

PRO-FORM INSURANCE SERVICES

15 Allstate Parkway, Suite 220
Markham ON L3R 5B4
Tel: (905) 305-1054 Fax: (905) 305-1093
www.hubinternational.com



Mediation: The Preferred Dispute Resolution Technique

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

Scenario One: A dispute arises with your client. The client's lawyer calls your lawyer. Attempting to gain the advantage, each becomes inflexible in their stances. Work on the project screeches to a halt while threatening letters fly back and forth. Finally, a claim and then a countersuit are filed. Next comes the discovery process: document requests, interrogatories and depositions. Then come pretrial motions, hearings and, finally, a trial. You spend considerable time and money dealing with legal wrangling while your dirty laundry is aired in public. Now your future is left to the whim of a jury and, win or lose, your reputation has been irrevocably damaged in the eyes of current and prospective clients.

Scenario Two: A dispute arises with your client. You agree to take the matter to arbitration and select a mutually acceptable arbitrator. Each side presents its version of what happened to the arbitrator. Each side gives a one-sided story, knowing that the arbitrator will make a binding decision that cannot be appealed. You'll win or you'll lose, so it's no holds barred. Either way, you've lost this client and possibly others who get wind of this nasty affair.

The second scenario is certainly preferable to the first. In most cases, arbitration is a less costly and less public form of dispute resolution. The appointed arbitrator is typically knowledgeable about the design and construction industry. Still it is far from perfect. It is still a largely adversarial situation that forces a judgment on both parties. Chances are, neither you nor your client will be totally happy with the outcome and – after much finger-pointing -- you'll likely never do business together again.

There must be a better option.

It's Time for Mediation

Imagine a dispute resolution technique that is based on finding common ground and resolving disputes quickly and inexpensively while preserving business relationships and reputations. That's the objective of mediation.

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

In litigation, you will most likely face a 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, the individual hearing the dispute can be chosen based upon the technical knowledge required to assist the parties in reaching an equitable agreement.

So why mediation over arbitration? Mediation is voluntary and designed to be conciliatory (win/win) to both sides. Arbitration is compulsory and can be adversarial (win/lose). Even when an arbitrated dispute is resolved quickly, the disputants' business relationship may be mortally wounded.

Mediation requires agreement by both sides. 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. Only when both parties voluntarily sign a negotiated agreement does mediation become binding.

Both litigation and arbitration follow strict procedural rules. 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 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 value may be the saved business relationship between you and your client -- and your saved reputation as a high-quality, low-risk firm.

Best of all, mediation works. Many mediated disputes are settled in one day, and mediation groups in the design-construction arena typically claim a success rate of 85%-90%.

How Mediation Works

There are various types and hybrids of mediation, but in concept, the process works as follows: During negotiations with a client, before a project upset arises, one party calls for mediation as the initial resolution method to any project dispute and the other agrees. This agreement to mediate is often included in the client-designer contract.

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

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 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 non-binding 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 “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 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 language such as the following offered by the Design Professional Group of the XL Insurance Companies:

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

When and how do you choose your mediator? It is generally preferable that you and your client agree to a mediation service 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, they each have their own detailed set of rules and procedures. Consider these as part of your selection process.

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.

Check with your attorney for the names of recommended mediation services in your area. As your professional liability specialist agency, we can provide a list of qualified mediators as well.

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 us for details on current deductible-reimbursement programs available.

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.

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