

A/E RISK REVIEW

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Why You Should Choose Mediation

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

Imagine a confidential dispute resolution technique based on finding common ground and resolving disputes quickly and inexpensively while preserving business relationships and reputations. That technique is mediation.

Mediation is a confidential, nonbinding, conciliatory process by which parties to a dispute agree to sit down and seriously attempt to reach a mutually acceptable resolution. Mediation offers a structured negotiation procedure guided by a trained and experienced neutral. It is designed to resolve problems in a manner that is agreeable to both parties – win/win rather than win/lose. The mediator is a trier of fact, typically familiar with the design and construction industry and the specific issues in dispute. This creates a fast, flexible forum with the potential to resolve problems at greatly reduced time and costs.

Better Than Litigation or Arbitration

In litigation, it's you versus your adversary – strictly win/lose. A layperson jury unable to fully understand and evaluate the technical issues at stake could very likely decide your fate. For that reason, each side presents "expert witnesses" to explain technical matters in lay terms. Inevitably, the experts from each side disagree – since they are both biased to the case of their client – and it will be left for the inexpert jury to decide which witnesses to believe. With mediation, on the

other hand, the unbiased mediator hearing the dispute can be chosen based upon the technical knowledge required to assist the parties in reaching an equitable agreement.

Why mediation over arbitration? Mediation is voluntary and designed to be conciliatory to both sides. Arbitration is compulsory and sometimes adversarial. Even when an arbitrated dispute is resolved quickly, the disputants' business relationship may be mortally wounded. Typically, somebody wins and somebody loses.

Nonbinding mediation requires agreement by both sides of the dispute. Arbitration decisions are binding and typically afford no appeal of decisions absent a clear showing that the arbitrator was biased or acted outside the scope of the arbitration agreement. Mediation needs no appeals process because neither party is bound to settle. Only when both parties voluntarily sign a negotiated agreement does mediation become binding.

Both litigation and arbitration follow strict procedural rules. In addition, litigation may be bound by past court cases, limiting the range of creative options available for parties to resolve their dispute. Mediation has its rules, but they are relatively simple and flexible: You present your side of the story; the other party presents its side. Interrogatories and mandatory depositions are not used, and in the event witnesses are called upon, the process is voluntary and informal. The goal of mediation is to get agreement on problem resolution and keep the project rolling.

As a result of procedural simplicity and mediator knowledge, mediation can be pursued even while work on the project continues, eliminating costly delays and damages. Additionally, the time savings and lack of

need for teams of attorneys and professional expert witnesses make the mediation process much less costly than litigation. But your greatest value may be the saved business relationship between you and your client – and your saved reputation as a high-quality, low-risk firm. Mediation is private and confidential.

Best of all, mediation works. Many mediated disputes are settled in one day, and mediation has proven highly successful in the design-construction arena.

How Mediation Works

There are various types and hybrids of mediation. But in general terms, the process works as follows:

During your initial negotiations with a client, before a project upset arises, one party requests that mediation be the initial dispute resolution method to any project upset and the other agrees. This agreement to mediate is often included in the client-designer contract (more on that later). Note that the parties have retained their rights to later use arbitration, litigation or some other dispute resolution technique should mediation not result in a mutually acceptable settlement.

When a dispute arises, the parties try to reach a negotiated settlement. If agreement cannot be reached between the two parties, they agree to enter mediation. A qualified mediator familiar with the design and construction industries is agreed to.

The neutral mediator arranges for a joint session with representatives from each of the two parties. These representatives, which may include firm principals, key project designers and/or legal counsel, should have decision-making authority to reach agreement on the dispute. The mediator explains the voluntary mediation process, how it differs from arbitration and litigation, and the specific rules that he or she will apply.

Once these ground rules are agreed to, each party explains its position regarding the dispute likely including a chronological history of the pertinent events. This joint session gives the mediator the chance to gather facts, evaluate the relationships and dynamics between the parties, and identify areas of agreement and areas of discord.

In some cases, the mediator can get the two parties to reach a settlement during this initial joint session.

Typically, however, the joint session ends without agreement.

When it becomes apparent that the parties have stalled in their search for an agreement, the mediator typically begins holding separate private meetings, or “caucuses,” with each of the parties. These caucuses may involve pertinent witnesses or outside experts to help establish the party’s position. Limited discovery may consist of voluntary depositions and a review of basic project documents. The mediator evaluates the party’s case, asks probing questions – sometimes acting as a devil’s advocate – and brainstorms alternative solutions for reaching a settlement. Anything said to the mediator in these caucuses is held strictly confidential and cannot be disclosed to the other party except when agreed to by the disclosing party.

Sometimes, a mediator will request permission to disclose information to the other party when he or she believes it will expedite an agreement. The mediator also may comment as to what a reasonable settlement may include, or whether one party’s offer is likely to be accepted.

Following the caucuses, the parties are brought back together in an attempt to reach an agreement. The mediator seeks to summarize the areas of agreement and narrow the points of contention, pointing out the benefits of compromise and the consequences of not reaching agreement. Often the parties negotiate the final settlement in this second joint session. The mediator verifies the specifics of the agreement and makes certain its terms are clear. Both parties sign the negotiated agreement, which becomes a binding contract.

If either party fails to accept an agreement at this point, additional caucuses and joint sessions are held to iron out continuing points of contention. Typically, the mediator eventually reaches a final proposed resolution. This resolution is nonbinding unless both parties agree to it in writing.

If no resolution is agreed to, the parties are free to seek resolution elsewhere, including in arbitration or litigation. Because the mediation process is typically “without prejudice,” any information voluntarily revealed by one party during negotiations cannot be

used or referred to as evidence by the other party during any future litigation.

A Mediation Clause in Your Contract

You and your client do not have to be contractually bound in order to agree to mediate. Either party can suggest mediation at any time. Getting both parties to agree to mediation after a dispute arises, however, can be difficult due to the emotions involved. At least one party feels wronged and, in many cases, is unwilling to give an inch to reach a compromise. That's why mediation is most successful when parties have agreed to it by contract *before* a dispute arises.

Most professional associations (AIA, EJCDC, ASFE and CASE included) have standard contract forms that call for mediation. Some of these forms require mediation prior to arbitration or litigation; others simply recommend it. Regardless, by including a mediation clause in your contract with your client, you both have an available means by which to inexpensively settle disputes and emerge from the process with your business relationship intact.

You and your attorney can consider the standard language used by your professional associations or develop your own language. Regardless, the language should state something to the effect that in an effort to resolve conflicts that arise during or after the design and construction of the project, you and your client agree that all disputes shall be submitted to nonbinding mediation unless the parties mutually agree otherwise. You and your client should further agree to include a similar mediation provision in all agreements with contractors, subcontractors and subconsultants retained for the project. If possible, go one step further and require those third parties to include a mediation provision in their agreements with suppliers, fabricators and other pertinent parties to the project, thereby providing for mediation as the primary method for dispute resolution for the project.

Choosing the Mediator

When and how do you choose your mediator? It is generally preferable that you and your client agree to a mediation service and mediator after a dispute arises, rather than having a mediator predetermined in your contract. That way, you can choose a mediator with knowledge applicable to the specific dispute in question.

There are several local and national organizations that provide mediation services for design and construction industry disputes. Generally, these organizations each have their own set of rules and procedures. Consider these as part of your selection process.

When selecting a mediator, look for someone who is not only knowledgeable of the design and construction field, but someone trained in negotiation and facilitation techniques. Check with your attorney for the names of recommended mediation services in your area. As your professional liability specialist agency, we may be able to provide a list of qualified mediators as well.

Paying the Costs

The cost of mediation services vary greatly depending on the complexity of the dispute, the number of parties involved, and the amount of time required. Typically, mediators are paid on an hourly or daily basis or on a percentage of the dollar amount in controversy, much the same as with lawyers. Costs can be split equally by the two parties or paid as agreed to as part of the settlement. These costs are almost always insurable under your professional liability policy.

Some professional liability insurers offer a deductible reimbursement program to encourage participation in mediation. Under such a program, policyholders successfully concluding a dispute through formal mediation have a percentage of their deductible returned, up to a preset limit. Ask us for details on current deductible-reimbursement programs available.

Not all disputes are suitable for settlement via mediation, but a vast majority are. It makes perfect sense for parties to a design project to choose mediation as their preferred dispute resolution technique. Getting and giving that commitment upfront in writing signals that your primary goal is to have a litigation-free project where problems are handled quickly and fairly with minimal impact on time and money.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.