

For the Client

Dealing With Disputes . . . Mediation as an Option

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In the March 2001 "For the Client" column, former NSPE general counsel Milt Lunch explored the key issues associated with the use of arbitration in resolving construction disputes. Like litigation, arbitration is basically adversarial in nature and results in a binding decision imposed by a third party. In this column, we will look at an increasingly popular nonadjudicative method of dispute resolution: mediation.

Mediation is a nonbinding, facilitative process in which an impartial mediator actively assists the parties in identifying and clarifying issues of concern and in designing and agreeing to solutions for those issues. For mediation to work effectively, it is important that the mediator be carefully selected on the basis of qualification, reputation, and knowledge in the design and construction process; that representatives of the parties with authority to resolve the dispute directly and personally participate in the mediation process; and that the parties be willing to participate in good faith in the process and maintain an open mind with respect to the issues in question.

Mediation can proceed under the rules or guidelines of a particular organization, such as the Construction Industry Mediation Rules of the Amer-

ican Arbitration Association (AAA) or the Model Mediation Procedures of the CPR Institute for Dispute Resolution, and the mediator can be selected from that organization's prequalified panel of mediators. Alternatively, the parties may simply agree on engaging a particular mediator who may establish any necessary ground rules.

Whichever way the parties choose to proceed, mediation is a relatively informal process. Typically, in a given mediation proceeding, the mediator will conduct joint meetings with the parties and separate meetings or caucuses with each party to gain an understanding of the facts and issues involved in the dispute and the underlying concerns and priorities of each of the parties.

During the course of these sessions, the mediator's objective will be to help the parties identify, clarify, narrow, and ultimately remove the barriers to a mutually satisfactory negotiated settlement. Often, this requires the mediator to serve as an "agent of reality," by encouraging the parties to consider their individual views and demands more realistically as well as to understand the uncertainty and expense associated with the alternatives to a negotiated settlement—arbitration or litigation.

Use of mediation can be promoted by including a contract provision requiring the parties to submit disputes to mediation prior to resorting to arbitration or litigation. While mediation is optional under the 1996 editions of the Engineers Joint Contract Documents Committee (EJCDC) documents, the 1997 editions of the American Institute of Architects

Document A201 and Document B141 require mediation as a condition precedent to arbitration or litigation. The AIA documents further provide that mediation is to be conducted in accordance with the AAA's Construction Industry Mediation Rules, with the fees to be split equally between the contracting parties unless they agree otherwise.

A provision based on the EJCDC treatment of dispute resolution would read as follows:

Owner and Engineer agree to negotiate in good faith for a period of 30 days from the date of notice to the other party any and all unsettled claims, disputes, or other matters in question between them arising out of or relating to this Agreement prior to submitting them to mediation by [the parties can either name a mediator, cite the Construction Industry AAA mediation procedure, or agree to agree on a mediator later]. This requirement of negotiation and mediation shall be effective prior to the initiation of any legal action, unless delay in initiating legal action would irrevocably prejudice one of the parties.

Mediation can also be simply described in a contract rather than specifically tied to a set of rules, such as those of the AAA. A simple provision might be worded as follows:

Owner and Engineer agree that if a dispute arises out of or relates to this contract, the parties will attempt to settle the dispute through good faith negotiations. If direct negotiations do not resolve the dispute, the parties agree to endeavor to settle the dispute by mediation prior to the initiation of any

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legal action, unless delay in initiating legal action would irrevocably prejudice one of the parties.

As a practical matter, the idea of making mediation mandatory is somewhat contrary to its purposes. However, it provides a valuable opportunity to resolve a dispute in a relatively relaxed, low-key environment. Even if the parties fail to reach a complete resolution of the dispute, they often succeed in narrowing it enough that it can be dealt with more expeditiously in any subsequent adjudicative proceeding. For that very reason, many local courts across the country include a mandatory "mediation track" for certain categories of civil litigation.

The success rate for resolving construction industry disputes through mediation is impressive. The AAA has consistently reported a success rate of over 85% for AAA-administered mediations. Not surprisingly, there is broad support for the use of mediation among professional liability insurers.