has a responsibility to help build a high performance team through introducing strategic management processes and facilitation.

Facilitators do not get involved with resolving contract interpretation issues regarding who owns the risk or the quantification of disputed issues. They must stick to facilitating processes to help the team communicate and problem-solve the technical side of the problems. This involves developing plans for taking action, giving direction, solving the problem in the field and stopping the flow of damage dollars as soon as possible. Facilitating the design of a solution plan is different from facilitating contract interpretation and cost issues.

The job responsibility of the partnering facilitator leaves a void in services for the project team. When a problem is solved in the field, there is an additional need to resolve the question of who pays who for what, how much and why. This is not the partnering facilitator's area of responsibility and is where the facilitator/DRB team complements each other's services. The issue shifts from technical solution to a business solution phase and into the DRB's area of influence.

The project team specifically needs the help of an objective third party to work through the issues causing the dispute over contract scope and dollars. When asked by the parties, the DRB helps them facilitate, evaluate and provide advise to the team regarding interpretation of contract documents, quantification methodology, and evaluating support documentation. When formally re-

quested, the DRB gives the parties their non-binding recommendation for solution to the disputed issues in writing.

Therefore, it would seem appropriate for the DRB Foundation to invite partnering facilitators to join the DRB Foundation. As members of the DRB Foundation, there may be ways to promote the development and refinement of the relationship between DRBs and facilitators on projects.

The partnering facilitators need an organization, which will offer them a forum to help develop industry support for the protection and develop of the partnering strategy. The DRB Foundation also needs to find processes that help project teams better utilize the DRB process on their jobs.

For those who have seen partnering and DRBs work effectively together on projects, it would be a welcome sight to see open forums at DRB Foundation conventions and in future publications to set the bar and advance the quality of services of both facilitators and DRBs on projects. £

**Coming in the  
next issue of  
the *Forum*:**

**Prove It!—The  
Challenge of  
Quantifying  
DRB Cost  
Savings**

**How do we develop em-  
pirical data to prove  
the success of DRBs?**

# Report on the Rome DRBF International Conference

by  
Peter Chapman

The azure skies were cloudless. The early summer sun warmed and revitalised the spirit. The venue was the ancient Vatican university in the very heart of Rome where delegates to the DRBF 2002 International Conference found themselves cloistered in ecumenical history, the like of which exist nowhere else in the world.

Resisting temptations to explore the sights of this unique city, sixty delegates from seventeen countries assembled for the one-day DRBF Conference—the theme of which was, “Dispute Boards on International Projects.”

The day was kicked into gear by President Jack Woolf—recently out of hospital after successful major surgery—who welcomed delegates and formally announced the new name of the Foundation. Jack explained that the DRBF Manual—the “Bible”—was now in need of updating and the DRBF were actively moving towards this objective. Delegates were quick to remind Jack that he should take care when suggesting the bible was out-of-date in such hallowed halls as the Vatican university!

The session that followed—“Can it work for you?”—was aimed at introducing the concepts of dispute resolution boards to those who were unfamiliar with the process. Peter Chapman (UK) spoke about the “real-time” benefits of DRBs and the certainty created by early determination. The dispute “doom scenario” was explored and contrasted with the pro-active and positive approaches of the DRB. Peter especially made the point that a DRB should be viewed by all parties as a benefit to the project—not a nuisance or a contractor's charitable institution. This opening discussion went on to consider the popularity of DRBs and Peter asked delegates for their thoughts on this. Geoffrey Hawker from UK believed their value lay in the fact that the DRB saw the game objectively—like most spectators—and thus was best able to bring objective justice to the project. Gwyn Owen (UK) thought that DRBs worked well if the parties wanted the process to work and thus took a pragmatic approach. Professor Crivellaro (Italy) considered it important to keep things simple and not to allow DRB adjudication to

turn into arbitration. He admitted that there was always the risk of mistakes in any fast-track process but as long as the DRB understood the facts the risk of some mistakes being made was acceptable. Carlo Ospina (Colombia) held the firm belief that DRBs worked well because they were impartial and this was the essential quality that led to their success.

John Bradshaw (USA) led the next discussion which looked at getting the most from the DRB. John took the view that parties would get as much—or as little—as they would allow a DRB to give. John emphasised that the DRB should be established at the very start of a project as only by the regular contact with the parties can the DRB influence the parties' behaviour and only by regular site inspections can the DRB understand the project and thus give wise, balanced decisions and recommendations. From his long experience with DRBs, John suggested that parties would eventually accept DRB recommendations if they believed they were honest and impartial. John stressed the value of a DRB assisting the parties to reach settlements by an informal process—the dispute avoidance approach. John's comments drew comments from the other delegates with Peter Caldwell (Hong Kong) asking the thorny question as to whether the DRB should be acting judicially or merely to assist the parties reach a settlement. Peter emphasised the different processes and approaches that would be necessary depending on the objectives. Justice Khan (Pakistan) echoed the sentiment that to get the best from a DRB both parties must see it as a friend not a foe. Stefano Pavletic (Italy) raised the subject of med/DRB where the board commence as mediators and, in the event that no settlement is achieved, move on to give an adjudication decision. The delegates were advised that UK experience shows that very few issues handled in this way are not settled at the mediation stage - the parties getting to know roughly what the award might be and therefore preferring to seal their own fate.

The next session looked at becoming a DRB member. Romano Allione (Italy) spoke about what makes a good DRB member. He stated what was to become a recurring theme during the conference that employers need to be taught how best to use a DRB and not to expect the im-

*(Continued on page 14)*

## The Foundation needs your help!

The Board of Directors is seeking the names of those interested in serving on Foundation committees. Positions are open for the following committees:

Marketing

Data compilation

International

Membership

Please help the Foundation by volunteering for one of these committees.

Contact Jack Woolf or call Steve Fox. £

*(Continued from page 13)*

possible. Members should understand the political climate, to behave accordingly and to exhibit a reasonable approach at all times. Professor Crivellaro (Italy) stressed that DRB members should be available and not so tied to their other occupations that it makes DRB activities impossible. Antonio Zaffaroni (Italy) emphasised the need for a member to be experienced in construction and dispute resolution. Next, Igor Leto (Italy) brought some culture to the proceedings by quoting the Bard and advising us to “First, kill all the lawyers”! Igor felt that DRBs were better off with construction professionals as members rather than “pure” lawyers. He was, of course, promptly corrected as pure lawyers were said to be a species unknown in recent times. Under pressure, Igor expanded his philosophy by saying that the important point was to ensure the members had proper experience of construction and that some lawyers had acquired such experience after many years of work in construction and would, at a pinch, be suitable for DRB appointments. Sighs of relief arose from the legal fraternity present. Igor went on to state his views that nationality should not be a bar from DRB appointments. An experienced professional would not favour a party of the same country as his own. Bob McLean (Canada) agreed with Igor but went on to mention the perceptions that might arise in cases where a party selected a member of its own nationality when that member did not have the other qualities necessary for service on the DRB. Bob stressed the importance of specialist knowledge both technical and contractual.

The next session was led by Jack Woolf (USA) who told us how to get those elusive appointments to DRBs. Jack’s message was clear. Networking. Every opportunity should be taken to promote the use of DRBs by speaking at conferences, discussing the benefits (and burdens) of DRBs with employers and contractors, setting up study groups in ones neighbourhood and raising awareness of the dispute board concept. Geoffrey Hawker (UK) and Peter Caldwell (Hong Kong) both considered that lists were important although this view was not universally supported with Pierre Genton (Switzerland) being unconvinced that some of the current lists served a useful purpose and Gwyn Owen (UK) believing that the FIDIC list had not been as successful as it might but thought that regional lists may offer some benefits. John Bradshaw (USA) mentioned the usefulness of lists as an aide memoir although personal knowledge of the members is very desirable.

Pierre Genton (Switzerland) led the next session which talked of money matters. As can be imagined, this stimulated much discussion and a range of views were promoted. Pierre maintained that DRBs should pay members a retainer plus a daily fee and, of course, reimbursement of expenses. He suggested that the fees paid to the members should be consistent across the DRB and that it was incorrect to differentiate between members nationality in matters of payment. Pierre proposed that the monthly retainer should be the equivalent of three-days daily fee. The delegates, whilst generally in agreement with Pierre’s suggestions, did discuss other approaches such as the rates of remuneration being linked to an index that would compensate for the different costs of living throughout the world. Justice Khan (Pakistan) believes that there should be no differentials between members and that a hard currency, such as US\$, should be the usual currency of payment. Although consistency in payment was generally accepted as the correct approach, several delegates considered that the DRB Chairman should receive a higher retainer for the additional administrative work undertaken. Suggestions were made that the DRBF should set up costs guidelines and possibly act as stakeholders on behalf of the DRB (much like the ICC and other institutional arbitration organisations). The idea was to be explored. The age-old danger of “buying” appointments by charging low fees was discussed, particularly when a low-fee bidder may not have the necessary experience for service on a DRB. There is little that can be done to prevent this happening—particularly when DRB appointments are a way of keeping ones hand in during retirement. The idea of some sort of registration system for practising DRB members was mooted but this would have its own difficulties in policing.

Keeping out of trouble was the next topic led by Peter Chapman (UK) who stressed that DRBs that were firm, fair and consistent would have a good chance of survival. Decisions and recommendations should be clear and unambiguous and should avoid “witch hunting.” Parties want to know the way forward not to have their noses rubbed in their mistakes. The better advised the members were—by attending the site regularly and reading the routine report—the better able they would be of making acceptable determinations. Romano Allione (Italy) added that whenever possible the DRB should be asked to give its views on principle alone, leaving quantification as a separate exercise after principles of entitlement had been established.

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The discussion that followed was led by Jack Torrance (Scotland) who spoke about the routine visits of DRBs to site. Jack stressed the importance of looking and listening during the routine visits as, in his view, much can be learnt from observing the manner in which the meetings are conducted and the attitudes of the individuals present. “Bad news rises slowly” and the routine visits give an opportunity of the senior members on both sides of the contractual divide to really understand the other party's position in the presence of the impartial DRB. In Jack's view, shared by the delegates, the routine visit to site is an essential part of the operation of a DRB and boards that convene if and only when disputes arise are missing out on an important and beneficial aspect of the DRB process.

Gianni Arrigoni (Italy) led the next discussion covering dispute avoidance and “documents only” determinations. Gianni emphasised that only DRBs could offer both dispute avoidance and dispute resolution and that this was a powerful combination. Gianni believed that the DRB was particularly well qualified in assisting parties to resolve potential disputes. He urged proactivity whenever the situation demanded—adjudication was like “lancing a boil”—it was often painful in the short-term but the end result was worth the suffering! Gianni advocated that the DRB should be the link between the parties in creating a positive alliance and should foster partnering and teamwork on the project. On the topic of documents only determinations, Gianni was not supportive of the process and felt this was too much like arbitration by proxy.

After lunch the conference looked at what can go wrong on international DRBs. Antonio Zaffaroni (Italy) led the discussion on the problems that can occur when a DRB is not established. He stressed the importance of having the DRB provisions properly contained in the tender documents so that both parties understand the dispute resolution provisions from the outset. He suggested that penalties should be introduced if the DRB is not established at the start of the contract although he, like other delegates, considered the most important feature of the DRB is its independence and impartiality. Helmut Kontges (Germany) considered there was a role here for an appointing authority to whom a party can turn in the event that the other party is prevaricating. John Bradshaw (USA) supported this suggestion and Pierre Genton (Switzerland) thought that funds could be withheld until such time as the DRB was established.

Paolo Moder (Italy) next spoke about the

problems faced if one or other party does not convene meetings or refer disputes to the DRB. Paolo described the “nightmare scenario” where one party can stall the DRB process for years by failing to give support or refusing to permit the DRB members visiting the site. Paolo thought that the DRBF could assist in these difficult situations, not least by updating the “manual” so that the benefits of the DRB process could be better understood by contracting parties (although he noted that the manual would not carry the weight of a contract document). Delegates made further suggestions leading from Paolo's introduction. The role of the funding institutions was raised, particularly the World Bank. The Bank, whilst supportive of the DRBF and has incorporated the DRB concept into its standard bidding documents, has not been prepared to act as the DRB police force as such function does not fall within their accepted function as a lending institution. Gordon Bathgate (Scotland) also questioned whether the DRBF could play a role in ensuring DRBs around the world functioned properly. Igor Leto (Italy) asked whether the World Bank could publish a list of its funded projects so the DRBF could gauge the extent that DRB provisions are being ignored.

Next up was Frank McDonough (USA) who discussed the reluctant party and other matters. Frank explained how the DRB process could cover any dispute—technical and financial—and how the DRB could persuade parties to reach amicable settlements. Professor Antonio Crivellaro (Italy) emphasised the need for DRBs to provide clear and well-written recommendations as much of the reluctance in accepting is a lack of understanding of what exactly has been recommended. Real money is involved and the DRB needs to be clear who gets what and why. A compromise is required between the lengthy documents produce by lawyers and the often too brief documents produced by engineers. However, a losing party needs to know why it has lost. Carlos Ospina (Colombia) urged that DRB speak and write basic English particularly when parties are not English speaking. The role of the chairman is part-statesman whose job it is to convince both parties to accept the DRB recommendations.

John Bellhouse (UK) then discussed the question of partiality. John outlined the standard provisions concerning a DRB member's impartiality and contrasted the positions of an arbitrator to that of a DRB member. In that the DRB process is less formal than arbitration and a DRB will be required to make determinations on less depth

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of evidence (e.g., expert's reports) than that presented to an arbitrator or the courts, it is even more important that the parties recognise the DRB members as being impartial. In that the DRB will be required to act inquisitorially, the perception of impartiality is vital. John emphasised the dangers in the DRB undertaking an informal role and stressed the need for caution and care. John considered communication to be extremely important to the success of DRBs. Igor Leto (Italy) mentioned situations where partiality had caused problems (employee acting as a members) and in such cases it was inevitable that majority decisions were published.

Carlos Ospina followed by presenting how best to describe the DRB process. He said that nothing is as successful as success itself and the best way to promote the DRB process is to make it work. Satisfied parties will become converts to the DRB process and the word will spread. He said there needs to be a system provided to replace a DRB member if, for any reason, the member cannot continue to serve. PR is important too—the DRB should be a salesman for the process and be prepared to explain how the system works to those inexperienced in DRB matters. Carlos supported non-binding recommendations over decisions that were binding. He believed that the DRB recommendation should form the basic building block on which the party's settlement agreements are founded. In his view, visits to site three times a year should be the norm. George Rosenberg (Greece) suggested that DRB should be linked with partnering and facilitation agreements. George explained the successful use in Hong Kong of the Dispute Resolution Adviser (DRA) service which links these various forms of dispute resolution together. George stressed the need to educate employers in the DRB process, also mentioning the difficulties that some state employers have with implementing a non-binding recommendation.

Peter Chapman (UK) and Brison Shipley (USA) then looked at how legal the DRB process should be. Horse trading or judicial? Peter explained the need to honour the contractual provisions although the DRB process has more inherent flexibility than more formal processes in deciding the non-absolute issues that arise in construction conflict. Matters such as the form and length of submissions, the admissibility of evidence, the use of factual and expert witnesses, the degree of legal representation all need to be discussed and agreed between the parties and this is often best done with the assis-

tance of the DRB at the outset. If agreement cannot be reached, the DRB needs to be sufficiently robust in giving directions. The important aspect is that both parties know the rules before the first formal dispute is referred to the DRB. To change the rules mid-way through a hearing is a recipe for disaster. Brison discussed the different approaches that would be required if the DRB were to give non-binding recommendations to binding decisions—and this harked back to the points raised earlier in the day by Peter Caldwell (Hong Kong) concerning the objective of the DRB process (a discussion on another day for sure). Peter Chapman (UK) mentioned that if lawyers were to be used in the DRB process, they would need to be prepared to approach DRB procedures differently from those they may be used to in arbitration or the courts. This might give difficulties to some lawyers as Peter has witnessed in the UK under the new adjudication statutes.

The final formal session of the conference was led by Jack Torrance (Scotland) who spoke of the versatility of the DRB process. Jack stated that the process can be as versatile as you like so long as the intent is maintained and the decisions given are just. DRBs are being used on a number of concession projects in UK and elsewhere

The conference concluded with delegates making suggestions as to how future DRBF international conferences should be arranged. The general consensus was that two-day conference should be considered with the first day aimed at describing the DRB process to local employers, consultants and contractors—the second day being more for the DRBF members. Although delegates appeared to enjoy the discursive approach taken in the Rome conference, more in-depth presentations could be considered for future years. Case studies could be considered and a DRB “moot” was suggested. Venues suggested for the 2003 conference included Athens, Paris and Hong Kong. Sponsors would be considered.

At about 5.00 PM, the conference concluded allowing delegates to sightsee for a couple of hours (the Trevi Fountains being just a few steps away from the university). The evening conference dinner was held on the rooftop of the Minerva Hotel where delegates (and many of their wives) could listen to music and enjoy cocktails and a truly superb Italian meal as the sun set across the roof tops of Rome. A memorable experience.

In conclusion may I thank all those who participated in the Rome conference, particularly

*(Continued on page 25)*

## **INTERNATIONAL CONSTRUCTION**

### **Current developments in planning, management & closeout**

***A one-day seminar sponsored by  
The Mid Atlantic States Local Association of the Institution Civil Engineers  
and  
The World Bank***

**\*Tuesday 8th October 2002, at The World Bank, Washington DC**

**(\* Coordinated to precede DRBF World Bank Workshop 9th October 2002)**

Experienced practitioners will present and discuss project management principles and their successful application to International construction projects.

#### **Enhancing International Project Quality, Time and Cost through:**

- Pre- Tender Document Review
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Key objectives of any project are quality performance, finishing on time, within the agreed budget. Successful management techniques, when implemented from the inception, provide a sound basis for planning, funding, scheduling, administration and project closeout.

International projects can be especially risky for the participants, due to diverse logistical and schedule problems, unusual contractual/legal constraints, and multiple cultures.

***This seminar will include discussion of the application of successful project management techniques to International Projects***

**Guests:** Authorized Staff of The World Bank

**Invitees:** Owners, Developers, Contractors, Engineers, Funding Agencies, Insurers, and other professionals.

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**FEDERAL ADVERTISEMENT --- REQUEST FOR QUALIFICATIONS**

Disputes Review Board (DRB) Members and Chairpersons

**Due Date: August 16, 2002 @ 4PM**

**Note that this solicitation is aimed at individuals, not at consulting firms or law firms.**

The Metropolitan Transportation Authority (MTA) East Side Access Project (ESA) seeks to establish an approved panel of Dispute Review Board (DRB) members and chairpersons.

The ESA Project consists of several dozen construction contracts to be performed during the next ten years to build an underground connection for the Long Island Rail Road between Queens and Grand Central Terminal in Manhattan. The types of construction to be executed include soft ground large diameter tunneling, large-scale rock tunneling, underground railroad facilities of all kinds, underground ventilation plants, and railroad systems. ESA is planning to utilize a DRB on approximately one-third of these construction contracts. The DRB will be used to assist in the resolution of disputes in accordance with the contract terms and conditions by providing a non-binding written recommendation to the contractor and MTA for each dispute brought to the DRB for consideration. Each DRB will be made up of two members and one chairperson. The MTA and the contractor will both participate in the DRB member selection process. The MTA will nominate its proposed DRB members from its approved panel.

The standard MTA construction contract provides that DRB members shall have substantial experience (technical or managerial) in a senior capacity in engineering or construction and substantial experience in one or more of the general types of construction or construction disciplines involved in the particular contract, and in the interpretation of construction contract documents, and in the analysis and resolution of construction issues. Each shall have the integrity and neutrality appropriate to serve as a DRB member. The MTA construction contract also states that one of the objectives in selecting the chairperson is to ensure that the DRB has administrative and dispute resolution experience to complement the technical and/or managerial expertise of the first two members and to facilitate the DRB's proceedings. The chairperson shall have substantial experience in a senior capacity in construction disputes resolution, adjudication or arbitration, the interpretation of construction contract documents, and the analysis and resolution of construction claims. The chairperson shall have the integrity and neutrality appropriate to serve as a DRB chairperson.

The MTA construction contract has conflict of interest requirements which provide that no DRB member shall have (a) currently or within 2 years prior to execution of the particular construction contract, employment with, an ownership interest in, or existing business or financial relationship with (including providing fee-based consulting services to) any party to the particular contract, the program management consultant, the design and engineering consultants, any third-party construction manager for the contract, any subcontractor or subconsultant to the contractor, or other ESA Project contractors or construction managers for adjacent or interfacing contracts; (b) any financial interest in the contract or the Project; (c) been involved, directly or indirectly, in preparation of the bid documents for the contract, the preparation of a bid by any bidder for the invitation to bid for the contract, or the management or administration of the contract; or (d) any current or prior involvement in ESA of a nature that could compromise his/her ability to review disputes impartially.

All persons that are designated as DRB members and chairpersons under the terms of the construction contract will be required to enter into a three-party contract with the MTA and the contractor, which will be based on hourly fees and reimbursable expenses. **Please note that if you have submitted qualification information in response to ESA-RFQ-001, Disputes Review Board (DRB) Members and Chairpersons, there is no need to submit additional qualifications. The MTA will utilize the qualifications we received from that solicitation and this one to develop a list of potential DRB Members/Chairpersons.**

Discrimination on the basis of race, religion, color, sex or national origin is prohibited.

MTA will be evaluating prospective DRB members and chairpersons based on the criteria set forth above. Interested candidates can obtain the RFQ by calling 212-967-0291/212-967-0382 or downloading a copy off the Internet at <http://www.mta.info/mta/procure-esa-drb.htm> and following the instructions for Disputes Review Board (DRB) Members and Chairpersons.

# Summaries of Board Meeting Conference Calls

## **February 15, 2002 DRBF Board Meeting Conference Call**

A DRBF Board of Directors meeting was held by conference call on February 15, 2002 with 10 Directors and Officers participating, together with the Administrative Manager, Steve Fox. The following is a brief summary of the discussions and actions taken at the meeting.

A California law firm has asked to reproduce portions of the DRB Manual in a new publication. Bob Smith requested to have a copy of the letter FAXed direct to his home for him to review.

### **DRBF Annual Meetings:**

**Rome** - Peter Chapman reported that he hopes to complete arrangements for accommodations and venue for the upcoming meeting in Rome within another week. Possibly the meeting will be held at a Vatican University. An ADR organization has indicated an interest in becoming associated with the Annual DRBF International Conference but will not be able to participate this year. Peter requested cost information for a DRBF Chairing Workshop at the conference in order to determine the viability of offering such. Jim Donaldson indicated that he would offer his services for the workshop free of charge.

**Orlando** – Steve Fox reported that arrangements have been signed with the Renaissance World Gate Hotel for the 2002 Annual Meeting to be held on Saturday and Sunday, October 5 & 6, 2002. Training Workshops will be held on Oct. 3 & 4. The Board of Directors meeting has been scheduled for October 4<sup>th</sup>. Breakout rooms have been set up near the main meeting room and nightly room rates will be \$109.

### **Treasurer's Report:**

Pete Douglass reported that as of January 31, 2002 ~ \$50,000 had been received in pre-paid 2002 memberships. January expenses were consistent with budget expectations.

As of February 12, 2002 more dues revenues have been collected than at this time last year, largely due to the increased dues rates adopted for 2002. The actual number of paid 2002 members is about 11% behind 2001.

### **Membership:**

A job description and monthly compensation package has been agreed to with Larry Rogers for his role as membership director for the DRBF.

Steve Fox provided a report on the membership status as of 2/12/02 noting YTD (year to date) membership of 341 (compared to 385 the same time last year). Steve noted that we had lost 12 members who failed to renew and he will give these names to Larry (with a copy to Jack) to follow up on with respect to their reasons for leaving.

It is on Larry Rogers' agenda to get a package out in February addressing a membership network broken into 8 US regions. These might include:

- New England
- Mid Atlantic
- Southeast (Florida – currently with 80 members)
- North Central
- South Central
- Pacific Northwest (currently with 75 members)
- California (currently with 110 members)
- Southwest

Southeast region – Jimmy Lairscey reported that he had arranged for a regional meeting to be held at the Thousand Oaks Ranch southwest of Jacksonville on March 9, 2002 to discuss various issues, including how to measure success of the DRB process. Jimmy indicated that any of the DRBF Board members who were interested in attending should let him know. It is hoped that the meeting will lead to another 15 to 20 new members. Jimmy is also trying to get together a team to work on selling the DRB process to Cities and Counties and has invited a few of these players to his Regional Meeting.

Canada – Adele McKillop indicated that she was trying to get the word out to various organizations in an attempt to generate interest in DRBs in Canada.

Southwest region – John Nichols from the Bay Area has expressed an interest in helping in this region.

More work is needed in setting up the Inter-

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national membership network and Jack will contact Peter Chapman for assistance in this matter.

Joe Sperry indicated that Hawaii used to be a strong area for DRB use but has fallen off.

**Training:**

Twelve DRBF training workshops have been scheduled and confirmed for this year so far. It is hoped that more workshops will come out of regional membership meetings like Jimmy's.

A new workshop session has been developed which is directed specifically at DRB users such as DOTs, AGC, etc. This new session is being conducted in Boise for IDOT and at the Univ. of Washington.

**Group Professional Liability Insurance:**

Brison Shipley reported that more than one underwriter has expressed interest in providing such a group rate policy. Background information regarding past experience on DRB work has been requested. The Board and Officers were not aware of any action brought against DRB members in the past. With the suggested wording in the 3 Party agreement the risk should be minimal. Even in Florida where the State legislature disallowed the immunity wording, there has never been a problem.

**Web Site:**

Jim Donaldson is looking for help in drafting up a form for "Bios" that can be submitted by DRBF members for inclusion on the website. Board members were requested to mark up a hard copy of Jim's draft form with their comments and FAX it to Steve Fox by 2/22/02 for compilation and transmittal to Jim Donaldson. A few of the suggestions included:

- There needs to be more space for the "resume" and "DRB experience";
- Eliminate "DRBF" in the form heading as it could be taken to imply endorsement;
- The DRBF should check for satisfactory attendance at DRBF training workshop sessions;
- Be sure to add a disclaimer.

Jim Donaldson also suggested there may possibly be a need for a user's form to request information through the website.

Jack reminded the Directors and Officers to e-mail a photo or mail a hard copy photo to the web master for inclusion on the website.

Jack and Steve will get together a listing of DRBF events and send it to the webmaster.

Send any comments regarding the website ([www.drb.org](http://www.drb.org)) to Craig Neff.

**Code of Ethics:**

Brison indicated that this task has been on the back burner, but hopes that a draft will be available by some time in June.

**AA Mathews Award Procedure:**

Jack ask Bill Baker to draft up a procedure for the selection of the recipient for this annual award.

**Name Change Vote Status:**

Jack reported that there were 21 votes from the membership received at this time with 20 agreeing with the name change and one opposed. The votes are due in by 2/28/02 and it is hoped that over 100 votes will be cast.

Once the vote on the name change is completed we can kick-off the Logo contest in earnest.

**Presidential Duties and Authority:**

Jack noted that the DRBF was growing and was no longer based in the Pacific Northwest with both the current President and the President Elect located on the East coast. Jack indicated that he would like to structure procedures and input in accordance with the by-laws and would like to have everything report to the current President. This would include Steve Fox and Larry Rogers reporting directly to the President for approval of any action to be taken.

Jack also indicated that Steve Fox's employment agreement should be reviewed and asked that Pete Douglass and Bill Baker do this and draft appropriate revisions.

Jack also indicated that he hopes we are looking for a part time Executive Director.

**Other:**

Joe Sperry indicated that he would FAX the Board members a copy of contract language used on some jobs to provide for the use of DRB advisory quick opinions (DRB Light).

Only four of the Board members had received their copies of the FORUM at the time of the Board conference call, even though it went out the 1<sup>st</sup> week of February. Steve indicated that with our bulk mailing rate it can take up to 2 or 3 weeks for delivery.

Jimmy Lairscey indicated that he will inquire into possible outside funding for DRBF projects through FHWA and/or ASHTO.

An inquiry was made as to the status of Kathleen Harmon's research project and Jack indicated that he would follow up and find out.

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**April 12, 2002 DRBF Board Meeting Conference Call**

A DRBF Board of Directors meeting was held by conference call on April 12, 2002 with 12 Directors and Officers participating, together with the Administrative Manager, Steve Fox. The following is a brief summary of the discussions and actions taken at the meeting.

**DRBF Annual Meetings:**

**Rome, Italy Conference on May 25, 2002** - Peter Chapman and Igor Leto reported the following:

- 17 or 18 are now confirmed to be attending;
- The Chairing workshop has been scrubbed due to lack of sufficient pre-registrants;
- DRBF Board members who currently plan to attend include Jack Woolf, Brison Shipley, Robert McClean, Peter Chapman and Igor Leto;
- DRBF Representatives from several different countries have signed up and it's looking to be a very successful conference; and
- Updates and additional information will be provided in the next FORUM.

**Orlando, Florida Annual Meeting on October 5 & 6, 2002** - Brison Shipley reported the following information:

- The DRBF Board meeting will be held on Friday, October 4, 2002;
- Saturday AM and PM there will be 3 Break-out Sessions which are currently envisioned as:
  - Marketing the DRB process;
  - Legal Developments and Maintaining the Integrity of the DRB Process; and
  - Around the World in 80 Minutes

**Revised Administrative Manager's Agreement:**

The revised Administrative Manager's "Employment Agreement" had been circulated to the Board prior to the conference call and it was approved, subject to one change. A Reporting section is to be added that states "the Administrative Manager will report to the current President or, if unavailable, to the Secretary/Treasurer."

**Annual "Al Mathews Award" Procedure:**

A draft document stating the basis for the Award, the procedure for nominations and the

formation of the nominating committee, and a description of the Award and when it is to be presented, had been circulated to the Board members before the conference call. A question was raised as to whether a non-DRBF member could be nominated for the Award. The Board felt that initially it should be restricted to DRBF members. Bill Baker agreed to FAX the final version to the Board with the suggested revisions.

**Florida DRBF Chapter/Special Assessment:**

Jimmy Lairscey reported that the 1<sup>st</sup> Florida Regional Meeting had been held and they had discussed a separate dues assessment to fund the Florida Chapter's activities. It was suggested that for those wishing to be a member of the "Florida Chapter" an additional mandatory \$20 fee be included on the dues assessment from the DRBF and that general DRBF membership be a requirement in order to be a member of the "Chapter".

Bob Smith noted that the Board needs to send a letter authorizing the formation of the "Florida Chapter" and authorizing the additional dues assessment.

It was reported that John Nichols would like to set up a similar chapter for the California Region.

**Treasurer's Report:**

Pete Douglass reported that as of April 1, 2002 dues revenues were approximately 41% ahead of this time last year, even though we are about 5% behind last year in the number of paid memberships. Workshop revenues are generally off target with the budget and operational expenses are comparable to last year at this time.

Projections to the end of the year based on reaching the same membership as 2001 (still 111 more members needed) suggests a greater net increase in the reserve fund from 2002 operations than budgeted. The main difference between the current projections and the budget stems from the fact that we have not hired an Executive Director. Instead we have set up a Membership Director and a Webmaster totaling about \$25,000 less than budgeted.

**Other:**

Bill Baker made a presentation to the Federal GSA (General Services Administration) in an effort to get them to include DRBs on their projects. GSA indicated that they hope to put together a model project to try it on. Jack Woolf pushed for a NYC project as this is where they have had the worst success.

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Jack Woolf ask the Board for any ideas to give to Messrs. Rueben and Meyer for their talk to the Moles.

At this point the Board went into closed session and Steve Fox was excused from the conference call.

### **June 14, 2002 DRBF Board Meeting Conference Call**

A DRBF Board of Directors meeting was held by conference call on June 14, 2002 with 12 Directors and Officers participating, together with Steve Fox, Administrative Manager. The following is a brief summary of the discussions and actions taken at the meeting.

#### **Treasurer's Report:**

As of 5/31/02 there were 486 DRBF members, which is slightly behind this point last year, but the dues revenues are well ahead of last year. It is currently projected that our 2002 membership will reach approximately 550 with dues revenues roughly 13% less than budgeted.

Workshop revenues, with 10 workshops completed and at least 2 more workshops at the Annual Meeting, are expected to be very close to budget. Operational expenses are on target but are projected to be roughly 25% less than budgeted, largely as a result of hiring a Membership Director and Webmaster instead of an Executive Director. As a result, it is currently estimated that 2002 additions to the reserve fund will be approximately 50% greater than budgeted.

#### **Training Workshops:**

Ten have been accomplished to date, with 2 more scheduled at the Annual Meeting and possibly 2 more in the New York City area.

#### **Membership:**

Jack Woolf reported that this effort is moving along, although we need Peter Chapman and Igor Leto to help energize the International membership efforts. Jack noted that we picked up 5 new members at the Rome Conference and that was very good.

Adele McKillop indicated that she had been talking with a number of people in Canada and needed to define the Regions. Jack thought that there would probably be two Regions in Canada, East and West, and suggested that Adele talk directly with Larry Rogers to confirm and to discuss setting up possible workshops.

#### **Website:**

The bios resume form is now on the website for use by members in submitting their information. A disclaimer is included on the form to protect the DRBF.

#### **Newsletter Reformatting:**

Our consultant is doing a random survey to obtain more information on what changes are desired. Some of the possible changes under consideration include:

- A monthly newsletter instead of quarterly;
- A more "newsey" format;
- Opening up the competition for publishing the newsletter from different areas of the country with possible significant savings; and
- Re-assessing e-mail distribution as only about 20% of the Rome conference attendees expressed an interest in receiving the newsletter by e-mail only.

#### **Rome International Conference Update:**

Approximately 60 attended the conference with a lot of attendance from Italy. A number of topics were discussed and these will be recapped in the next issue of *Forum*.

There was a general feeling amongst the attendees that the Manual should be updated to include Dispute Adjudication Boards (DABs), etc., and noting if possible:

- Special applications for DABs;
- International experience in the use of DRBs/DABs;
- Distinctions between binding and non-binding recommendations;
- More focus on the users, Owners and Contractors, that must appear before the Boards; and
- Possible incorporation of a "loose leaf" format to facilitate future updates.

Jack Woolf noted that he was very impressed with the Rome meeting. Further, the ex-Chief Justice to Pakistan ask Jack if he would speak at an Islamabad meeting near the end of June. Jack told him that he was not available. Peter Chapman thought, however, that Gordon Jaynes was planning to be at that meeting and that he might be willing to make the presentation.

Jack indicated that discussions at the Rome meeting suggested that future International Conferences should be held where DRB work is crystallizing. Jack suggested that Armando Araujo pursue identifying a possible South American location that meets these criteria for the next International meeting.

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**DRBF Annual Meeting in Orlando:**

Brison reported that the meeting would start with a business meeting on Saturday morning, 10/5/02, followed by 3 breakout sessions:

- Marketing Strategy and Structure – with Bill Baker, Bill Edgerton and Jimmy Lairscey as facilitators;
- Integrity of the DRB Process: Legal Developments – with Pete Douglass, John O'Rourke and Joel Lewin as facilitators; and
- International / Global Picture – with Peter Chapman, John Bradshaw and Frank McDonough as facilitators.

On Sunday morning 45 minutes would be spent summing up the results from Saturday's breakout sessions and then the meeting would be open to general discussion from the conference attendees.

Brison mentioned that he is still looking for a good keynote speaker. Jimmy Lairscey mentioned that the head of the Road Builders Association in Florida is an interesting speaker and Jimmy will check with him as to his interest and willingness. Jack Woolf suggested that we might want to consider selling memorabilia such as lapel pins to commemorate the DRBF name change and new logo.

**Logo Contest:**

Jack Woolf reported that he had only received 2 logo submittals to date and he was rather disappointed.

**Mathews Award:**

Jack Woolf reported that he would be convening a panel from the general DRBF membership to serve as a nominating committee for this award.

**Code of Ethics:**

Brison Shipley reported that he had drafted up a Code of Ethics and ask if we needed to obtain permission from other organizations to use some of the same cannons. Brison has also been communicating with Adrian Bastianelli and Gary Brierly and is considering drawing from the Code of Ethics for DRBs contained in David Hatem's book. The draft Code of Ethics would not contain anything that is not already in the DRB Manual.

It is Brison's intention to get the draft Code of Ethics in the July issue of the FORUM so that the general membership can review it and be prepared to discuss it at the DRBF Annual Meeting.

**Errors and Omissions Insurance:**

Brison indicated that one insurance underwriter had put together a policy that could be issued to the DRBF such that all DRBF members would be covered for E & O on DRB work at a total cost of approximately \$30,000 per year. Two other underwriters are also pricing this type of policy. Following some discussion amongst the Board, it was expressed that probably 60 to 90 percent of the DRBF membership would be interested in serving on DRBs.

**Other:**

Jimmy Lairscey inquired as to how many of the members, as a percentage, have taken DRBF Workshop training. Steve responded that approximately 260 members have taken the training, which is a little over 50%. Jimmy is looking at the possibility of offering another claims course for dispute avoidance.

Peter Chapman indicated that the International Conferences have been great but that we aren't spreading the word to potential employers. He suggested that next year we may want to have a 2 day conference with the 1<sup>st</sup> day set up to invite area employers to hear a presentation on the benefits of DRBs / DABs. Some extra money was netted from the Rome conference that could be used to help fund next year's International Conference. Peter also suggested 2 or 3 man "missions" to go to places like China and India and others to talk with employers about DRBs/DABs. Peter believes that we could pick up a lot of members this way.

Armando Araujo agreed with Peter on the benefits of a 2 day meeting and the need to focus on the employers. Armando particularly liked the concept of "missions" and felt that the World Bank's (WB) "distance learning facility" might be able to assist in this matter by facilitating such presentations from Washington, DC. Jim Donaldson indicated that the DRBF "User Workshop" is currently 2 to 4 hours long and Armando thought this was a reasonable length of time for transmission via the WB's "distance learning facility".

Armando also noted that the World Bank is hosting a meeting on October 9, 2002 supporting DRBs with the intent being to create more awareness in the World Bank and to provide needed information. It will be a 2 day activity with day 1 addressing risk management. The 2<sup>nd</sup> day will be on DRBs with a presentation by Jack Woolf and discussions on how to extend the use of DRBs to other types of contracts be-

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sides Civil Works.

Igor Leto indicated that it would be very helpful to get an updated list of what DRBs/ DABs currently exist, or have existed, through WB contracts. Armando agreed to put together and distribute such a list.

Steve Fox indicated that Larry Rogers is working on a DRBF information pamphlet that would incorporate a membership application.

**The next DRBF Conference Call is set for Friday, August 16, 2002 at 9:00 am PDT. £**

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2254879

E-Mail: justicekhalil@hotmail.com

Dr. Helmut Koentges

Lilienstr.14

D-45133 Essen, GERMANY

Phone: 49-201 424512 Fax: 49-201 8241972

E-Mail: helmut.koentges@hochtiet.de

Harold Kvaas

Kvaas Management Co.

10076 Shadow Road

La Mesa, CA 91941 USA

Phone: 619-668-4080 Fax: 619-668-4088

E-Mail: hkvaas@kvaas.com

Christopher Laughton

Fermi Laboratory - DOE

PO Box 500 MS 220

Batavia, IL 60510 USA

Phone: 630-840-5407 Fax: 630-840-6039

James W. MacLaughlin

2036 S.W. 77th Terrace

Gainesville, FL 32607 USA

Phone: 352-331-7185 Fax:

E-Mail: jimcindymac@aol.com

James R. Madison

750 Menlo Avenue Suite 250

Menlo Park, CA 94025 USA

Phone: 650-614-0160 Fax: 650-321-0198

E-Mail: jrmcoach@aol.com

Dean Martyniak

289 East Halsey Road

Parsippany, NJ 07054 USA

Phone: 908-730-4660 Fax:

E-Mail: DMartyniak@sprintmail.com

Jessica Miles

SJB Group

PO Box 175

Baton Rouge, LA 70821-1751 USA

Phone: 225-765-1900 Fax: 225-765-1919

E-Mail: jmiles@sjbgroup.com

Kenneth E. Millsaps

8973 Lakes Blvd.

W. Palm Beach, FL 33412 USA

Phone: 561-776-9941 Fax: 561-776-4981

Eduardo Cantu Muguera

Mision de San Diego 13 Jardines Coloniales

Garza Garcia, NL 66230 MEXICO

Phone: 52-81-83420196 Fax: 52-81-83441306

E-Mail: edcantu@infosel.net.mx

PMA Consultants LLC

Bruce Stephan

One Gateway Center 6th Floor

Newark, NJ 07102 USA

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**Do you have a question or concerns about DRBs in general or the DRB you are working on? Consult with one of the Hotline Committee members:**

Joe Sperry  
Auburn, CA  
530-878-7305

Daniel F. Meyer  
Chicago, IL  
847-295-9197

Jim Donaldson  
Seattle, WA  
206-525-5216

Bill Baker  
Calistoga, CA  
707-942-5886

Norman Nadel  
New York, NY  
914-279-5516

Ray Henn  
Denver, CO  
303-534-1100

Roger Brown  
Portland, OR  
503-628-1707

*(Continued from page 24)*  
Phone: 917-842-1970 Fax: 518-963-4331  
E-Mail: bmstephan@msn.com

Mathew H. Poftak, P.E.  
Independent Consultant  
1338 Hooksett Road #250  
Hooksatt, NH 03106 USA  
Phone: 603-268-0751 Fax: 603-268-0752  
E-Mail: poftakm@asme.org

Dermot Roughan  
14 Holmwood  
Dublin, 18 IRELAND  
Phone: 35-31-2855135 Fax: 35-31-2855626  
E-Mail: Droughan@eircom.net

Susan F. Rudy, P.E.  
Susan F. Rudy & Associates, Inc.  
8701 Summit Ave.  
Baltimore, MD 21234 USA  
Phone: 410-661-4790 Fax: 410-661-4791  
E-Mail: sfrudy@juno.com

Anthony A. Sabbag  
Carnahan Proctor & Cross  
6101 W. Atlantic Blvd  
Margate, FL 33063 USA  
Phone: 305-756-8600 Fax: 954-972-4178

Richard A. Sage  
Sound Transit  
18624 116th Street S.E.  
Snohomish, WA 98290 USA  
Phone: 360-794-4923 Fax:  
E-Mail: dicksage@interserv.com

Michael P. Schawe  
110 Lake Emerald Drive  
Oakland Park, FL 33309 USA  
Phone: 954-677-2778 Fax: 954-485-1033  
E-Mail: Mschawe@Trumbullcorp.com

Robert C. Schuster  
3621 McCormick Street S.E.  
Olympia, WA 98501 USA  
Phone: 360-705-0883 Fax: 360-705-0883  
E-Mail: marciboboly@attbi.com

Walter E. (Ted) Stanley  
Bovis Lend Lease  
1661 Hendrix Avenue  
Thousand Oaks, CA 91360 USA  
Phone: 310-863-8487 Fax: 310-312-0155  
E-Mail: tedstan@adelphia.net

Thomas D. Sullivan  
Sullivan Equip. Inc.  
807 Palomino Dr.  
San Marcos, CA 92069 USA  
Phone: 619-990-1480 Fax:  
E-Mail: TomnJaneS@aol.com

Gerry Sverdlin, PE, Esq.  
TCG, LLC  
16 Fairmount Way  
Quincy, MA 02619 USA  
Phone: 617-847-6053 Fax: 617-471-7231  
E-Mail: gisverdl@bigdig.com

Bob Velasquez  
3115 Stardust Street  
Rocklin, CA 95677 USA  
Phone: 916-632-7304 Fax: 925-685-3206  
E-Mail: bvelasquez@hotmail.com

John R. White  
R.W. Beck, Inc.  
851 Broadway  
Hanover, MA 02339 USA  
Phone: 508-935-1623 Fax: 508-935-1666  
E-Mail: Jwhite@RWBeck.com

Robert H. Wood  
7131 Brentwood Drive  
Boise, ID 83709 USA  
Phone: 208-376-6016 Fax: 208-376-0360  
E-Mail: Bobjacky@aol.com

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those who kindly led discussions and who participated from the floor. Our sincere thanks to Igor Leto who was “our man in Rome” and who found and organised the conference venue, hotels, restaurant and transportation. Really excellent job. And finally, if I have missed out or misreported the proceedings of the conference please accept my apologies—note taking when trying to emcee a conference is never comprehensive and my thanks are due to John Bradshaw who kept his notes of the conference which I have used in preparing this summary. £

# WELCOME TO NEW FOUNDATION MEMBERS

## MEMBER ADDITIONS APRIL TO JUNE 2002

John A. Apostolos, P.E.  
PO Box 5022  
Patra, 26004 GREECE  
Phone: 30-610-992826  
E-Mail: jaa@otenet.gr

Richard A. Appuhn  
Consultant  
via Del Paradiso, 41  
Rome, 00186 ITALY  
Phone: 39-340-4028715 Fax: 39-06-6868676  
E-Mail: appuhn.r@I-sys.com

Mark A. Burroughs  
Roger Brown Corp.  
15917 32nd Avenue S.E.  
Mill Creek, WA 98012 USA  
Phone: 425-357-6096 Fax:

Courtney L. Canfield  
95 Louis Street  
Staten Island, NY 10304-2111 USA  
Phone: 718-720-4959 Fax: 718-720-4959  
E-Mail: clcanfield@aol.com

Jay E. Carlson  
6882 W. Williams Drive  
Glendale, AZ 85310 USA  
Phone: 623-572-8562 Fax: 623-572-8598  
E-Mail: jcarlson@cox.net

Steven L. Chamberlain  
SCA Consulting Group  
PO Box 3485  
Lacey, WA 98509-3485 USA  
Phone: 360-493-6002 Fax: 360-496-2476  
E-Mail: schamberlain@scaconsultinggroup.com

Joseph Covello  
The Covello Group  
43 Quail Court Ste 111  
Walnut Creek, CA 94596 USA  
Phone: 925-933-2300 Fax: 925-933-0434  
E-Mail: jcovello@covellogroup.com

Antonio Crivellaro  
Bonelli Erede Pappalardo Caix Firu  
Via Barozzi, 1  
Milan, 20122 ITALY  
Phone: 39-02-7711131 Fax: 39-02-7711263  
E-Mail: Antonio.Crivellaro@beplex.com

Richard Di Fedele  
Bechtel Corp. - ESAP  
7 Dolphin Cove Quay  
Stanford, CT 06902 USA  
Phone: 212-643-4726 Fax: 212-695-3266  
E-Mail: RDifedel@mta.esa.org

Jerry Eggleston  
CH2M HILL  
2503 Esquire Drive  
Boise, ID 83704-6210 USA  
Phone: 208-345-5310 x253 Fax: 208-345-5315  
E-Mail: jegglest@mindspring.com

Robert J. Fullmer  
21 Arden Lane  
Essex Fells, NJ 07021 USA  
Phone: 973-403-0053 Fax: 973-403-2938  
E-Mail: fullmerrobert@aol.com

G. W. Gilfillan  
1000 Point San Pedro Road  
San Rafael, CA 94901 USA  
Phone: 415-258-6876 Fax: 415-258-9714

Terrance N. Glunt  
Corzo Castella Carballo Thompson  
Salman, P.A.  
1456 SE 6th Street  
Deerfield Beach, FL 33441 USA  
Phone: 954-570-8621 Fax:  
E-Mail: tglunt@ct3s.com

Louis E. Gosewisch, Director  
City of Lakeland Facilities & Const  
Mgmt.  
228 S. Massachusetts Ave.  
Lakeland, FL 33801 USA  
Phone: 863-499-2380 Fax: 863-499-2384  
E-Mail: lou.gosewisch@lakelandgov.net

Piergiorgio Grasso  
Geodata SPA  
C. Duca Abruzzi, 48E  
Turin, 10129 ITALY  
Phone: 39-011-5810661 Fax: 39-011-597440  
E-Mail: pgr@geodata.it

Giorgio Guiducci  
G.P. Lugepuene SPA  
V. Le Tiziano 3  
Rome, 00146 ITALY

Phone: 39-06-3235408 Fax: 39-06-32302702  
E-Mail: posta@gpingegezia.com

Hinckley, Allen & Snyder LLP  
Joel Lewin, Esq.  
28 State Street  
Boston, MA 02109 USA  
Phone: 617-345-9000 Fax: 617-345-9020  
E-Mail: Jlewin@haslaw.com

George E. Howell  
105 Sparks Court  
Williamsburg, VA 23185 USA  
Phone: 860-312-2511 Fax: 860-312-2514  
E-Mail: Jhwl@msn.com

Jack F. Immel  
660 Wendt Terrace  
Laguna Beach, CA 92651 USA  
Phone: 949-494-6336 Fax: 949-494-6336  
E-Mail: jimmel@juno.com

Robert J. Jacobs  
2207 25th Avenue  
San Francisco, CA 94116-1749 USA  
Phone: 415-731-4393 Fax:  
E-Mail: pat\_bob@prodigy.net

Eric B. Johnson  
4657 Blue Pine Circle  
Lake Worth, FL 33463 USA  
Phone: 954-316-3807 Fax: 954-316-1110

Michael M. Joye  
Joye & Associates  
122 Main Street  
Flemington, NJ 08822 USA  
Phone: 908-806-2261 Fax: 908-806-2213

Lawrence H. Kay  
Law Office of Lawrence H. Kay  
7801 Folsom Blvd. Ste 350  
Sacramento, CA 95826 USA  
Phone: 916-381-7868 Fax: 916-381-7880  
E-Mail: lkay@skandw.com

Justice(Ret) Khalil-Ur-Rehman Khan  
Rector, International Islamic University  
Islamabad, PAKISTAN  
Phone: 92-51-2254707 Fax: 92-51-

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# **The Dispute Resolution Board Workshops**

## **Administration and Practice**

**October 3, 2002—Orlando**

## **Chairing**

**October 4, 2002—Orlando**

**We recommend that attendees take the Administration and Practice workshop prior to attending the Chairing workshop. Registration fees include lunch and workshop materials. Each participant will also receive a Certificate of Completion from the Dispute Resolution Board Foundation. The cost for each workshop is \$395 for non-DRBF attendees and \$345 for DRBF members. To register call the Dispute Review Board Foundation**

# Foundation Forum

The Dispute Resolution Board Foundation  
6100 Southcenter Blvd., Suite 115  
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Foundation Forum

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**Program Information and Registration**

## **The Dispute Resolution Board Foundation 6th Annual Meeting and Conference**

**October 5 and 6, 2002**

**Renaissance Worldgate Hotel  
Orlando, Florida**

# Forum

Volume 6, Issue 3

July, 2002

## DRBs & Partnering—The Working Relationships Between DRBs and Facilitators

by

**Tom Brascher and Marsha Bailey  
Team Technologies, Olympia, WA  
and ADRWorks, Inc., Sacramento, CA**

**“The role of a partnering facilitator is to lead process and discussions effectively. . . . The role of the DRB is to advocate and lead the issue resolution process with the project team.”**

More and more DRBs are being implemented on projects that are also incorporating partnering. With the growth of the Dispute Review Board process and use in more public works contracts, partnering and DRBs, combined, offer an unprecedented opportunity for dispute prevention and resolution.

The relationship between the DRB panel and Partnering strategies provide an ideal situation for a project team to bring out the best in both management tools. The partnering facilitator manages team process while the DRB manages content of issues. Clearly defining and separating out the different focus of process and content is critical.

DRBs and partnering facilitators need to understand each other’s roles and responsibilities, and then work together as a team to educate and optimize the use of both systems.

The collective goal is to help the project manager team on the job achieve a successful project without any unresolved claims at contract completion.

The Partnering process is the ideal strategy to develop professional trust/respect relationships. Implementing partnering on a job creates the environment to optimize the use of the DRB panel to resolve issues as they occur on the job. The direct result of this is a project team that makes timely and fair decisions on disputed issues. Timely issue resolution helps keep the change order process current and cash flow healthy for the project parties.

Combining partnering and DRBs seems so straightforward and self evident, it has been a puzzle to industry advocates why there is such great resistance to partnering, DRBs and/or both on jobs. The fast answer most often heard is: “The processes are too expensive!”

In addition, both partnering and DRBs suffer from the “I know what it is,” (but I

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# President's Page

With just a few months to go before our Annual Meeting in Orlando, Florida, I'd like to take the opportunity to review some of the actions taken by the Foundation since our last Annual Meeting in Las Vegas:

- Broadened our Board of Directors to properly reflect our International constituency
- Redesigned the website (www.drb.org)
- Changed our name to the Dispute Resolution Board Foundation
- Appointed a Membership Director and created a Global Member Acquisition Network
- Increased and refined our Training Programs
- Finalized our new Logo
- Perpetuated the Annual "Al Mathews Award"
- Created "on-line" BIOS for our members
- Drafted a "Code of Ethics" planned to be adopted at the Annual Meeting

All of these initiatives have helped position the Foundation to achieve its goal of furthering the use of DRBs worldwide.

At our very successful International Annual Meeting in Rome, Italy, this past May, the message from the attendees was that the use of DRBs is growing not only in Asia, but is spreading to European countries as well. We had over 60 attendees from 16 countries. One of the attendees, and now new member, was the retired Chief Justice of the Pakistani Supreme Court. Mr. Justice Khan's interest in the DRB process caused the convening of over 100 interested State Officials at a meeting on June 29th in Islamabad to examine how to increase DRB usage in Pakistan.

As our membership increases (and our income increases), we will be able to continue our growth and Member Benefits.

It is always appropriate to remind each of our Members, that we are a volunteer organization, and our energy source is the time, commitment and creativity of our membership. Please be sure that you are contributing to our cause and goals!

**Jack**

Jack J. Woolf  
Phone: 704 541 0065  
Fax: 704 544 2859  
Email: jjwoolfconstsol@aol.com

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**Editor: Larry V. Rogers**

Editorial and subscription address: Dispute Resolution Board Foundation, 6100 Southcenter Blvd., Suite 115, Seattle, WA 98188-2441, 206-248-6156 206-248-6453 (FAX) Toll free (US only) (888) 523-5208, E-mail: home@drb.org. Web site: www.drb.org

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## From the Editor

We have talked a great deal in the workshops over the past two years about the interplay between DRBs and partnering. Tom Brascher provides us with an analysis from the partnering perspective in this issue of the *Forum*.

When Peter Chapman puts on a conference you had better hang on to your hat. Reading the report on the International Conference in Rome it is hard to believe that it all took place in just one day. It is good to see that the international meetings are becoming as popular as the annual meetings here in the US. You should strongly consider going to next year's international meeting where ever it will be held.

Steve Fox, incoming President Brison Shipley and the Board are hard at work on the 6th Annual Meeting and Conference in Orlando. Now is a good time to make your plane reservations. It is amazingly inexpensive to fly to Orlando right now. Brison has created another great program..

Information about the conference and a registration form is in the special pull-out section of this *Forum*.

Another thing that has been needed for some time is a Code of Ethics and Brison has provided one for your review. Please take time to read it and the accompanying comments and be sure to send Brison your comments. We really do want your ideas.

Most of you are aware that Kathleen Harmon has been working on her dissertation concerning DRBs. Please be sure to fill out and return the survey that will be coming to you in August. We really need to start the process of developing empirical data concerning the cost savings associated with DRBs so that we can do a better job of convincing people to use them.

See you in Orlando. □

**Larry Rogers**

## Letters and E-mail to the DRBF

### Growing Interest in DRBs in Europe

This is to inform the readers of the DRB Foundation journal that the DRB procedures are interesting more and more practitioners in Europe, in common law countries as well as in civil law countries. I have been asked to speak in 3 recent conferences which may be worth mentioning:

1. The International Construction Law Conference in London on 25/26 March 2002, organised by Judge Humphrey Lloyd QC and David Wightman. The topic presented was "The Growing Interest in Dispute Boards in International Contracts."
2. The conference of the "Swiss As-

sociation of Lawyers & Advocates" in Lausanne on 7/8 June 2002. The topic was "La procédure des Disputes Boards" (The Procedure of Dispute Boards).

3. The ICC has issued at the intention of the National Committee the "Report on the Introduction of ICC of Dispute Boards in the Prevention and Resolution of Disputes."

**Pierre M. Genton**

# A Proposed Code of Ethics for Dispute Resolution Board Members

by  
**Brison Shhipley**

Since the annual meeting last October in Las Vegas, the DRBF has been developing a draft Code of Ethics for DRB members and chairpersons. The notes taken during the break-out sessions in October were reviewed, along with (1) the DRB Guide Specification and Three-Party Agreement found in the DRB Manual, (2) the Code of Ethics for Arbitrators in Commercial Disputes (American Arbitration Association), and (3) a code developed with DRBs specifically in mind by the American Consulting Engineers Council of New England. With respect to the latter, a subcommittee headed by Gary Brierley conducted a thorough review of other ethical codes developed for not only arbitrators, but attorneys and judges as well. The text of that code is reprinted nearby.

A few comments: The principles enunciated in the draft DRBF code can all be found in different places in the Guide Specifications and Three-Party Agreement. They are set forth in the Code as simple, broad statements. Those members who are familiar with the codes for arbitrators, lawyers, and/or judges, will note that this draft does not contain lengthy explanatory text. These other codes have been in effect for decades and even centuries, and reflect the experiences of thousands of practitioners. A wholesale incorporation of such material by the Foundation without benefit of extensive review and comment would, in my opinion, be a mistake.

**Your comments on this first draft are earnestly solicited – they will greatly assist in producing a viable code for DRB members. Please direct your comments to me at bshiple@attbi.com. A portion of the annual meeting will be devoted to this matter.**

## Code of Ethics for Dispute Resolution Board Members

In order to ensure the integrity of the Dispute Resolution Board (“DRB”), each DRB member should take personal responsibility for adhering to the following Code of Ethics:

**Cannon 1.** The DRB should consider fairly and impartially, the disputes referred to it. Each member should act impartially and independently in the consideration of facts, contract provisions, and conditions surrounding any dispute.

**Cannon 2.** A DRB Member should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias. The obligation to disclose is a continuing obligation.

**Cannon 3.** A DRB member is in a relationship of trust to the contracting parties and should not use confidential information acquired during DRB proceedings for personal advantage or divulge such information to others.

**Cannon 4.** A DRB member in communicating with the parties should avoid impropriety or the appearance of impropriety. Ex parte communications regarding the Project should be avoided.

**Cannon 5.** A DRB member should conduct the proceedings in an expeditious, diligent, fair, and impartial manner.

\*\*\*\*\*

**American Consulting Engineers Council of New England Code of Ethics for DRB Members.** Source: Subcommittee chaired by Gary Brierley Reference: Subsurface Conditions: Risk Management for Design and Construction

*(Continued on page 5)*

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Management Professionals, David J. Hatem, Esq., Editor; Chapter 9 “Dispute Resolution Mechanisms for Differing Site Conditions Claims” by Hugh Caspe.

**Canon One—Financial Separation**

The members of a DRB should perform their duties while maintaining financial separation from both parties in accordance with the following framework:

- A DRB member should refrain from any financial or business dealings that may reflect adversely on his/her impartiality or involve him/her in business transaction with persons or businesses likely to be involved in disputes presented to the DRB.
- DRB members shall be compensated for the time and expenses incurred in the performance of their duties. DRB members should, however, avoid engaging in communications concerning compensation that create an appearance of impropriety. Likewise, DRB members should terminate their involvement if compensation is used in an attempt to compromise judgment.
- If a DRB member becomes aware of questionable financial conduct by any party involved in the DRB process, then he/she should report this information to both the owner and the contractor.

**Canon Two—Impartiality**

A DRB member should be impartial, fair, and independent in accordance with the following guidelines:

- DRB members must disclose to all parties the existence of interests or relationships that are likely to affect their impartiality or that might create an appearance that they are biased against either party. Both parties have the freedom, however, to agree on whomever they choose as a DRB member. When the contracting parties, after full disclosure of a person's interests and relationships, nevertheless desire that individual to serve as a DRB member, then that person may properly serve.
- A DRB member should disqualify him/herself from serving if he/she has:
  - A personal bias or prejudice concerning a party.
  - Personal knowledge of disputed evidentiary facts concerning the proceedings.
  - A financial or property interest that could be affected by the outcome of the proceedings.
- A DRB member shall not exhibit, in the per-

formance of his/her duties, bias or prejudice including but not limited to that based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

**Canon Three—Confidentiality/  
Communications**

A DRB member is in a relationship of trust to the contracting parties and should not use confidential information acquired during DRB proceedings for personal gain, to adversely affect the interest of another, or to damage the reputational interests of the parties.

- The DRB should accord all persons the right to be heard in full accordance with the established DRB agreement. At no time, however, should a DRB member participate in private interviews or communications outside of an officially sanctioned DRB hearing. Any attempt by either party to institute such discussions by individuals associated with either contracting party should be immediately reported to and discussed with other members of the DRB.
- DRB members should refrain from public discussion or publication of opinions and views as they may relate to specific issues, claims, or disputes pending before a DRB.
- A DRB member should not discuss the decision-making process of the Board with others or inform anyone of a recommendation in advance of the contracting parties. Once a recommendation is made, then no member of a DRB should try to influence any action of the contracting parties unless specifically required to do so in conformance with established DRB procedures.
- The ethical obligations of a DRB member begin upon acceptance of an appointment and continue even after a recommendation has been given to the parties.

**Canon Four—Adherence to the Contract Documents**

DRB members should act within the confines of their jurisdiction and issue recommendations based upon and consistent with the requirements of the contract document.

- The DRB's source of authority to hear disputes and to issue recommendations derives from an agreement between the Owner and the Contractor. The contract document typically defines the process by which the respective contracting parties may assert claims or disputes and the procedures by which those claims or disputes shall be evaluated and adjudicated. DRB members should be mindful of the limitations placed upon their jurisdiction as expressed in the agreement

*(Continued on page 6)*

*(Continued from page 5)*

empowering them. This admonition has two important dimensions: (1) the DRB should decide only those issues actually presented to it in accordance with the requirements of the contract document; and (2) the DRB should not supplant or otherwise interfere with the respective rights, authorities, duties and obligations of the Owner, the Designer, and the Contractor as defined in the contract document.

- In making recommendations, the DRB must acknowledge the centrality of the contract document and should never propose a resolution which ignores, disregards, or significantly undermines the intention, requirements, economic allocation of risk, or work specified in the contract document.

**Canon Five—Conduct of Hearing**

DRB members should attend to the conduct of a hearing as expeditiously as possible

- The DRB should facilitate the prompt accumulation and distribution of appropriate project records and should assemble to hear a dispute as quickly as possible.
- DRB members should make certain that all hearings are conducted in an evenhanded and dignified manner. A DRB should make all reasonable efforts to prevent delaying tactics, harassment of participants, or other abuse or disruption of the DRB process.
- To the greatest possible degree, the DRB should decide a claim on the basis of factual data and direct observation. DRB members are free to request additional information when it is felt that a dispute presented to the Board is incomplete. DRB members should not, however, attempt to assemble documents or conduct investigations relative to a dispute independently of the contracting parties.

**Canon Six—Recommendations**

DRB recommendations should be expressed in writing and in a manner which respects and acknowledges the DRB jurisdiction, acknowledges the respective positions of the parties and demonstrates fair and impartial consideration of the pertinent evidence.

- A DRB recommendation should be clearly stated and succinct. As a minimum, the recommendation should include the following: a statement of the issue(s) presented for resolution; a brief statement of the progression of the dispute so as to demonstrate that all conditions precedent to DRB consideration of the dispute have been satisfied; a recitation of the DRB's understanding of the respective parties' posi-

tions; an identification and description of the relevant evidence or information considered by the DRB; an evaluation of that evidence or information in the context of the specific dispute presented; and a clear and logical discussion of the DRB's reasoning supporting its recommendation.

- In making a recommendation, the DRB should only consider information presented by the parties in the common reference documents, the parties' respective position papers, and/or observations or other information jointly obtained by and shared with all DRB members. Information, perceptions, or observations of a DRB member which are personal to that member and not disclosed to other members should not be used to form the basis of a recommendation.
- Requests for reconsideration of a recommendation should be sparingly entertained and granted only in those circumstances in which the petitioning party demonstrates that the existing recommendation disregarded relevant evidence; is inconsistent with the contract document; is based upon fraud or other misconduct of a party; and/or exceeds the jurisdiction of the DRB. In addition, requests for reconsideration may be entertained in circumstances in which new evidence is discovered which could not have been discovered by a party through the exercise of reasonable diligence prior to the issuance of a recommendation. £

**Construction  
Dispute Review  
Board Manual by  
Matyas, Mathews,  
Smith and Sperry**

An essential reference for all construction professionals, this book shows you how to use Dispute Resolution Boards to solve construction disputes on the job, avoid claims and thereby reduce project costs. This definitive manual provides all the procedures required to employ the DRB process, and fully explains the benefits and pitfalls of DRBs. Whether you're an owner, contractor, construction manager, attorney or construction lender, this time- and money-saving sourcebook offers you the most complete guidance now available on the successful establishment and practice of a DRB during construction.

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Dispute Resolution Board Foundation  
6100 Southcenter Blvd., Suite 115  
Seattle, WA 98188-2441

206-248-6156  
206-248-6453 (FAX)  
888-523-5208 Toll free (US only)  
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really don't have a clue) syndrome. This condition blossoms when people have just enough information to get a hint of what the processes are, then proceed to use the terminology on the job in ways they were never intended. In this way the project parties can avoid the expense of retaining quality facilitators and DRBs. When faced with project representatives who have had this experience on past projects, the facilitator and/or DRB has to perform damage control measures to salvage the reputation of the partnering or DRB processes.

**Partnering Needs DRBs**

The focus of the partnering strategy is the continual search for the answer to this question: "How are we going to work together to build a successful project for all team members?" To accomplish this, part of the answer must address working through disagreements fairly and timely. The partnering strategy works with the project team to "agree in advance how to resolve issues fairly". To do this, the partnering team must implement an issue resolution process as a part of the partnering strategy.

Partnering contains eight core principles, which must be in place and regularly monitored in order to optimize the process. One of these core principles is the Confrontation Process.

If partnering does not have an effective issue resolution process that helps the partnering team confront and resolve issues timely and fairly, the partnering will implode and self-destruct. This is why we believe the DRB process provides a vital survival tool to the partnering strategy that is needed in order to keep it from falling apart when a job is hit by tough dispute issues.

**The Partnering Confrontation Process**

The basic partnering process for resolving dispute issues involves the use of the matrix, escalation or elevation process. There are many names for the partnering method in use in the industry today. The concept involves the development of core teams at different levels of the project team to resolve the issue. Each team is allowed to take a more objective or fresher look at the issues.

The partnering resolution method creates core teams that are identified across contract lines at the field, project management and executive levels on the project team. If the team closest to where the work is being performed cannot resolve dispute issues they are to elevate the issues up to the next team.

The field level team usually is in need of a "go" or "no go" decision on direction of work performance. The resolution of how much it costs, who owns the work and how it is apportioned between the parties becomes the responsibility of the project manager team. At this point, if the issue is disputed, the core project management team faces a business level contract dispute.

The critical factor for this process is how long does the core Project Management (PM) Team hold onto an issue before it elevates it to the core Executive Team? If the PMs hold onto the issue too long, cash flow and relationship damage will end the partnering effort and begin seeding adversarial relationships.

One of the greatest causes of partnering failure is the mismanagement of unresolved dispute issues. The greatest cause of breakdown of the partnering confrontation process is holding on to issues too long and not using the matrix process as designed. If the parties do not allow the confrontation process to run "concurrently" with the formal contract provisions, the issues may be held hostage and delayed from being resolved for months.

To correct this problem, partnering facilitators push the project executive and project management teams to calendar regularly scheduled meetings at the jobsite, to specifically review all eight partnering principles (in particular unresolved dispute issues). In so doing, they create the rule that if there are any unresolved dispute issues at the project manager team level not resolved prior to the joint executive/PM meeting, the core PM team must elevate and present the issues to the executive team.

**Partnering Confrontation and DRB rules**

When partnering is first implemented on a project, the partnering facilitator should meet with the project team and the DRB. They discuss the formal and informal rules for the use of the DRB and the partnering confrontation process. The Executive and Project Manager Teams need to agree on the rules of confrontation and the use of the DRB on the project.

*(Continued on page 9)*

# Other News

## Florida Chapter Formed

On March 9, 2002, thirty-five members of Florida DRBs met in north Florida to discuss issues relating to Dispute Review Boards for construction projects in Florida. Jimmy Lairscey chaired the meeting and presented the agenda.

Among discussion items were upcoming training sessions and conferences in Florida as well as briefings on the improved DRBF website, the change of name for the Foundation and ways of measuring the success of DRBs in Florida.

Specific issues related to Florida DRBs were discussed including an FDOT Inspector General audit of the DRB process in Florida, whether the Florida Sunshine Law applies to DRB hearings and the establishment of six Regional DRBs to hear disputes on projects without established DRBs.

It was decided to request permission to form the Florida Chapter of the Dispute Resolution Foundation (FCDRBF) and to request that the Foundation allow Florida members to pay an additional \$20.00 a year membership fee to be held in a Trust Fund by the Foundation for Florida expenses.

## Bios Now Available on Website

Foundation members may now have their bios posted on the Foundation website. We have added a new section to the website allowing members to post information about their availability to serve on DRBs. By going to the home page and then clicking on "Member Resumes", then clicking on "Add Resume", you can add your information to the website.

Any information submitted will first be checked to assure that the individual submitting information is, in fact, a member in good standing of the Foundation and any attendance at Foundation sponsored workshops will be verified. Following review of this information your bio will be added to the data base and will be available to those coming to the website in search of prospective DRB members.

## Spreading the Word

Bob Rubin and Dan Meyer spoke about DRBs at the Moles May 1st Business Meeting at the Hilton Hotel in New York City. They report that they were enthusiastically received. There were about one hundred members in attendance.

Jack Woolf will be a panel member at International Construction conference in October sponsored by the Mid Atlantic States Local Association of the Institution Civil Engineers and the World Bank. **See page 17 for more information and how to register—ed.**

Larry Rogers has been asked to make a presentation on DRBs to the 5th Annual Damage Prevention Convention in San Diego in December. The Convention is sponsored by *Underground Focus Magazine* and is directed primarily at the underground utility industry. He made a presentation to the group two years ago at their convention in Long Beach.

Larry will also be on the faculty for the 9th Annual Washington Construction Law seminar in Seattle in September. The two-day seminar covers all aspects of construction law from successfully bidding thru successful completion of projects without litigation. £

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**Adrian Bastianelli**  
Mid-Atlantic  
(Maryland, West Virginia, District of Columbia, Virginia, North Carolina, Delaware, Kentucky)

**Rammy Cone**  
Southeast  
(South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee)

**Sharon Daily**  
North Central  
(Ohio, Indiana, Michigan, Wisconsin, Minnesota, Iowa, Illinois, Missouri)

**Diane Gollhofer**  
South Central  
(Texas, Oklahoma, Kansas, Arkansas, Louisiana)

**Ray Henn**  
Rocky Mountain  
(Montana, North Dakota, South Dakota, Nebraska, Wyoming, Colorado, Utah, New Mexico)

**Jim Donaldson**  
Northwest  
(Alaska, Washington, Oregon, Idaho)

**John Nichols**  
Southwest  
(California, Nevada, Arizona, Hawaii)

**If you've got  
news we'd like  
to hear it.**

**Deadline for the  
next issue is  
September 15, 2002.**

## Survey Coming in August

One of our members, Kathleen Harmon, is preparing a survey related to construction conflicts and the effectiveness of Dispute Review Boards. The information obtained from this survey will be a part of her dissertation, but more importantly, it will be published in industry journals to spread the news about the DRB process and its effect on reducing costs related to protracted disputes.

She will be mailing the survey out to all current DRBF member in later August. For the survey data to be valid, she needs **all** our members to promptly complete and mail back the survey. As some of you will remember, she handed out a pilot survey at our annual meeting in October. Partial results have already been published in the AAA newsletter *Currents*.

We would encourage every member to complete this survey. It will be the first empirical data on the DRB process and as such will be considered more seriously by owners than anecdotal evidence currently available.

**Please help this effort.**

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Many projects decide to allow the core PM Team to use the DRB informally to air their disputes verbally in “what if..” scenarios. The PM Team receives coaching or guidance from the DRB on how to proceed with analyzing the issues, preparing interpretations, generating support data and developing a decision on their own. If they still do not resolve the issue, the PM Team is prepared to elevate the issue at their next regular meeting with the core executive team.

In this way, the core PM team elevates recommendations and options for solution to the executive team rather than just pass on a disputed issue.

The rules for the DRB and the partnering elevation method are designed to be engaged early on in the dispute and move quickly. If the specifications call for a slow complex method of compliance to review claims, we end up with a racehorse that is forced to walk instead of run. The specifications need to be written to allow the processes to work as designed.

The greatest barrier is when the contract provisions are in conflict with the concept of using the DRB expeditiously. The solution to this problem is to get the executive team to allow the partnering and DRB methods to be used concurrently with the change order process. Only after the Change Order process is exhausted, then engage the claim provisions of the contract. With this understanding, the DRB can be involved at the project manager and/or the executive levels of the partnering elevation resolution method.

### Challenges

Both DRBs and Partnering must have meaningful commitment from both the executive and project manager levels of the primary contract parties. If this is achieved, the two processes face challenges in the following areas:

•**Follow Through:** Establishing regular meetings for walk-through and project assessment. The primary barrier is money. The party’s see reducing or canceling these meetings as a means to save money.

•**Leadership:** Gaining support and leading the education of others on the project. The Project Manager Team must recognize and use situations on the job, for utilizing the partnering and DRB processes. They are the team leaders. At a minimum, the primary owner and constructor representative must champion

and advocate the use of partnering and DRBs in order to optimize the use of these processes.

•**Dilution:** Discounting the processes when parties want the benefits with out doing the work to achieve it. The best way for this to happen is to water down the frequency of meetings/site visits and put off using the tools. The solution is to “walk the talk”. To actually conduct the meetings, work the issues, and bring in the Partnering Facilitator and the DRB to work the process. The project representatives must want to use the processes and want them to work!

•**Consistency of Process:** If the DRBs or facilitators are not trained and educated about the back ground, history and evolution of the processes they can not pass it on to others. Without this training and consistency, they can invent what they want the partnering or DRB process to be. Poorly trained DRBs and facilitators use bits and pieces of what they know and what best suit them. They then make up their methodology and call it DRB or Partnering. This generates poor results and bad experiences by the project parties. When asked later if they advocate DRBs or Partnering, the response is negative and the project parties discount of the process. This situation does great damage to the DRB or partnering reputation in the industry. This applies far more to partnering than it does to DRBs. This is because the DRB Foundation has been formed and helps protect the integrity of the process through education materials, training and membership advocacy. Unfortunately, partnering has suffered over the last fifteen years by not having a home. As a result, every facilitator conducts his or her own brand or method of partnering. There is no Partnering Foundation or support organization for partnering facilitators.

### Working Together

The facilitator and DRB develop their roles and responsibilities for working together by meeting with the project team. Then talk through the three timeframes that issues develop on the project: past, present and future issues. Each of these time frames needs to be dealt with differently by the facilitator and DRB.

### Past Issues – History Issues

The partnering facilitator asks the PM Team to meet on a regular basis, to identify issues that are unresolved and disputed. Specifically identify issues that need to be resolved timely,

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or the (lack of resolution) result will negatively impact the partnering team's cost, schedule, quality, and/or safety. This periodic assessment generates a list of issues to put into the confrontation process. If the issues are not resolved within agreed upon time frames, they are elevated to the executive team at the next regularly scheduled session between the executive and PM Teams.

The facilitator asks the PM Team to notify and invite the DRB to the assessment meeting. The DRB observes and gets a true picture of the project status of unresolved dispute issues and hear the discussions first hand.

After the identification phase of the dispute issues is concluded, the DRB works with the core PM team to layout the use of the informal and/or formal rules to schedule the meetings to make sure the issues are resolved timely.

### **Present Issues**

The partnering team conducts regular follow up assessments. The partnering facilitator works with the PM Team to identify problem areas with contract administrative systems, change orders, submittals and other processes. As a part of this assessment the project team identifies what issues are currently developing on the project and are still ongoing.

The role of the partnering facilitator is to help the team exchange communications, ideas, options, assess consequences, risks and benefits through directed discussions.

The partnering facilitator works in a way to avoid offering advice, recommendations and getting directly involved with the content of an issue topic while facilitating problem solving processes.

The problem solving facilitation focuses on resolving the technical side of the problem and getting direction to proceed with the work. The team also works to minimize the damage and impact, so whom ever has to pay for the work benefits by least cost payment for damages.

During these discussions, the DRB can help the PM team by participation in the facilitated problem solving discussions and by advising methods to document disputed work areas. In the event the issue later becomes an unresolved contract dispute, and while the work areas are still exposed, the DRBs advise may help the project team document and quantify the scope of work. In addition, it is of great benefit to the DRB to see the issue as it is unfolding. This first hand knowledge may be of value at a later time.

Facilitating problem-solving discussion with the DRB present and observing the project team interaction provides a clear distinction between the roles of the facilitator running process and the DRB's focus on the content of the issue(s).

The DRB may choose if and when it is appropriate to interact in discussions with the project team.

### **Future Issues**

The partnering facilitator, working with the project team, conducts regularly scheduled project look ahead sessions to identify and problem-solve potential opportunities or risks facing the project. By anticipating and problem solving in advance, this allows the PM Team to manage the issues for minimum impact and/or complete avoidance of the issues occurring. This is the pro-active side of the partnering strategy lead by the core PM Team.

The core PM team may invite the DRB to attend these sessions at the jobsite. This gives a two-fold benefit. First, the DRB observes the team working together. Second, the DRB is accepted as a part of the project team. The DRB involvement is optional and they generally come periodically.

### **Roles and Responsibilities**

The role of a partnering facilitator is to lead process and discussions effectively. The facilitator must not get involved with positions between the parties when it relates to contract dispute issues. If they become biased they are no longer a project advocate and they may lose the ability to lead the partnering effort for the team.

The role of the DRB is to advocate and lead the issue resolution process with the project team. They do get directly involved with the content of the issues. At some point, they explain to the team who owns the risk and what their opinion is for apportionment of scope and dollars. Interpretation and quantification evaluation and findings is the primary role of the DRB.

If the facilitator sticks to process and allows the DRB to work with the team on the disputed issues, there is a clear separation of duties and together they complement each other's services.

When project issues are proactively identified as happens in the future look ahead session, the facilitator takes the lead and uses problem-solving processes to generate solutions. If the issues have already occurred (history issues) and/or are in dispute, the facilitator becomes an advocate for the resolution process and asks the project team to use the DRB's services for resolution of the dispute.

*(Continued on page 12)*

# **CALL FOR NOMINATIONS FOR THE AL MATTHEWS AWARD**

The Dispute Resolution Board Foundation (DRBF) shall present annually the “Al Matthews Award” to a DRBF member who has given exemplary service in advancing the use of the dispute resolution board concepts, and the DRBF.

## **NOMINATIONS**

Nominations shall be solicited from the membership in the April edition of the *Forum*, and by the President from the Board of Directors.

## **NOMINATING COMMITTEE**

A nominating committee for the annual recipient of the Award shall be appointed by the President. The President shall serve as Chair, and shall appoint four additional members from the general DRBF membership.

The Nominating Committee shall present its recommendation to the Board for consideration at the June meeting of the Board of Directors.

## **THE AWARD**

The Award will be presented to the recipient at the annual DRBF meeting and conference generally held in October.

The Award will consist of a framed proclamation and a trophy with the recipient’s name and date of award engraved thereon.

Send your nominations, including an explanation of why you think the nominee is deserving of the award to:

**Award Nominations  
DRBF  
6100 Southcenter Blvd.  
Suite 115  
Seattle, Washington 98188-2441**

**Postmarked not later than 8/31/02.**

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### Summary

There are two primary topics for mutual understanding that provide enhanced areas of effectiveness for both the DRB and the Partnering strategy.

First, a quality partnering strategy on a project provides an environment, which promotes good faith and fair dealing between all contract parties. The partnering strategy and systems are designed to build teams who advocate the building of professional trust-respect working relationships. If DRBs can be introduced on a project, which support and foster fairness between contract parties, the DRB process can be utilized as an integral part of that teams management philosophy.

At the same time, partnering cannot survive long term without a rock solid issue resolution process. The partnering team will fall apart if they do not have an effective means of resolving issues timely and fairly. The teaming up of the partnering and DRB systems makes sense.

Second, the roles and responsibilities of the facilitator and DRB complement each other and allow for them to work together as a team. The facilitator has a responsibility to help build a high performance team through introducing strategic management processes and facilitation.

Facilitators do not get involved with resolving contract interpretation issues regarding who owns the risk or the quantification of disputed issues. They must stick to facilitating processes to help the team communicate and problem-solve the technical side of the problems. This involves developing plans for taking action, giving direction, solving the problem in the field and stopping the flow of damage dollars as soon as possible. Facilitating the design of a solution plan is different from facilitating contract interpretation and cost issues.

The job responsibility of the partnering facilitator leaves a void in services for the project team. When a problem is solved in the field, there is an additional need to resolve the question of who pays who for what, how much and why. This is not the partnering facilitator's area of responsibility and is where the facilitator/DRB team complements each other's services. The issue shifts from technical solution to a business solution phase and into the DRB's area of influence.

The project team specifically needs the help of an objective third party to work through the issues causing the dispute over contract scope and dollars. When asked by the parties, the DRB helps them facilitate, evaluate and provide advise to the team regarding interpretation of contract documents, quantification methodology, and evaluating support documentation. When formally re-

quested, the DRB gives the parties their non-binding recommendation for solution to the disputed issues in writing.

Therefore, it would seem appropriate for the DRB Foundation to invite partnering facilitators to join the DRB Foundation. As members of the DRB Foundation, there may be ways to promote the development and refinement of the relationship between DRBs and facilitators on projects.

The partnering facilitators need an organization, which will offer them a forum to help develop industry support for the protection and develop of the partnering strategy. The DRB Foundation also needs to find processes that help project teams better utilize the DRB process on their jobs.

For those who have seen partnering and DRBs work effectively together on projects, it would be a welcome sight to see open forums at DRB Foundation conventions and in future publications to set the bar and advance the quality of services of both facilitators and DRBs on projects. £

**Coming in the  
next issue of  
the *Forum*:**

**Prove It!—The  
Challenge of  
Quantifying  
DRB Cost  
Savings**

**How do we develop em-  
pirical data to prove  
the success of DRBs?**

# Report on the Rome DRBF International Conference

by  
Peter Chapman

The azure skies were cloudless. The early summer sun warmed and revitalised the spirit. The venue was the ancient Vatican university in the very heart of Rome where delegates to the DRBF 2002 International Conference found themselves cloistered in ecumenical history, the like of which exist nowhere else in the world.

Resisting temptations to explore the sights of this unique city, sixty delegates from seventeen countries assembled for the one-day DRBF Conference—the theme of which was, “Dispute Boards on International Projects.”

The day was kicked into gear by President Jack Woolf—recently out of hospital after successful major surgery—who welcomed delegates and formally announced the new name of the Foundation. Jack explained that the DRBF Manual—the “Bible”—was now in need of updating and the DRBF were actively moving towards this objective. Delegates were quick to remind Jack that he should take care when suggesting the bible was out-of-date in such hallowed halls as the Vatican university!

The session that followed—“Can it work for you?”—was aimed at introducing the concepts of dispute resolution boards to those who were unfamiliar with the process. Peter Chapman (UK) spoke about the “real-time” benefits of DRBs and the certainty created by early determination. The dispute “doom scenario” was explored and contrasted with the pro-active and positive approaches of the DRB. Peter especially made the point that a DRB should be viewed by all parties as a benefit to the project—not a nuisance or a contractor's charitable institution. This opening discussion went on to consider the popularity of DRBs and Peter asked delegates for their thoughts on this. Geoffrey Hawker from UK believed their value lay in the fact that the DRB saw the game objectively—like most spectators—and thus was best able to bring objective justice to the project. Gwyn Owen (UK) thought that DRBs worked well if the parties wanted the process to work and thus took a pragmatic approach. Professor Crivellaro (Italy) considered it important to keep things simple and not to allow DRB adjudication to

turn into arbitration. He admitted that there was always the risk of mistakes in any fast-track process but as long as the DRB understood the facts the risk of some mistakes being made was acceptable. Carlo Ospina (Colombia) held the firm belief that DRBs worked well because they were impartial and this was the essential quality that led to their success.

John Bradshaw (USA) led the next discussion which looked at getting the most from the DRB. John took the view that parties would get as much—or as little—as they would allow a DRB to give. John emphasised that the DRB should be established at the very start of a project as only by the regular contact with the parties can the DRB influence the parties' behaviour and only by regular site inspections can the DRB understand the project and thus give wise, balanced decisions and recommendations. From his long experience with DRBs, John suggested that parties would eventually accept DRB recommendations if they believed they were honest and impartial. John stressed the value of a DRB assisting the parties to reach settlements by an informal process—the dispute avoidance approach. John's comments drew comments from the other delegates with Peter Caldwell (Hong Kong) asking the thorny question as to whether the DRB should be acting judicially or merely to assist the parties reach a settlement. Peter emphasised the different processes and approaches that would be necessary depending on the objectives. Justice Khan (Pakistan) echoed the sentiment that to get the best from a DRB both parties must see it as a friend not a foe. Stefano Pavletic (Italy) raised the subject of med/DRB where the board commence as mediators and, in the event that no settlement is achieved, move on to give an adjudication decision. The delegates were advised that UK experience shows that very few issues handled in this way are not settled at the mediation stage - the parties getting to know roughly what the award might be and therefore preferring to seal their own fate.

The next session looked at becoming a DRB member. Romano Allione (Italy) spoke about what makes a good DRB member. He stated what was to become a recurring theme during the conference that employers need to be taught how best to use a DRB and not to expect the im-

*(Continued on page 14)*

## The Foundation needs your help!

The Board of Directors is seeking the names of those interested in serving on Foundation committees. Positions are open for the following committees:

Marketing

Data compilation

International

Membership

Please help the Foundation by volunteering for one of these committees.

Contact Jack Woolf or call Steve Fox. £

*(Continued from page 13)*

possible. Members should understand the political climate, to behave accordingly and to exhibit a reasonable approach at all times. Professor Crivellaro (Italy) stressed that DRB members should be available and not so tied to their other occupations that it makes DRB activities impossible. Antonio Zaffaroni (Italy) emphasised the need for a member to be experienced in construction and dispute resolution. Next, Igor Leto (Italy) brought some culture to the proceedings by quoting the Bard and advising us to “First, kill all the lawyers”! Igor felt that DRBs were better off with construction professionals as members rather than “pure” lawyers. He was, of course, promptly corrected as pure lawyers were said to be a species unknown in recent times. Under pressure, Igor expanded his philosophy by saying that the important point was to ensure the members had proper experience of construction and that some lawyers had acquired such experience after many years of work in construction and would, at a pinch, be suitable for DRB appointments. Sighs of relief arose from the legal fraternity present. Igor went on to state his views that nationality should not be a bar from DRB appointments. An experienced professional would not favour a party of the same country as his own. Bob McLean (Canada) agreed with Igor but went on to mention the perceptions that might arise in cases where a party selected a member of its own nationality when that member did not have the other qualities necessary for service on the DRB. Bob stressed the importance of specialist knowledge both technical and contractual.

The next session was led by Jack Woolf (USA) who told us how to get those elusive appointments to DRBs. Jack’s message was clear. Networking. Every opportunity should be taken to promote the use of DRBs by speaking at conferences, discussing the benefits (and burdens) of DRBs with employers and contractors, setting up study groups in ones neighbourhood and raising awareness of the dispute board concept. Geoffrey Hawker (UK) and Peter Caldwell (Hong Kong) both considered that lists were important although this view was not universally supported with Pierre Genton (Switzerland) being unconvinced that some of the current lists served a useful purpose and Gwyn Owen (UK) believing that the FIDIC list had not been as successful as it might but thought that regional lists may offer some benefits. John Bradshaw (USA) mentioned the usefulness of lists as an aide memoir although personal knowledge of the members is very desirable.

Pierre Genton (Switzerland) led the next session which talked of money matters. As can be imagined, this stimulated much discussion and a range of views were promoted. Pierre maintained that DRBs should pay members a retainer plus a daily fee and, of course, reimbursement of expenses. He suggested that the fees paid to the members should be consistent across the DRB and that it was incorrect to differentiate between members nationality in matters of payment. Pierre proposed that the monthly retainer should be the equivalent of three-days daily fee. The delegates, whilst generally in agreement with Pierre’s suggestions, did discuss other approaches such as the rates of remuneration being linked to an index that would compensate for the different costs of living throughout the world. Justice Khan (Pakistan) believes that there should be no differentials between members and that a hard currency, such as US\$, should be the usual currency of payment. Although consistency in payment was generally accepted as the correct approach, several delegates considered that the DRB Chairman should receive a higher retainer for the additional administrative work undertaken. Suggestions were made that the DRBF should set up costs guidelines and possibly act as stakeholders on behalf of the DRB (much like the ICC and other institutional arbitration organisations). The idea was to be explored. The age-old danger of “buying” appointments by charging low fees was discussed, particularly when a low-fee bidder may not have the necessary experience for service on a DRB. There is little that can be done to prevent this happening—particularly when DRB appointments are a way of keeping ones hand in during retirement. The idea of some sort of registration system for practising DRB members was mooted but this would have its own difficulties in policing.

Keeping out of trouble was the next topic led by Peter Chapman (UK) who stressed that DRBs that were firm, fair and consistent would have a good chance of survival. Decisions and recommendations should be clear and unambiguous and should avoid “witch hunting.” Parties want to know the way forward not to have their noses rubbed in their mistakes. The better advised the members were—by attending the site regularly and reading the routine report—the better able they would be of making acceptable determinations. Romano Allione (Italy) added that whenever possible the DRB should be asked to give its views on principle alone, leaving quantification as a separate exercise after principles of entitlement had been established.

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The discussion that followed was led by Jack Torrance (Scotland) who spoke about the routine visits of DRBs to site. Jack stressed the importance of looking and listening during the routine visits as, in his view, much can be learnt from observing the manner in which the meetings are conducted and the attitudes of the individuals present. “Bad news rises slowly” and the routine visits give an opportunity of the senior members on both sides of the contractual divide to really understand the other party's position in the presence of the impartial DRB. In Jack's view, shared by the delegates, the routine visit to site is an essential part of the operation of a DRB and boards that convene if and only when disputes arise are missing out on an important and beneficial aspect of the DRB process.

Gianni Arrigoni (Italy) led the next discussion covering dispute avoidance and “documents only” determinations. Gianni emphasised that only DRBs could offer both dispute avoidance and dispute resolution and that this was a powerful combination. Gianni believed that the DRB was particularly well qualified in assisting parties to resolve potential disputes. He urged proactivity whenever the situation demanded—adjudication was like “lancing a boil”—it was often painful in the short-term but the end result was worth the suffering! Gianni advocated that the DRB should be the link between the parties in creating a positive alliance and should foster partnering and teamwork on the project. On the topic of documents only determinations, Gianni was not supportive of the process and felt this was too much like arbitration by proxy.

After lunch the conference looked at what can go wrong on international DRBs. Antonio Zaffaroni (Italy) led the discussion on the problems that can occur when a DRB is not established. He stressed the importance of having the DRB provisions properly contained in the tender documents so that both parties understand the dispute resolution provisions from the outset. He suggested that penalties should be introduced if the DRB is not established at the start of the contract although he, like other delegates, considered the most important feature of the DRB is its independence and impartiality. Helmut Kontges (Germany) considered there was a role here for an appointing authority to whom a party can turn in the event that the other party is prevaricating. John Bradshaw (USA) supported this suggestion and Pierre Genton (Switzerland) thought that funds could be withheld until such time as the DRB was established.

Paolo Moder (Italy) next spoke about the

problems faced if one or other party does not convene meetings or refer disputes to the DRB. Paolo described the “nightmare scenario” where one party can stall the DRB process for years by failing to give support or refusing to permit the DRB members visiting the site. Paolo thought that the DRBF could assist in these difficult situations, not least by updating the “manual” so that the benefits of the DRB process could be better understood by contracting parties (although he noted that the manual would not carry the weight of a contract document). Delegates made further suggestions leading from Paolo's introduction. The role of the funding institutions was raised, particularly the World Bank. The Bank, whilst supportive of the DRBF and has incorporated the DRB concept into its standard bidding documents, has not been prepared to act as the DRB police force as such function does not fall within their accepted function as a lending institution. Gordon Bathgate (Scotland) also questioned whether the DRBF could play a role in ensuring DRBs around the world functioned properly. Igor Leto (Italy) asked whether the World Bank could publish a list of its funded projects so the DRBF could gauge the extent that DRB provisions are being ignored.

Next up was Frank McDonough (USA) who discussed the reluctant party and other matters. Frank explained how the DRB process could cover any dispute—technical and financial—and how the DRB could persuade parties to reach amicable settlements. Professor Antonio Crivellaro (Italy) emphasised the need for DRBs to provide clear and well-written recommendations as much of the reluctance in accepting is a lack of understanding of what exactly has been recommended. Real money is involved and the DRB needs to be clear who gets what and why. A compromise is required between the lengthy documents produce by lawyers and the often too brief documents produced by engineers. However, a losing party needs to know why it has lost. Carlos Ospina (Colombia) urged that DRB speak and write basic English particularly when parties are not English speaking. The role of the chairman is part-statesman whose job it is to convince both parties to accept the DRB recommendations.

John Bellhouse (UK) then discussed the question of partiality. John outlined the standard provisions concerning a DRB member's impartiality and contrasted the positions of an arbitrator to that of a DRB member. In that the DRB process is less formal than arbitration and a DRB will be required to make determinations on less depth

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of evidence (e.g., expert's reports) than that presented to an arbitrator or the courts, it is even more important that the parties recognise the DRB members as being impartial. In that the DRB will be required to act inquisitorially, the perception of impartiality is vital. John emphasised the dangers in the DRB undertaking an informal role and stressed the need for caution and care. John considered communication to be extremely important to the success of DRBs. Igor Leto (Italy) mentioned situations where partiality had caused problems (employee acting as a members) and in such cases it was inevitable that majority decisions were published.

Carlos Ospina followed by presenting how best to describe the DRB process. He said that nothing is as successful as success itself and the best way to promote the DRB process is to make it work. Satisfied parties will become converts to the DRB process and the word will spread. He said there needs to be a system provided to replace a DRB member if, for any reason, the member cannot continue to serve. PR is important too—the DRB should be a salesman for the process and be prepared to explain how the system works to those inexperienced in DRB matters. Carlos supported non-binding recommendations over decisions that were binding. He believed that the DRB recommendation should form the basic building block on which the party's settlement agreements are founded. In his view, visits to site three times a year should be the norm. George Rosenberg (Greece) suggested that DRB should be linked with partnering and facilitation agreements. George explained the successful use in Hong Kong of the Dispute Resolution Adviser (DRA) service which links these various forms of dispute resolution together. George stressed the need to educate employers in the DRB process, also mentioning the difficulties that some state employers have with implementing a non-binding recommendation.

Peter Chapman (UK) and Brison Shipley (USA) then looked at how legal the DRB process should be. Horse trading or judicial? Peter explained the need to honour the contractual provisions although the DRB process has more inherent flexibility than more formal processes in deciding the non-absolute issues that arise in construction conflict. Matters such as the form and length of submissions, the admissibility of evidence, the use of factual and expert witnesses, the degree of legal representation all need to be discussed and agreed between the parties and this is often best done with the assis-

tance of the DRB at the outset. If agreement cannot be reached, the DRB needs to be sufficiently robust in giving directions. The important aspect is that both parties know the rules before the first formal dispute is referred to the DRB. To change the rules mid-way through a hearing is a recipe for disaster. Brison discussed the different approaches that would be required if the DRB were to give non-binding recommendations to binding decisions—and this harked back to the points raised earlier in the day by Peter Caldwell (Hong Kong) concerning the objective of the DRB process (a discussion on another day for sure). Peter Chapman (UK) mentioned that if lawyers were to be used in the DRB process, they would need to be prepared to approach DRB procedures differently from those they may be used to in arbitration or the courts. This might give difficulties to some lawyers as Peter has witnessed in the UK under the new adjudication statutes.

The final formal session of the conference was led by Jack Torrance (Scotland) who spoke of the versatility of the DRB process. Jack stated that the process can be as versatile as you like so long as the intent is maintained and the decisions given are just. DRBs are being used on a number of concession projects in UK and elsewhere

The conference concluded with delegates making suggestions as to how future DRBF international conferences should be arranged. The general consensus was that two-day conference should be considered with the first day aimed at describing the DRB process to local employers, consultants and contractors—the second day being more for the DRBF members. Although delegates appeared to enjoy the discursive approach taken in the Rome conference, more in-depth presentations could be considered for future years. Case studies could be considered and a DRB “moot” was suggested. Venues suggested for the 2003 conference included Athens, Paris and Hong Kong. Sponsors would be considered.

At about 5.00 PM, the conference concluded allowing delegates to sightsee for a couple of hours (the Trevi Fountains being just a few steps away from the university). The evening conference dinner was held on the rooftop of the Minerva Hotel where delegates (and many of their wives) could listen to music and enjoy cocktails and a truly superb Italian meal as the sun set across the roof tops of Rome. A memorable experience.

In conclusion may I thank all those who participated in the Rome conference, particularly

*(Continued on page 25)*

## **INTERNATIONAL CONSTRUCTION**

**Current developments in planning, management & closeout**

***A one-day seminar sponsored by  
The Mid Atlantic States Local Association of the Institution Civil Engineers  
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**\*Tuesday 8th October 2002, at The World Bank, Washington DC**

**(\* Coordinated to precede DRBF World Bank Workshop 9th October 2002)**

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Disputes Review Board (DRB) Members and Chairpersons

**Due Date: August 16, 2002 @ 4PM**

**Note that this solicitation is aimed at individuals, not at consulting firms or law firms.**

The Metropolitan Transportation Authority (MTA) East Side Access Project (ESA) seeks to establish an approved panel of Dispute Review Board (DRB) members and chairpersons.

The ESA Project consists of several dozen construction contracts to be performed during the next ten years to build an underground connection for the Long Island Rail Road between Queens and Grand Central Terminal in Manhattan. The types of construction to be executed include soft ground large diameter tunneling, large-scale rock tunneling, underground railroad facilities of all kinds, underground ventilation plants, and railroad systems. ESA is planning to utilize a DRB on approximately one-third of these construction contracts. The DRB will be used to assist in the resolution of disputes in accordance with the contract terms and conditions by providing a non-binding written recommendation to the contractor and MTA for each dispute brought to the DRB for consideration. Each DRB will be made up of two members and one chairperson. The MTA and the contractor will both participate in the DRB member selection process. The MTA will nominate its proposed DRB members from its approved panel.

The standard MTA construction contract provides that DRB members shall have substantial experience (technical or managerial) in a senior capacity in engineering or construction and substantial experience in one or more of the general types of construction or construction disciplines involved in the particular contract, and in the interpretation of construction contract documents, and in the analysis and resolution of construction issues. Each shall have the integrity and neutrality appropriate to serve as a DRB member. The MTA construction contract also states that one of the objectives in selecting the chairperson is to ensure that the DRB has administrative and dispute resolution experience to complement the technical and/or managerial expertise of the first two members and to facilitate the DRB's proceedings. The chairperson shall have substantial experience in a senior capacity in construction disputes resolution, adjudication or arbitration, the interpretation of construction contract documents, and the analysis and resolution of construction claims. The chairperson shall have the integrity and neutrality appropriate to serve as a DRB chairperson.

The MTA construction contract has conflict of interest requirements which provide that no DRB member shall have (a) currently or within 2 years prior to execution of the particular construction contract, employment with, an ownership interest in, or existing business or financial relationship with (including providing fee-based consulting services to) any party to the particular contract, the program management consultant, the design and engineering consultants, any third-party construction manager for the contract, any subcontractor or subconsultant to the contractor, or other ESA Project contractors or construction managers for adjacent or interfacing contracts; (b) any financial interest in the contract or the Project; (c) been involved, directly or indirectly, in preparation of the bid documents for the contract, the preparation of a bid by any bidder for the invitation to bid for the contract, or the management or administration of the contract; or (d) any current or prior involvement in ESA of a nature that could compromise his/her ability to review disputes impartially.

All persons that are designated as DRB members and chairpersons under the terms of the construction contract will be required to enter into a three-party contract with the MTA and the contractor, which will be based on hourly fees and reimbursable expenses. **Please note that if you have submitted qualification information in response to ESA-RFQ-001, Disputes Review Board (DRB) Members and Chairpersons, there is no need to submit additional qualifications. The MTA will utilize the qualifications we received from that solicitation and this one to develop a list of potential DRB Members/Chairpersons.**

Discrimination on the basis of race, religion, color, sex or national origin is prohibited.

MTA will be evaluating prospective DRB members and chairpersons based on the criteria set forth above. Interested candidates can obtain the RFQ by calling 212-967-0291/212-967-0382 or downloading a copy off the Internet at <http://www.mta.info/mta/procure-esa-drb.htm> and following the instructions for Disputes Review Board (DRB) Members and Chairpersons.

# Summaries of Board Meeting Conference Calls

## **February 15, 2002 DRBF Board Meeting Conference Call**

A DRBF Board of Directors meeting was held by conference call on February 15, 2002 with 10 Directors and Officers participating, together with the Administrative Manager, Steve Fox. The following is a brief summary of the discussions and actions taken at the meeting.

A California law firm has asked to reproduce portions of the DRB Manual in a new publication. Bob Smith requested to have a copy of the letter FAXed direct to his home for him to review.

### **DRBF Annual Meetings:**

**Rome** - Peter Chapman reported that he hopes to complete arrangements for accommodations and venue for the upcoming meeting in Rome within another week. Possibly the meeting will be held at a Vatican University. An ADR organization has indicated an interest in becoming associated with the Annual DRBF International Conference but will not be able to participate this year. Peter requested cost information for a DRBF Chairing Workshop at the conference in order to determine the viability of offering such. Jim Donaldson indicated that he would offer his services for the workshop free of charge.

**Orlando** – Steve Fox reported that arrangements have been signed with the Renaissance World Gate Hotel for the 2002 Annual Meeting to be held on Saturday and Sunday, October 5 & 6, 2002. Training Workshops will be held on Oct. 3 & 4. The Board of Directors meeting has been scheduled for October 4<sup>th</sup>. Breakout rooms have been set up near the main meeting room and nightly room rates will be \$109.

### **Treasurer's Report:**

Pete Douglass reported that as of January 31, 2002 ~ \$50,000 had been received in pre-paid 2002 memberships. January expenses were consistent with budget expectations.

As of February 12, 2002 more dues revenues have been collected than at this time last year, largely due to the increased dues rates adopted for 2002. The actual number of paid 2002 members is about 11% behind 2001.

### **Membership:**

A job description and monthly compensation package has been agreed to with Larry Rogers for his role as membership director for the DRBF.

Steve Fox provided a report on the membership status as of 2/12/02 noting YTD (year to date) membership of 341 (compared to 385 the same time last year). Steve noted that we had lost 12 members who failed to renew and he will give these names to Larry (with a copy to Jack) to follow up on with respect to their reasons for leaving.

It is on Larry Rogers' agenda to get a package out in February addressing a membership network broken into 8 US regions. These might include:

- New England
- Mid Atlantic
- Southeast (Florida – currently with 80 members)
- North Central
- South Central
- Pacific Northwest (currently with 75 members)
- California (currently with 110 members)
- Southwest

Southeast region – Jimmy Lairscey reported that he had arranged for a regional meeting to be held at the Thousand Oaks Ranch southwest of Jacksonville on March 9, 2002 to discuss various issues, including how to measure success of the DRB process. Jimmy indicated that any of the DRBF Board members who were interested in attending should let him know. It is hoped that the meeting will lead to another 15 to 20 new members. Jimmy is also trying to get together a team to work on selling the DRB process to Cities and Counties and has invited a few of these players to his Regional Meeting.

Canada – Adele McKillop indicated that she was trying to get the word out to various organizations in an attempt to generate interest in DRBs in Canada.

Southwest region – John Nichols from the Bay Area has expressed an interest in helping in this region.

More work is needed in setting up the Inter-

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national membership network and Jack will contact Peter Chapman for assistance in this matter.

Joe Sperry indicated that Hawaii used to be a strong area for DRB use but has fallen off.

**Training:**

Twelve DRBF training workshops have been scheduled and confirmed for this year so far. It is hoped that more workshops will come out of regional membership meetings like Jimmy's.

A new workshop session has been developed which is directed specifically at DRB users such as DOTs, AGC, etc. This new session is being conducted in Boise for IDOT and at the Univ. of Washington.

**Group Professional Liability Insurance:**

Brison Shipley reported that more than one underwriter has expressed interest in providing such a group rate policy. Background information regarding past experience on DRB work has been requested. The Board and Officers were not aware of any action brought against DRB members in the past. With the suggested wording in the 3 Party agreement the risk should be minimal. Even in Florida where the State legislature disallowed the immunity wording, there has never been a problem.

**Web Site:**

Jim Donaldson is looking for help in drafting up a form for "Bios" that can be submitted by DRBF members for inclusion on the website. Board members were requested to mark up a hard copy of Jim's draft form with their comments and FAX it to Steve Fox by 2/22/02 for compilation and transmittal to Jim Donaldson. A few of the suggestions included:

- There needs to be more space for the "resume" and "DRB experience";
- Eliminate "DRBF" in the form heading as it could be taken to imply endorsement;
- The DRBF should check for satisfactory attendance at DRBF training workshop sessions;
- Be sure to add a disclaimer.

Jim Donaldson also suggested there may possibly be a need for a user's form to request information through the website.

Jack reminded the Directors and Officers to e-mail a photo or mail a hard copy photo to the web master for inclusion on the website.

Jack and Steve will get together a listing of DRBF events and send it to the webmaster.

Send any comments regarding the website ([www.drb.org](http://www.drb.org)) to Craig Neff.

**Code of Ethics:**

Brison indicated that this task has been on the back burner, but hopes that a draft will be available by some time in June.

**AA Mathews Award Procedure:**

Jack ask Bill Baker to draft up a procedure for the selection of the recipient for this annual award.

**Name Change Vote Status:**

Jack reported that there were 21 votes from the membership received at this time with 20 agreeing with the name change and one opposed. The votes are due in by 2/28/02 and it is hoped that over 100 votes will be cast.

Once the vote on the name change is completed we can kick-off the Logo contest in earnest.

**Presidential Duties and Authority:**

Jack noted that the DRBF was growing and was no longer based in the Pacific Northwest with both the current President and the President Elect located on the East coast. Jack indicated that he would like to structure procedures and input in accordance with the by-laws and would like to have everything report to the current President. This would include Steve Fox and Larry Rogers reporting directly to the President for approval of any action to be taken.

Jack also indicated that Steve Fox's employment agreement should be reviewed and asked that Pete Douglass and Bill Baker do this and draft appropriate revisions.

Jack also indicated that he hopes we are looking for a part time Executive Director.

**Other:**

Joe Sperry indicated that he would FAX the Board members a copy of contract language used on some jobs to provide for the use of DRB advisory quick opinions (DRB Light).

Only four of the Board members had received their copies of the FORUM at the time of the Board conference call, even though it went out the 1<sup>st</sup> week of February. Steve indicated that with our bulk mailing rate it can take up to 2 or 3 weeks for delivery.

Jimmy Lairscey indicated that he will inquire into possible outside funding for DRBF projects through FHWA and/or ASHTO.

An inquiry was made as to the status of Kathleen Harmon's research project and Jack indicated that he would follow up and find out.

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**April 12, 2002 DRBF Board Meeting Conference Call**

A DRBF Board of Directors meeting was held by conference call on April 12, 2002 with 12 Directors and Officers participating, together with the Administrative Manager, Steve Fox. The following is a brief summary of the discussions and actions taken at the meeting.

**DRBF Annual Meetings:**

**Rome, Italy Conference on May 25, 2002** - Peter Chapman and Igor Leto reported the following:

- 17 or 18 are now confirmed to be attending;
- The Chairing workshop has been scrubbed due to lack of sufficient pre-registrants;
- DRBF Board members who currently plan to attend include Jack Woolf, Brison Shipley, Robert McClean, Peter Chapman and Igor Leto;
- DRBF Representatives from several different countries have signed up and it's looking to be a very successful conference; and
- Updates and additional information will be provided in the next FORUM.

**Orlando, Florida Annual Meeting on October 5 & 6, 2002** - Brison Shipley reported the following information:

- The DRBF Board meeting will be held on Friday, October 4, 2002;
- Saturday AM and PM there will be 3 Break-out Sessions which are currently envisioned as:
  - Marketing the DRB process;
  - Legal Developments and Maintaining the Integrity of the DRB Process; and
  - Around the World in 80 Minutes

**Revised Administrative Manager's Agreement:**

The revised Administrative Manager's "Employment Agreement" had been circulated to the Board prior to the conference call and it was approved, subject to one change. A Reporting section is to be added that states "the Administrative Manager will report to the current President or, if unavailable, to the Secretary/Treasurer."

**Annual "Al Mathews Award" Procedure:**

A draft document stating the basis for the Award, the procedure for nominations and the

formation of the nominating committee, and a description of the Award and when it is to be presented, had been circulated to the Board members before the conference call. A question was raised as to whether a non-DRBF member could be nominated for the Award. The Board felt that initially it should be restricted to DRBF members. Bill Baker agreed to FAX the final version to the Board with the suggested revisions.

**Florida DRBF Chapter/Special Assessment:**

Jimmy Lairscey reported that the 1<sup>st</sup> Florida Regional Meeting had been held and they had discussed a separate dues assessment to fund the Florida Chapter's activities. It was suggested that for those wishing to be a member of the "Florida Chapter" an additional mandatory \$20 fee be included on the dues assessment from the DRBF and that general DRBF membership be a requirement in order to be a member of the "Chapter".

Bob Smith noted that the Board needs to send a letter authorizing the formation of the "Florida Chapter" and authorizing the additional dues assessment.

It was reported that John Nichols would like to set up a similar chapter for the California Region.

**Treasurer's Report:**

Pete Douglass reported that as of April 1, 2002 dues revenues were approximately 41% ahead of this time last year, even though we are about 5% behind last year in the number of paid memberships. Workshop revenues are generally off target with the budget and operational expenses are comparable to last year at this time.

Projections to the end of the year based on reaching the same membership as 2001 (still 111 more members needed) suggests a greater net increase in the reserve fund from 2002 operations than budgeted. The main difference between the current projections and the budget stems from the fact that we have not hired an Executive Director. Instead we have set up a Membership Director and a Webmaster totaling about \$25,000 less than budgeted.

**Other:**

Bill Baker made a presentation to the Federal GSA (General Services Administration) in an effort to get them to include DRBs on their projects. GSA indicated that they hope to put together a model project to try it on. Jack Woolf pushed for a NYC project as this is where they have had the worst success.

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Jack Woolf ask the Board for any ideas to give to Messrs. Rueben and Meyer for their talk to the Moles.

At this point the Board went into closed session and Steve Fox was excused from the conference call.

### **June 14, 2002 DRBF Board Meeting Conference Call**

A DRBF Board of Directors meeting was held by conference call on June 14, 2002 with 12 Directors and Officers participating, together with Steve Fox, Administrative Manager. The following is a brief summary of the discussions and actions taken at the meeting.

#### **Treasurer's Report:**

As of 5/31/02 there were 486 DRBF members, which is slightly behind this point last year, but the dues revenues are well ahead of last year. It is currently projected that our 2002 membership will reach approximately 550 with dues revenues roughly 13% less than budgeted.

Workshop revenues, with 10 workshops completed and at least 2 more workshops at the Annual Meeting, are expected to be very close to budget. Operational expenses are on target but are projected to be roughly 25% less than budgeted, largely as a result of hiring a Membership Director and Webmaster instead of an Executive Director. As a result, it is currently estimated that 2002 additions to the reserve fund will be approximately 50% greater than budgeted.

#### **Training Workshops:**

Ten have been accomplished to date, with 2 more scheduled at the Annual Meeting and possibly 2 more in the New York City area.

#### **Membership:**

Jack Woolf reported that this effort is moving along, although we need Peter Chapman and Igor Leto to help energize the International membership efforts. Jack noted that we picked up 5 new members at the Rome Conference and that was very good.

Adele McKillop indicated that she had been talking with a number of people in Canada and needed to define the Regions. Jack thought that there would probably be two Regions in Canada, East and West, and suggested that Adele talk directly with Larry Rogers to confirm and to discuss setting up possible workshops.

#### **Website:**

The bios resume form is now on the website for use by members in submitting their information. A disclaimer is included on the form to protect the DRBF.

#### **Newsletter Reformatting:**

Our consultant is doing a random survey to obtain more information on what changes are desired. Some of the possible changes under consideration include:

- A monthly newsletter instead of quarterly;
- A more "newsey" format;
- Opening up the competition for publishing the newsletter from different areas of the country with possible significant savings; and
- Re-assessing e-mail distribution as only about 20% of the Rome conference attendees expressed an interest in receiving the newsletter by e-mail only.

#### **Rome International Conference Update:**

Approximately 60 attended the conference with a lot of attendance from Italy. A number of topics were discussed and these will be recapped in the next issue of *Forum*.

There was a general feeling amongst the attendees that the Manual should be updated to include Dispute Adjudication Boards (DABs), etc., and noting if possible:

- Special applications for DABs;
- International experience in the use of DRBs/DABs;
- Distinctions between binding and non-binding recommendations;
- More focus on the users, Owners and Contractors, that must appear before the Boards; and
- Possible incorporation of a "loose leaf" format to facilitate future updates.

Jack Woolf noted that he was very impressed with the Rome meeting. Further, the ex-Chief Justice to Pakistan ask Jack if he would speak at an Islamabad meeting near the end of June. Jack told him that he was not available. Peter Chapman thought, however, that Gordon Jaynes was planning to be at that meeting and that he might be willing to make the presentation.

Jack indicated that discussions at the Rome meeting suggested that future International Conferences should be held where DRB work is crystallizing. Jack suggested that Armando Araujo pursue identifying a possible South American location that meets these criteria for the next International meeting.

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**DRBF Annual Meeting in Orlando:**

Brison reported that the meeting would start with a business meeting on Saturday morning, 10/5/02, followed by 3 breakout sessions:

- Marketing Strategy and Structure – with Bill Baker, Bill Edgerton and Jimmy Lairscey as facilitators;
- Integrity of the DRB Process: Legal Developments – with Pete Douglass, John O'Rourke and Joel Lewin as facilitators; and
- International / Global Picture – with Peter Chapman, John Bradshaw and Frank McDonough as facilitators.

On Sunday morning 45 minutes would be spent summing up the results from Saturday's breakout sessions and then the meeting would be open to general discussion from the conference attendees.

Brison mentioned that he is still looking for a good keynote speaker. Jimmy Lairscey mentioned that the head of the Road Builders Association in Florida is an interesting speaker and Jimmy will check with him as to his interest and willingness. Jack Woolf suggested that we might want to consider selling memorabilia such as lapel pins to commemorate the DRBF name change and new logo.

**Logo Contest:**

Jack Woolf reported that he had only received 2 logo submittals to date and he was rather disappointed.

**Mathews Award:**

Jack Woolf reported that he would be convening a panel from the general DRBF membership to serve as a nominating committee for this award.

**Code of Ethics:**

Brison Shipley reported that he had drafted up a Code of Ethics and ask if we needed to obtain permission from other organizations to use some of the same cannons. Brison has also been communicating with Adrian Bastianelli and Gary Brierly and is considering drawing from the Code of Ethics for DRBs contained in David Hatem's book. The draft Code of Ethics would not contain anything that is not already in the DRB Manual.

It is Brison's intention to get the draft Code of Ethics in the July issue of the FORUM so that the general membership can review it and be prepared to discuss it at the DRBF Annual Meeting.

**Errors and Omissions Insurance:**

Brison indicated that one insurance underwriter had put together a policy that could be issued to the DRBF such that all DRBF members would be covered for E & O on DRB work at a total cost of approximately \$30,000 per year. Two other underwriters are also pricing this type of policy. Following some discussion amongst the Board, it was expressed that probably 60 to 90 percent of the DRBF membership would be interested in serving on DRBs.

**Other:**

Jimmy Lairscey inquired as to how many of the members, as a percentage, have taken DRBF Workshop training. Steve responded that approximately 260 members have taken the training, which is a little over 50%. Jimmy is looking at the possibility of offering another claims course for dispute avoidance.

Peter Chapman indicated that the International Conferences have been great but that we aren't spreading the word to potential employers. He suggested that next year we may want to have a 2 day conference with the 1<sup>st</sup> day set up to invite area employers to hear a presentation on the benefits of DRBs / DABs. Some extra money was netted from the Rome conference that could be used to help fund next year's International Conference. Peter also suggested 2 or 3 man "missions" to go to places like China and India and others to talk with employers about DRBs/DABs. Peter believes that we could pick up a lot of members this way.

Armando Araujo agreed with Peter on the benefits of a 2 day meeting and the need to focus on the employers. Armando particularly liked the concept of "missions" and felt that the World Bank's (WB) "distance learning facility" might be able to assist in this matter by facilitating such presentations from Washington, DC. Jim Donaldson indicated that the DRBF "User Workshop" is currently 2 to 4 hours long and Armando thought this was a reasonable length of time for transmission via the WB's "distance learning facility".

Armando also noted that the World Bank is hosting a meeting on October 9, 2002 supporting DRBs with the intent being to create more awareness in the World Bank and to provide needed information. It will be a 2 day activity with day 1 addressing risk management. The 2<sup>nd</sup> day will be on DRBs with a presentation by Jack Woolf and discussions on how to extend the use of DRBs to other types of contracts be-

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sides Civil Works.

Igor Leto indicated that it would be very helpful to get an updated list of what DRBs/ DABs currently exist, or have existed, through WB contracts. Armando agreed to put together and distribute such a list.

Steve Fox indicated that Larry Rogers is working on a DRBF information pamphlet that would incorporate a membership application.

**The next DRBF Conference Call is set for Friday, August 16, 2002 at 9:00 am PDT. £**

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2254879

E-Mail: justicekhalil@hotmail.com

Dr. Helmut Koentges

Lilienstr.14

D-45133 Essen, GERMANY

Phone: 49-201 424512 Fax: 49-201 8241972

E-Mail: helmut.koentges@hochtiet.de

Harold Kvaas

Kvaas Management Co.

10076 Shadow Road

La Mesa, CA 91941 USA

Phone: 619-668-4080 Fax: 619-668-4088

E-Mail: hkvaas@kvaas.com

Christopher Laughton

Fermi Laboratory - DOE

PO Box 500 MS 220

Batavia, IL 60510 USA

Phone: 630-840-5407 Fax: 630-840-6039

James W. MacLaughlin

2036 S.W. 77th Terrace

Gainesville, FL 32607 USA

Phone: 352-331-7185 Fax:

E-Mail: jimcindymac@aol.com

James R. Madison

750 Menlo Avenue Suite 250

Menlo Park, CA 94025 USA

Phone: 650-614-0160 Fax: 650-321-0198

E-Mail: jrmcoach@aol.com

Dean Martyniak

289 East Halsey Road

Parsippany, NJ 07054 USA

Phone: 908-730-4660 Fax:

E-Mail: DMartyniak@sprintmail.com

Jessica Miles

SJB Group

PO Box 175

Baton Rouge, LA 70821-1751 USA

Phone: 225-765-1900 Fax: 225-765-1919

E-Mail: jmiles@sjbgroup.com

Kenneth E. Millsaps

8973 Lakes Blvd.

W. Palm Beach, FL 33412 USA

Phone: 561-776-9941 Fax: 561-776-4981

Eduardo Cantu Muguera

Mision de San Diego 13 Jardines Coloniales

Garza Garcia, NL 66230 MEXICO

Phone: 52-81-83420196 Fax: 52-81-83441306

E-Mail: edcantu@infosel.net.mx

PMA Consultants LLC

Bruce Stephan

One Gateway Center 6th Floor

Newark, NJ 07102 USA

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**Do you have a question or concerns about DRBs in general or the DRB you are working on? Consult with one of the Hotline Committee members:**

Joe Sperry  
Auburn, CA  
530-878-7305

Daniel F. Meyer  
Chicago, IL  
847-295-9197

Jim Donaldson  
Seattle, WA  
206-525-5216

Bill Baker  
Calistoga, CA  
707-942-5886

Norman Nadel  
New York, NY  
914-279-5516

Ray Henn  
Denver, CO  
303-534-1100

Roger Brown  
Portland, OR  
503-628-1707

*(Continued from page 24)*  
Phone: 917-842-1970 Fax: 518-963-4331  
E-Mail: bmstephan@msn.com

Mathew H. Poftak, P.E.  
Independent Consultant  
1338 Hooksett Road #250  
Hooksatt, NH 03106 USA  
Phone: 603-268-0751 Fax: 603-268-0752  
E-Mail: poftakm@asme.org

Dermot Roughan  
14 Holmwood  
Dublin, 18 IRELAND  
Phone: 35-31-2855135 Fax: 35-31-2855626  
E-Mail: Droughan@eircom.net

Susan F. Rudy, P.E.  
Susan F. Rudy & Associates, Inc.  
8701 Summit Ave.  
Baltimore, MD 21234 USA  
Phone: 410-661-4790 Fax: 410-661-4791  
E-Mail: sfrudy@juno.com

Anthony A. Sabbag  
Carnahan Proctor & Cross  
6101 W. Atlantic Blvd  
Margate, FL 33063 USA  
Phone: 305-756-8600 Fax: 954-972-4178

Richard A. Sage  
Sound Transit  
18624 116th Street S.E.  
Snohomish, WA 98290 USA  
Phone: 360-794-4923 Fax:  
E-Mail: dicksage@interserv.com

Michael P. Schawe  
110 Lake Emerald Drive  
Oakland Park, FL 33309 USA  
Phone: 954-677-2778 Fax: 954-485-1033  
E-Mail: Mschawe@Trumbullcorp.com

Robert C. Schuster  
3621 McCormick Street S.E.  
Olympia, WA 98501 USA  
Phone: 360-705-0883 Fax: 360-705-0883  
E-Mail: marciboboly@attbi.com

Walter E. (Ted) Stanley  
Bovis Lend Lease  
1661 Hendrix Avenue  
Thousand Oaks, CA 91360 USA  
Phone: 310-863-8487 Fax: 310-312-0155  
E-Mail: tedstan@adelphia.net

Thomas D. Sullivan  
Sullivan Equip. Inc.  
807 Palomino Dr.  
San Marcos, CA 92069 USA  
Phone: 619-990-1480 Fax:  
E-Mail: TomnJaneS@aol.com

Gerry Sverdlin, PE, Esq.  
TCG, LLC  
16 Fairmount Way  
Quincy, MA 02619 USA  
Phone: 617-847-6053 Fax: 617-471-7231  
E-Mail: gisverdl@bigdig.com

Bob Velasquez  
3115 Stardust Street  
Rocklin, CA 95677 USA  
Phone: 916-632-7304 Fax: 925-685-3206  
E-Mail: bvelasquez@hotmail.com

John R. White  
R.W. Beck, Inc.  
851 Broadway  
Hanover, MA 02339 USA  
Phone: 508-935-1623 Fax: 508-935-1666  
E-Mail: Jwhite@RWBeck.com

Robert H. Wood  
7131 Brentwood Drive  
Boise, ID 83709 USA  
Phone: 208-376-6016 Fax: 208-376-0360  
E-Mail: Bobjacky@aol.com

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those who kindly led discussions and who participated from the floor. Our sincere thanks to Igor Leto who was “our man in Rome” and who found and organised the conference venue, hotels, restaurant and transportation. Really excellent job. And finally, if I have missed out or misreported the proceedings of the conference please accept my apologies—note taking when trying to emcee a conference is never comprehensive and my thanks are due to John Bradshaw who kept his notes of the conference which I have used in preparing this summary. £

# WELCOME TO NEW FOUNDATION MEMBERS

## MEMBER ADDITIONS APRIL TO JUNE 2002

John A. Apostolos, P.E.  
PO Box 5022  
Patra, 26004 GREECE  
Phone: 30-610-992826  
E-Mail: jaa@otenet.gr

Richard A. Appuhn  
Consultant  
via Del Paradiso, 41  
Rome, 00186 ITALY  
Phone: 39-340-4028715 Fax: 39-06-6868676  
E-Mail: appuhn.r@I-sys.com

Mark A. Burroughs  
Roger Brown Corp.  
15917 32nd Avenue S.E.  
Mill Creek, WA 98012 USA  
Phone: 425-357-6096 Fax:

Courtney L. Canfield  
95 Louis Street  
Staten Island, NY 10304-2111 USA  
Phone: 718-720-4959 Fax: 718-720-4959  
E-Mail: clcanfield@aol.com

Jay E. Carlson  
6882 W. Williams Drive  
Glendale, AZ 85310 USA  
Phone: 623-572-8562 Fax: 623-572-8598  
E-Mail: jcarlson@cox.net

Steven L. Chamberlain  
SCA Consulting Group  
PO Box 3485  
Lacey, WA 98509-3485 USA  
Phone: 360-493-6002 Fax: 360-496-2476  
E-Mail: schamberlain@scaconsultinggroup.com

Joseph Covello  
The Covello Group  
43 Quail Court Ste 111  
Walnut Creek, CA 94596 USA  
Phone: 925-933-2300 Fax: 925-933-0434  
E-Mail: jcovello@covellogroup.com

Antonio Crivellaro  
Bonelli Erede Pappalardo Caix Firu  
Via Barozzi, 1  
Milan, 20122 ITALY  
Phone: 39-02-7711131 Fax: 39-02-7711263  
E-Mail: Antonio.Crivellaro@beplex.com

Richard Di Fedele  
Bechtel Corp. - ESAP  
7 Dolphin Cove Quay  
Stanford, CT 06902 USA  
Phone: 212-643-4726 Fax: 212-695-3266  
E-Mail: RDifedel@mta.esa.org

Jerry Eggleston  
CH2M HILL  
2503 Esquire Drive  
Boise, ID 83704-6210 USA  
Phone: 208-345-5310 x253 Fax: 208-345-5315  
E-Mail: jegglest@mindspring.com

Robert J. Fullmer  
21 Arden Lane  
Essex Fells, NJ 07021 USA  
Phone: 973-403-0053 Fax: 973-403-2938  
E-Mail: fullmerrobert@aol.com

G. W. Gilfillan  
1000 Point San Pedro Road  
San Rafael, CA 94901 USA  
Phone: 415-258-6876 Fax: 415-258-9714

Terrance N. Glunt  
Corzo Castella Carballo Thompson  
Salman, P.A.  
1456 SE 6th Street  
Deerfield Beach, FL 33441 USA  
Phone: 954-570-8621 Fax:  
E-Mail: tglunt@ct3s.com

Louis E. Gosewisch, Director  
City of Lakeland Facilities & Const  
Mgmt.  
228 S. Massachusetts Ave.  
Lakeland, FL 33801 USA  
Phone: 863-499-2380 Fax: 863-499-2384  
E-Mail: lou.gosewisch@lakelandgov.net

Piergiorgio Grasso  
Geodata SPA  
C. Duca Abruzzi, 48E  
Turin, 10129 ITALY  
Phone: 39-011-5810661 Fax: 39-011-597440  
E-Mail: pgr@geodata.it

Giorgio Guiducci  
G.P. Lugepuene SPA  
V. Le Tiziano 3  
Rome, 00146 ITALY

Phone: 39-06-3235408 Fax: 39-06-32302702  
E-Mail: posta@gpingegezia.com

Hinckley, Allen & Snyder LLP  
Joel Lewin, Esq.  
28 State Street  
Boston, MA 02109 USA  
Phone: 617-345-9000 Fax: 617-345-9020  
E-Mail: Jlewin@haslaw.com

George E. Howell  
105 Sparks Court  
Williamsburg, VA 23185 USA  
Phone: 860-312-2511 Fax: 860-312-2514  
E-Mail: Jhwl@msn.com

Jack F. Immel  
660 Wendt Terrace  
Laguna Beach, CA 92651 USA  
Phone: 949-494-6336 Fax: 949-494-6336  
E-Mail: jimmel@juno.com

Robert J. Jacobs  
2207 25th Avenue  
San Francisco, CA 94116-1749 USA  
Phone: 415-731-4393 Fax:  
E-Mail: pat\_bob@prodigy.net

Eric B. Johnson  
4657 Blue Pine Circle  
Lake Worth, FL 33463 USA  
Phone: 954-316-3807 Fax: 954-316-1110

Michael M. Joye  
Joye & Associates  
122 Main Street  
Flemington, NJ 08822 USA  
Phone: 908-806-2261 Fax: 908-806-2213

Lawrence H. Kay  
Law Office of Lawrence H. Kay  
7801 Folsom Blvd. Ste 350  
Sacramento, CA 95826 USA  
Phone: 916-381-7868 Fax: 916-381-7880  
E-Mail: lkay@skandw.com

Justice(Ret) Khalil-Ur-Rehman Khan  
Rector, International Islamic University  
Islamabad, PAKISTAN  
Phone: 92-51-2254707 Fax: 92-51-

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# **The Dispute Resolution Board Workshops**

## **Administration and Practice**

**October 3, 2002—Orlando**

## **Chairing**

**October 4, 2002—Orlando**

**We recommend that attendees take the Administration and Practice workshop prior to attending the Chairing workshop. Registration fees include lunch and workshop materials. Each participant will also receive a Certificate of Completion from the Dispute Resolution Board Foundation. The cost for each workshop is \$395 for non-DRBF attendees and \$345 for DRBF members. To register call the Dispute Review Board Foundation**

# Foundation Forum

The Dispute Resolution Board Foundation  
6100 Southcenter Blvd., Suite 115  
Seattle, WA 98188-2441

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**Program Information and Registration**

## **The Dispute Resolution Board Foundation 6th Annual Meeting and Conference**

**October 5 and 6, 2002**

**Renaissance Worldgate Hotel  
Orlando, Florida**