

Using Mediation to Settle Construction Disputes

by Bryant H. Byrnes

Nine out of 10 mediations are successful; people don't come to the negotiating table unless they really want to wrap things up.

Every so often, a client will call for advice and begin by saying, "I've been in business for 20 years and have never had a problem like this with an owner." It frequently means my client is headed toward mediation.

Mediation is a method of alternative dispute resolution (ADR) in which a neutral third party, experienced in mediation, guides the disputing parties toward a mutually agreeable solution. Simply put, the contractor and homeowner sit down with a professional mediator who tries to help them settle their differences.

Mediation should not be confused with arbitration, which is another form of ADR. Whereas the award in arbitration is imposed from above (as in a civil lawsuit), the solution in mediation is freely negotiated by the parties themselves.

How Disputes Play Out

Construction disputes frequently progress through a series of stages. At first, the contractor and customer might talk and try to settle the issue themselves. But if that doesn't work, the next step can be mediation. If the mediation fails, the matter usually goes on to binding arbitration or litigation.

Binding arbitration is essentially the use of a private judge (see "What Happens When You Go to Arbitration?" *Legal*, 10/04). Litigation is a civil lawsuit with attorneys, a judge, and sometimes a jury. Mediation requires only a mediator, and although attorneys may be present, they play a less significant role than they do in litigation and arbitration.

It's best to avoid litigation and arbitration altogether, because they're risky and expensive. The goal of mediation is to settle the dispute before it escalates into an all-out war requiring that level of intervention.

Initiating a Mediation

Mediation is voluntary; though favored by courts, there is no law requiring it. The contractor and the homeowner begin the mediation process either because they want to or because they signed a construction contract that requires it.

Contractual requirement. The contract my clients use contains a clause that spells out how disputes will be settled (see sample clause, next page). Mediation is the first step. Both parties initial the page that contains the clause to indicate that they will mediate any disputes and, if that fails, forgo their right to litigate and instead submit their claims to binding arbitration.

When one side says no. If, in spite of the contract, members of one party end up balking at mediation, a judge may compel them to participate; after all, they signed a contract agreeing to do so. But, practically speaking, there is usually no point trying to mediate a solution when the people on one side are so entrenched they must be compelled to attend.

Who Is the Mediator?

The mediator is a neutral third party. Anyone can become one, but many mediators are retired judges or former trial attorneys who practiced construction law.

Finding a mediator. There are several ways to find a mediator. Courts encourage mediation because it reduces the number of cases they have to try. Thus, they often have lists or panels of mediators people can call. Likewise, local bar associations and organizations such as the American Arbitration Association (www.adr.org) can provide lists of mediators for hire.

If you go to mediation, be sure to get a mediator who has construction-industry experience. In most cases, the parties to the dispute can agree on which mediator to use, but in the

event of a true deadlock, the court will select one for you.

Cost of mediation. Although mediation is less expensive than arbitration or litigation, it isn't free. The parties to the dispute typically split the cost of the mediator and any associated fees. If the parties choose to hire attorneys, they have to pay them, too. Most mediators charge the same hourly rate as private attorneys.

What the Mediator Does

Once you have a mediator, he or she will take over the procedural aspects of the process, such as where and when to

time-consuming procedures like depositions and interrogatories. To reduce costs and speed the process, the rules of mediation severely limit the amount of discovery.

At the Mediation

The mediation session usually starts with a "joint session," during which the parties, counsel, and mediator gather in one room and the mediator goes over the rules. This is the first time he meets the parties, and this is when he begins to get a sense of the personalities involved.

Negotiations. At the conclusion of this initial joint meeting — which can be very

agree otherwise, the discussions are completely confidential.

These back-and-forth discussions and negotiations take time, so it's a good idea to bring a book to read or something to work on during the stretches of waiting. The proceedings can be tiring and emotionally draining, too, as the parties are often confronted with things they don't want to hear. (As bad as this sounds, though, it's still probably better than the alternatives — arbitration and litigation.)

Settlement. The mediator's job is to facilitate resolution, and if he is successful, the settlement is written up and signed by the parties at the mediation. The settlement agreement is a contract; if one party does not comply, the courts will readily enforce it.

41. Dispute Resolution:

a. Voluntary Dispute Settlement — Direct and Mediated Negotiations: Both parties agree that in the event any material difference of interpretation or any other controversy or claim arises out of or is related to this Agreement or the breach thereof, both parties shall promptly make good faith efforts to settle the matter directly between themselves.

Both parties agree that if any controversy or claim remains unsettled for fifteen (15) days following notification by ordinary mail that a dispute exists. In a further effort to achieve a voluntary settlement of the dispute, the parties shall immediately retain a mutually acceptable mediator or mediation team experienced in the field to conduct a mediation. The parties shall participate in good faith confidential mediated negotiations according to Evidence Code Section 1152.5. Each party shall pay one-half of the mediation fee and their own attorneys' fees and expenses.

Owner Initial

Contractor Initial

meet. I prefer to have the mediation at a neutral site where several rooms are available. This allows for the common practice of putting the parties in separate rooms while negotiations are under way.

Discovery. Before the mediation begins, the parties to the dispute usually prepare and exchange briefs. In litigation, this stage of the process is called "discovery" and includes expensive and

brief — the parties, along with their attorneys, go into separate rooms and the mediator shuttles back and forth for private meetings with each. The mediator gives the members of each side a frank appraisal of their case, detailing its strengths, its weaknesses, and — should it proceed to arbitration or litigation — its risks. The mediator also suggests ways to settle the dispute. Unless the parties

Prospects for Success

I have seen statistics indicating that nine out of 10 construction mediations are successful. In my experience, that number seems about right. People don't come to the negotiating table unless they really want to wrap things up.

What is success? If you participate in mediation, you will not get everything you want. The best you can expect is to get maybe 90 percent of your claim, and very frequently you'll have to settle for less — sometimes much less. But at least you will staunch the bleeding, so to speak, and ending the dispute will allow you to concentrate once again on running your business.

A Real-Life Example

One of my contractor clients recently entered mediation with a customer who owed him \$60,000 on a \$400,000 remodeling job. The workmanship was excellent, but my client was not very prompt about submitting the final bill, and when he did, the customers refused to pay.

Tempers flared, talks broke down, and

soon both sides hired attorneys. We still couldn't break the deadlock, so, with fees mounting, the parties agreed to an early mediation.

I attended the mediation, and it was clear to me that the customers were rabid and out for blood. One spouse had gone so far as to contact multiple past clients of my contractor to construct some kind of conspiracy theory.

The mediator, contractor, and I agreed that our side held the legal high ground, but that practically speaking the time and cost to prevail in court would be out of proportion to what my client would collect. In the end, the contractor agreed to settle for less than the entire amount.

Do You Need an Attorney?

An attorney is not required for mediation, but if the case is complicated, I advise at least consulting one. (And if the other side hires an attorney, then you should definitely retain one.) He or she can explain the procedures ahead of time and advise you on tactics and strategy.

Also, most mediators ask for a premediation brief or statement so that they come to the mediation well-informed of the issues. While you could write this statement without the aid of an attorney, you should at minimum talk with one, because a brief that informs and persuades is worth its weight in gold.

Attorneys play a limited role during the mediation. They are there not so much to advocate as to inform, clarify, and advise.

The really good mediators will often push counsel into the background for much of the proceeding. When the mediator says, "Mr. Byrnes is an excellent attorney, but" I know I am being asked to step back and shut up.

A Worthwhile Investment

Mediation is never a waste of time. Even if it fails, you will gain something by getting the mediator's objective read on the strengths and weaknesses of your case. Should the case go on to binding arbitration or litigation, much of the prep work will already be done.

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