

Building a Foundation for Successful Mediation

By James K. Schwartz, Esquire

In resolving disputes between design professionals and their clients, mediation offers many advantages over litigation or arbitration. But without proper planning and preparation, it can prove counterproductive, making settlement harder, not easier, to achieve. This article describes the preconditions for a successful mediation.

For design professionals, the benefits of mediation as a method of resolving client disputes are manifest. In addition to allowing both parties to avoid the high cost, time commitment and stress of litigation, the mediation process offers greater control, confidentiality and predictability. Moreover, because mediation is at its heart a voluntary process, it can provide a platform for discussing and resolving differences, resulting – ideally – in the preservation of a valued design professional/client relationship.

Once the exception rather than the rule in such disputes, mediation is now mandated as a first option by most AIA (American Institute of Architects) contracts. Though it is a time-tested solution that Beazley favors, we realize that not every dispute can or should be mediated, and there are naturally occasions when continued litigation is unavoidable or may be the best option. By entering into mediation, parties are not agreeing to settle, but are rather consenting to negotiate with the aid of a neutral facilitator – usually one with a substantial degree of expertise in the subject matter.

Happily, the majority of mediations end in settlements that are acceptable for both parties involved. While taking the matter to trial may offer each side the golden promise of a “home run,” it more commonly results in the irrevocable – and costly – severing of a tie between the design firm and its client, and can be drawn out over years. By contrast, most mediations, once begun, are relatively quick and cost-effective, with attorneys’ fees typically a fraction of what it would cost to fully litigate the case.

At the same time, mediation is not without its potential pitfalls. For one, it offers no “guarantee” of success. Unlike arbitration – an alternative to litigation that is adversarial and binding – either party to mediation can terminate the process if a “deal” is not in the making. If not handled well, it may harden the parties’ positions and ultimately make settlement more difficult. Therefore, the process must be thoughtfully planned out.

Design firms considering mediation as an avenue for resolving a dispute can assure a smoother, more predictable experience by understanding and keeping in mind four keys to success – timing; choice of

mediator; preparation; and availability of the decision-makers during the mediation process. They can also maximize the possibility of a favorable outcome by leveraging the resources, experience and expertise that their insurance carrier and broker can offer in each of these areas.

Because mediation requires that the disputing parties come to the table voluntarily with the intent to reach an acceptable, mutually agreed-upon resolution, timing is essential. This means investing the time upfront to thoroughly and objectively investigate the allegations at hand, and obtain a detailed understanding of the other side’s position. This may include preliminary meetings, the exchange of expert opinions or reports or even conducting some initial discovery. While an insurance company and its insured typically have a desire to resolve a matter, no one wants to do so without a reasoned approach and assessment of liability. Rushing to mediation before the parties have at least a rudimentary understanding of the strengths and weaknesses of their positions will usually result in a fruitless mediation effort.

The insurance carrier can provide valuable assistance during the preparation phase. An experienced claims manager should be able to explain the basics of the claims handling and pre-trial process, discuss the options of mediation and arbitration or litigation and their potential outcomes, and recommend and help engage the services of experienced defense counsel appropriate for each option. At this stage, it is critical that both the carrier and insured are “on board” with the selected course of action, and that there is a common understanding of the time and resources required to pursue the chosen strategy. Brokers, too, can act as advisors, providing important perspective on whether to mediate, arbitrate or litigate.

Once all parties have agreed to mediate, choosing a mediator is the next step. The choice of the right mediator is critical to attaining a positive outcome. Each brings different skills, styles and strengths to the process. While some mediators are adept at dissecting facts, others are more eager to negotiate immediately or seek a quick consensus. The best mediators know when to switch from fact-finding mode to “talking turkey.”

Your claims manager and defense counsel can assist with the selection of an experienced mediator. Though many are retired judges, they come from a variety of backgrounds. There are a number of professional organizations that can provide lists of qualified mediators, but at present there is no uniform licensing board or standard of certification. In the case of construction related disputes, selecting a mediator who specializes in the construction industry greatly enhances the likelihood of success. Naturally, both sides

must agree on the selection, so choosing someone with a strong industry track record is critical.

When getting ready for the mediation itself, the parties and their attorneys need to prepare almost as if they were going to trial. In developing the brief for the mediator, which is usually submitted to the opposing party in advance of mediation, the defense counsel must have a firm grasp of the project's history. This includes reviewing the relevant architectural and engineering drawings, meeting notes, and project correspondence, as well as any depositions that may have been taken. The defense counsel should also be able to effectively anticipate the opposing side's arguments and point of view. The resulting brief serves as the insured's position paper in mediation and therefore requires meticulous research and development.

During the actual negotiation – and in fact throughout the entire mediation process – it is essential that the mediator and counsel have access to both parties' leadership. For mediation to work effectively, those with decision making power must be invested and involved. This includes being present at the mediation itself to hear firsthand what the other parties are saying, and being in a position to authorize settlement offers and demands. Being briefed by telephone simply does not suffice.

Though some cases are better off being tried in court, mediation is a time-tested process that allows design professionals and their clients (or other disputing parties) to resolve claims and differences in a less confrontational manner, saving time and money while protecting professional reputations and relationships. It can also result in creative solutions that neither party may have considered, and that a judge, jury or arbitrator does not have the authority to deliver. For the mediation process to work effectively, however, timing, preparation, sound advice and careful selection of defense counsel and mediator are essential, and the design firm's insurance partners can often be a valuable resource in these matters.

Four Keys to a Successful Mediation

- **Timing** – Never rush to the mediation table – a thorough investigation is critical before mediation can even be considered as an option.
- **Choice of Mediator** – Select a mediator with experience in construction disputes and a demonstrated knowledge of the subject matter at hand.
- **Preparation** – Plan for a mediation as if you were planning for a trial, relying on the assistance of your legal counsel, insurance provider and broker as appropriate.

- **Availability of Decision Makers** – Ensure that senior decision makers are present throughout the mediation process and are in a position to authorize an agreement.