

Member Communication Experience

Dispute Resolution: Mediation Cuts Costs, Delays, And Risk

Written by: Scott Belton, Vice President, Professional Liability, Hub International

With construction projects growing larger and more complicated, disputes do arise – and they can be challenging to resolve. But litigation isn't in anyone's best interest except the lawyers, and experienced construction leaders are seeking other alternatives.

One of the best alternatives is mediation, a confidential, nonbinding process in which all parties agree to seek a resolution to the dispute outside the usual legal channels. Through a structured negotiation process with a trained mediator, parties work together to create an outcome that is acceptable to everyone. Usually, the mediator is familiar with the industry and the type of dispute in question, so that mediator is uniquely positioned to support problem solving.

BENEFITS OF MEDIATION

When it comes to a legal dispute, many organizations are frustrated because the participants (i.e., judge, jury, and even the lawyers) often don't understand the technical issues. What's more, the costs of litigation can cause the parties to make decisions based on other factors, namely, financial considerations.

When parties agree to resolve disputes through mediation, however, the experience is completely different. Some of these differences include:

- » **Time.** Mediation is typically resolved within a few days. There's no need for lengthy trial planning or waiting for a



court date. The project doesn't have to come to a grinding halt while you sort things out. The leaders come together fairly quickly to discuss the issue and reach a resolution so everyone can get back to work.

- » **Money.** Of course, with a smaller time investment, there's also no need to pay lawyers and expert witnesses. And, of course, when the project can continue moving forward, there's no need to pay for workers or other related fees for a project that is at a standstill.
- » **Relationship.** When two parties participate in a drawn-out litigation, there's a near guarantee that you'll never work together again. The dispute will be won or lost, and neither side will be inclined to try again because you've already proven you can't work well together. But when both sides

come together voluntarily to resolve a problem, both sides can feel like the winner and there is an easier path forward.

- » **Reputation.** The way you treat your partners has a ripple effect down the road, too. When other construction firms or contractors see how you handle a dispute, that impacts whether they want to engage with you. Lawsuits can be very public, with all the gory details shared around the community. But mediation is more private and it leaves all sides in a positive light. Other organizations will have no reason to feel nervous about working with you.

Best of all, mediation works. Mediation groups in the construction space claim a success rate of 85-90%, which means that most of the time, disputes can be resolved in a way that makes everyone happy.

TIPS FOR SUCCESSFUL MEDIATION

Mediation is completely voluntary, with both sides agreeing to work together to create an outcome that works for everyone. But just because the parties have bought into the system doesn't mean the solution will be easy to find.

Consider these tips for using mediation successfully:

1. Include a clause suggesting mediation in your contract.

While you don't have to be contractually bound to agree to mediation, it can be challenging to get both parties to agree to mediation after a dispute has arisen. That's why many organizations add a clause to the contract stipulating that any disputes should go through mediation in an effort to resolve them. Many professional associations offer standard language construction firms can use in their contracts.

2. Select a mediator after the dispute has arisen. It's

preferable to work with a mediator who is familiar with the issues you're facing, so select one after the dispute has arisen who is an expert in that issue. There are several local and national organizations that provide mediation services specifically for the construction industry, so look into those services.

3. Check with your insurer. Many professional liability insurers offer a reimbursement program for organizations that

participate in mediation. Reach out to your insurer to see if you are eligible for a reimbursement through your policy and ask for details on current deductible-reimbursement programs that may be relevant to your organization.

- 4. Consult with your broker or advisor.** An expert advisor in the space can also help to guide you through this challenging time. Reach out to your trusted advisor who may be able to help you with recommended mediation services in your area or other ways you can be supported through this dispute. 



About the Author

Scott Belton is the vice president of professional liability at global insurance brokerage [Hub International](#). His team works with Canadian professional services firms and technology companies to provide risk management and insurance solutions. They provide advice and actionable insights to clients on their Professional Liability/Errors and Omissions, Cyber and Privacy Liability, Directors and Officers Liability, and commercial insurance needs.

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