

SEVEN BENEFITS OF USING CIVIL MEDIATION IN CONTRACT DISPUTES



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WELCOME



I like to help people solve problems - both as a design professional and a mediator.

I specialize in the resolution of disputes involving real property and construction, including such matters as:

- Boundary line disputes
- Land use and construction permit approvals
- Disputes between project owners and their architects and engineers
- Construction claims by both owners and contractors
- Construction defects
- Sanitary sewer and drainage problems
- Accessibility for the disabled
- Street and sidewalk defects, and
- Insurance claims

My background, as a licensed Professional Engineer, Professional Land Surveyor, Professional Planner and Construction Official, has given me a broad based understanding of a wide array of problems associated with the development, construction and maintenance of improvements to real property. I have designed, inspected and been an owner's representative for many public works projects. My 40 years of work with project owners, attorneys, architects, engineers, contractors and government officials has helped me to understand their perspectives of construction disputes.

Construction litigation is time consuming and expensive. To save time and money, disputes should be resolved as they arise - during the course of the project - long before the parties feel a need to litigate the matter. Unfortunately, most parties to construction contracts fail to discuss effective dispute resolution procedures before they start the work.

In litigation, each party to the dispute is often required to retain expert witnesses to render opinions in support of that party's arguments. Locating qualified, effective experts can be difficult; expert's reports can be expensive. When coupled with attorney's fees, they often make litigating small construction disputes cost prohibitive. I've heard it said that it isn't worth litigating a construction dispute with a value of less than \$100,000.

I believe that as a neutral, my technical background can be useful, to help parties to craft ways to solve their differences during a construction project prior to embarking on the expensive path of litigation. Ideally, these disagreements can be settled quickly, during the course of the work, so that the project will not be delayed.

I welcome the opportunity to help you find a creative way to solve your real property dispute.

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Construction and real estate development has always been a complex and occasionally contentious industry that seemed to define the old saying about great risk and great rewards. The profit potential for builders and investors is huge, which keeps interest and involvement high, but in recent years the efforts to manage risk via contractual agreement has steadily grown out of proportion for even the most high-reward projects. In an environment where contracts between investors and contractors can run hundreds of pages and each party seeks to completely eliminate risk for themselves, and an environment where the default reaction to any problem is litigation, it's difficult to forge the sort of mutually-beneficial relationships that can make for the best return on an investment.

As a result, mediation is growing in popularity for contract disputes in general and in the construction industry specifically. For contractors, project owners, design professionals, and insurance carriers, mediation of contract disputes carries seven distinct benefits that make it much more preferable to litigation.

1 COST

For any contractual dispute – for any dispute, period – one of the most compelling benefits of mediation over other approaches to dispute resolution is the cost factor. Mediation is almost always significantly less costly than litigation. The costs of litigation make it an ineffective method of dispute resolution on smaller projects where the cost to prove ones claim may exceed the value of the claim. Without extended attorney's fees, court fees, expert witness fees, and the length of time those fees are paid over, mediation offers a much more affordable solution to any contract dispute. For projects that may already be over-budget due to whatever has triggered the dispute in the first place, resolving that dispute without significant further charges against the project is ideal.

2 TIME

Directly connected to the cost factor is the speed factor. Court proceedings are slow. Even getting on the court's calendar can be a challenge, and once on that calendar any number of procedural quirks can stop progress in its tracks.

With mediation for contract disputes, the schedule is entirely up to the parties involved, all of whom will almost always endorse a quick resolution. With complex and high-value projects, time is of the essence – every moment of delay results in extended carrying costs for all involved.

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Most important, mediation is a process that can be invoked as problems or disputes arise, dealing with them when they are small and easily resolved, as opposed to waiting until they are huge impediments to the project. It brings in a true Neutral to help resolve them, as opposed to the design professional on the project, who may not be able to be truly objective. This flexible and nimble approach to dispute resolution saves time in the long run by making disputes into a few short delays at worst, as often a project can proceed while minor disputes are resolved.

3 RISK MANAGEMENT

Risk is one of the main concerns of any high-value project. Managing that risk is the primary objective of all involved regardless of their position in the actual dispute. Mediation offers a fine sense of risk management because mediation is under the direct control of the disputants, both of whom presumably have a stake in resolving the issue as opposed to extending the conflict or undermining the other.

4 CONTROL

Related to Risk Management is the level of control that mediation brings to contract disputes. Every unrelated party brought into the process in the form of lawyers, judges, juries, and witnesses wrests control away from the people who are directly invested and involved in the project. Decisions will be made that have nothing to do with the project's health or fate.

In mediation, however, not only is the choice of Neutral up to the parties, but so is every single aspect of the mediation process. You retain full control over the process – which allows you to forestall undesired or unsatisfactory outcomes.

There are things that come up during the course of a construction or real estate project that are unanticipated and largely beyond the control of the parties to the contract. Therefore, neither party feels like it was "their fault" but they will need to come up with solutions to these problems in an efficient manner. Turning to mediation is one of the best routes to discover a workable solution that all parties can agree to.

5 PRIVACY

High value construction projects – or any sort of project – often have a good amount of publicity involved. Disputes between investors and contractors or insurance companies and other parties aren't the good kind of publicity. Court proceedings, records, and

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outcomes are matters of public record, and the revelations or accusations aired during litigation can find their way into the public eye when the time comes to sell units or other aspects of the project. Mediation allows for complete privacy – it's not governed by the same rules as the court, meaning that all the disclosures and facts are kept within the conference room walls, with no danger of "dirty laundry" being aired.

6 FLEXIBILITY

Mediation isn't bound by procedural rules. The moment a lawsuit is brought to court, the outcome and path to it become set in stone, governed by generic rules that may not have anything to do with your project's goals or your best interests.

Mediation for contract disputes, on the other hand, is entirely up to the disputants when it comes to its shape and process. Mediation is an open process that can result in practically any solution being adopted – all that is required is legality and mutual consent of the disputants.

The Mediator hired for the process isn't a judge and cannot in any way impose a solution. Rather, he or she is merely a guide who can help facilitate communication and make suggestions – but the final solution can be as creative and unusual as necessary.

7 SPECIFICITY

In litigation, sidetracking is a simple matter. The law does not always conform to the real issue at the heart of a dispute, and the judge will make rulings based on law rather than the project's scope and goals. This can easily drift the goal of the dispute away from real-world, practical solutions into the rarefied air of legal precedent and the letter of the law.

Mediation, on the other hand, can be a very finely tuned instrument that addresses *only* the issue in dispute, and no other aspect of the project or the contract under dispute. It is often a much more specific remedy than a lawsuit.

Contracts are always complex, and no matter how careful two parties are they can find themselves at odds. Mediation is an increasingly popular and consistently effective way to resolve contract disputes, in construction and real estate projects as well as other business arrangements.

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