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# Why 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.*

Picture this: A dispute arises with your client. The client's lawyer calls your lawyer. Each attempting to gain the advantage, they become inflexible in their stances. Work on the project screeches to a halt. Threatening letters fly back and forth. Finally, a claim and than a counter suit is filed.

Next comes the discovery process: document requests, interrogatories and depositions. Then pretrial motions, hearings, and, finally, trial.

What is the cost of such a scenario? You've lost a possible repeat client, drastically decreased productivity, spent considerable time and money dealing with legal issues and had your dirty laundry aired in public. You may or may not have won the litigation battle, but you certainly lost the war.

Since a great majority of civil suits are settled before trial anyway, why not simply work toward settlement of the problem to begin with, rather than expending all that time and money in a drag-out fight? This is exactly why mediation has become so popular.

## Benefits of Mediation

Mediation is a confidential, nonbinding, conciliatory process by which parties to a dispute agree to sit down and reach an accommodation before they enter into a hostile adversarial relationship. Mediation offers a structured procedure designed to resolve problems in a manner that is acceptable to both parties and umpired by a trier of fact familiar with the design industry and the specific issues in dispute. This typically creates a fast, flexible forum for resolving problems at greatly reduced costs.

In litigation, you will most likely face a judge or jury unable to fully understand and evaluate the technical issues discussed. For that reason, each side presents "expert witnesses" to explain technical matters in lay terms. Inevitably, the experts disagree, and it will be left for the inexpert jury to decide which witnesses to believe. With mediation, as with arbitration, the individual hearing the dispute can be chosen in part based upon the technical knowledge required to assist the parties in reaching an accommodation.

So why mediation over arbitration? While successful mediation is voluntary and designed to be conciliatory (win/win) to both sides, arbitration is compulsory and can be adversarial (win/lose). Even when a dispute is resolved quickly, the disputants' business relationship may be mortally wounded. Mediation requires agreement by both sides, while arbitration is binding and typically affords 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.

Both litigation and arbitration follow strict procedural rules. Mediation also has rules, but by comparison they are relatively simple and fairly flexible: You present your side of the story; the other party presents its side. Interrogatories and depositions are not used, and in the rare event witnesses are called upon, the process is 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 expert witnesses make the mediation process much less costly than litigation. But your greatest savings may be the saved business relationship between you and your client and your saved reputation as a high-quality, low-risk firm.

**How Mediation Works**

There are various types and hybrids of mediation, but in concept, the process works as follows: Subsequent to a project upset, one party calls for mediation and the other agrees. A qualified mediator familiar with the design and construction industries is selected. The mediator arranges for a joint session with the two parties to discuss the mediation process, how it differs from arbitration and litigation and the rules that apply. Once the preliminary issues are dealt with, each party explains its side of the dispute. This gives the mediator the chance to gather facts and evaluate the relationships and dynamics between the parties, as well as locate areas of agreement and areas of discord.

At the point where joint discussions are no longer productive, the mediator begins private meetings, or caucuses, with each of the parties. Anything said to the mediator in these caucuses is confidential and cannot be disclosed to other parties unless 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 negotiations. The mediator also may comment as to what a reasonable settlement may include or whether one party's offer is likely to be accepted.

Finally, 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 no agreement. The mediator acts to concentrate the discussions on the issues at hand and helps avoid new conflicts.

Often the parties negotiate the final settlement in a joint session, allowing the mediator to verify the specifics of the agreement and make certain its terms are clear. If either party fails to accept the agreement, the mediator’s proposed resolution is non-binding and the parties are free to seek resolution elsewhere, including turning to 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 sometimes be difficult due to the emotions involved. At least one party feels wronged and in many cases at least one feels completely faultless and 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 association standard contract forms now provide for mediation. The AIA 1997 documents call for mediation as the first step before arbitration for resolving disputes. The EJCDC 1910-1 (1996 edition) calls for good faith direct negotiations for resolving disputes for 30 days and, if the dispute is not resolved, then Exhibit H gives a choice of mediation or arbitration as agreed during contract formation. The EJCDC General Conditions (1910-8) says disputes will be resolved by whatever method is agreed upon in the Supplementary Conditions. Both CASE Contract Document 2 (1991) and ASFE Standard Forms of Agreement provide for mediation as well.

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. Such a clause might read:

**Mediation**
**In an effort to resolve any conflicts that arise during the design and construction of the Project or following the completion of the Project, the Client and the Consultant agree that all disputes between them arising out of or relating to this Agreement or the Project shall be submitted to nonbinding mediation unless the parties mutually agree otherwise.**

**The Client and the Consultant further agree to include a similar mediation provision in all agreements with independent contractors and consultants retained for the Project and to require all independent contractors and consultants also to include a similar mediation provision in all agreements with their subcontractors, subconsultants, suppliers and fabricators, thereby providing for mediation as the primary method for dispute resolution between the parties to all those agreements.**

**Choosing the Mediator**
We suggest you and your client select the mediation service together when a dispute arises, rather than have a mediator predetermined in the contract. There are several local and national organizations that provide mediation services for design and/or construction industry disputes. Generally, they each have they own detailed set of rules and procedures. When you and your client agree on the mediation service, you have agreed to be guided by their rules.

The cost of mediation services vary greatly depending on the type of problem, the number of parties involved, and the amount of time required. Typically, mediators are paid either on an hourly basis or on a percentage of the amount in controversy, much the same as lawyers.

Check with your attorney, professional liability insurance specialist or insurance carrier for the names of recommended mediation services in your area. They should be able to recommend a service to you.

**An Added Bonus**

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 your PLAN broker for details.

**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.*

**Sidebar**

**Don't Fear Mediation**

Mediation is still disfavored by some design professionals. These doubters feel that mediation often results in innocent parties having to pitch in and pay a portion of the damages - even though they "did nothing wrong." Such fears are usually unfounded, as the following claims case shows.

The facts: A mechanical engineer was hired by an architect to help design a car dealership. A lawsuit was filed by the owner against the architect due to problems with a floor drainage system in the area where the dealership changed motor oil and washed cars. At issue was the fact that the drainage system did not meet government standards regarding the potential drainage of motor oil into a sanitary or storm system.

It was clear early on that the civil engineer on the project failed to get the needed approvals and permits for the drainage system. And, because the architect hired the civil, he shared the liability. Yet the civil and the architect both blamed the mechanical engineer for the problem since he designed the drainage system.

The mechanical engineer first refused to participate in any mediation regarding the matter since he was convinced that 1) he was completely innocent and 2) mediation would force him to pay part of the claim. Eventually, following a little education on the mediation process, the three design firms agreed on a plan of action: the architect would first settle the claim with the owner and then the three design firms would attend a mediation hearing to determine who was responsible for what portion of the loss.

The results: Based on the mechanical's convincing presentation, both the architect and civil agreed that he had no fault and that they would settle the loss between themselves. The mechanical engineer paid no damages and received a credit through its insurance company’s mediation program that covered 50% of his minor legal expenses.