AGREE TO DISAGREE?

Mediator referees common construction disputes to avoid courtroom. **By Peter Merrill**

For many years, we all have been accustomed to believing that we had to "go to court" when we had a dispute over a construction contract item, if we had trouble collecting our monies due or if our clients had a problem with the standards of construction we used while building or remodeling a house or commercial building.

Today, however, that is far from true. Both you and your client have another option called Alternate Dispute Resolution (ADR), which is also more commonly referred to as mediation and/or arbitration.

The mediation process begins with the assumption both parties are willing to discuss the disputed issues and they are willing to compromise to some extent. The parties recognize if they are not able to resolve the disputed items by themselves, a trained neutral mediator will be able to help the parties reach a settlement. By exploring the strengths and weaknesses of each party's position, the mediator, acting as an intermediary, provides an objective point of view and helps to defuse the parties' emotions and guide the parties toward objectively looking at all of the consequences of the various options available in the decision-making process. The parties look at the mediator as a neutral and extend personal and confidential information to the mediator in private discussions that are commonly known as caucuses. At appropriate times during the mediation process, the parties may authorize the mediator to transmit ▶▶

settlement offers to the other party with the ultimate goal of reaching a final settlement on the disputed items.

The mediator's role is not to decide who is right or wrong, but to facilitate discussions between the parties to help them reach a settlement that is fair and equitable to both parties. Attorneys may be involved in the mediation process, but it is not required. The final settlement agreement is a legal document that can be enforced in a court of law.

IF AT FIRST YOU DON'T SUCCEED, TRY AGAIN

If the parties do not come to an agreement, there will be no settlement and they will need to proceed to the next specified dispute resolution process such as arbitration, or they may proceed to civil litigation in a court of law, whichever is specified in the construction contract.

Arbitration is another form of ADR. In binding arbitration, the parties agree to abide by the decision of the arbitrator and the arbitrator's decision is final and not generally subject to appeal. In non-binding arbitration, the parties do not agree to be bound by the arbitrator's decision and they use the arbitration process in order to obtain an advisory opinion. In non-binding arbitration, the parties may decide to abide by the arbitrator's decision to avoid what could be a lengthy and costly litigation.

The arbitration process allows the parties to select an individual or several individuals with a specialized expertise in the subject matter of the dispute to review the evidence and listen to the parties and witnesses or other specialists, and render a decision. In residential construction arbitrations, there is usually one arbitrator.

In more complex cases or in cases where there is a large amount of money involved, the parties may request more than one arbitrator, usually three, and they would have a comprehensive knowledge on construction matters. One main advantage arbitration offers over civil litigation is that in civil litigation, a judge is randomly assigned to hear a particular case and may not have substantive or technical expertise to fully appreciate the intricacies of legal counsel's arguments or the knowledge of the construction matters in dispute.

Remember a judge's main responsibility is to interpret and rule on matters of law,

Human nature leans toward avoidance of confrontation

HERMAN REPORT

Clients have noticed that a significant number of people avoid confrontation in the workplace. They are reluctant to ask for increases in compensation, more training or different job assignments. These employees would rather change employers than risk the resistance or negative consequences from bosses that may not support their requests.

People who see things that are wrong are hesitant to point them out. They fear the repercussions of whistle-blowing, so they simply say, and do, nothing. When they become too uncomfortable with ethics violations, quality deficiencies or sick cultures, they leave their organizations rather than raise issues or take corrective action. While we hear inspiring stories of people who have won awards and recognition for taking the risks and raising the alarm about financial irregularities or compliance violations in the manufacture of pharmaceuticals, many employees who discover problems look the other way or leave the offending organization.

The consequences for those who suffer as a result of their silence can be enormous.

When suppliers fail to meet customer expectations, the customer representatives let the problems slide or ignore them. They do not stand up for the company, protecting the company's interest, to insist that suppliers meet the required standards. Many consumers exhibit the same behavior, not informing retailers when they're happy and when they're dissatisfied.

The danger of this avoidance trend is the power gained by people and organizations that engage in harmful practices. On a very local basis, supervisors, and even front-line employees, who are incompetent are encouraged to continue their inappropriate behaviors. Valued employees and customers leave, damaging the company, school or government agency. They develop negative attitudes, their expectations are lowered, and this trend pushes our society to a lower-level of achievement and progress.

Take this trend to an international level and terrorists gain power and control because people fear the risks of resistance. This example stretches the issue of avoidance of confrontation and sounds like we encourage aggressive defense. We take no position on this matter, but use the global perspective to relate to terrorist behavior in the corporate setting.

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while an arbitrator's main responsibility is to render a final award that is fair and equitable to the parties involved. Having said that, who would you rather have handle your dispute resolution process?

BINDING MEDIATION CAN PROVIDE FINAL SOLUTION

My favorite form of alternate dispute resolution is binding mediation. In binding mediation, the mediator is empowered to render a final binding decision at the end of the mediation process on any items that remain unresolved by mediation. This process allows the free flow of information and discussion of the disputed items without the formality of a full-blown arbitration. However, there is the assurance at the end of the process, there will be a final settlement agreement recognizing the items agreed upon by the parties and the binding decision of the mediator on the unresolved disputed items. Mediation and non-binding arbitration do not offer the finality of binding arbitration/binding mediation.

As an example of binding mediation, I once had a mediation concerning a major addition on a residence. The general contractor and the homeowner had 32 items on which they could not come to an agreement prior to mediation. Their construction contract called for a standard mediation, however, after discussing the case with both parties, they decided to go with the binding mediation process as they had a desire to end the process with one session.

At the end of the regular mediation session they were pleasantly surprised to see they had come to an agreement on 30 of the 32 items on their own with assistance from a mediator. They signed a "Final Settlement Agreement" reflecting those 30 resolved items and then looked to me to render a decision on the last two remaining unresolved items. I rendered my decision, which was accepted as fair and equitable, and they added those two items to the settlement agreement, which concluded the session.

It is not unusual for there to be several binding mediation procedures on a large construction project. The contractor usually has negotiated a "General Contractor's Fast Track Agreement" that establishes a set fee with the mediator for these quick, short binding mediation procedures without the usual paperwork that a binding mediation would require. This fast track binding mediation process allows the project to continue with little loss of time and money. This is helpful if negotiated between the general contractor and subcontractors on larger jobs where disputes are likely between them during the construction process.

There is another form of dispute resolution that is also popular in construction-related disputes called med-arb, which is a combination of mediation and arbitration which allows the mediator to become an arbitrator or a new arbitrator is assigned to render a final decision on the unresolved items.

Keep in mind that if your contract calls for civil litigation, you can still use alternate dispute resolution if you and your clients agree to pursue the ADR process and avoid litigation. You can also jointly choose to use ADR during your construction project even if your construction contract calls for another dispute resolution procedure.

Many of you who take a great deal of pride in your work, never seem to have any disputes with your clients, and take care of their concerns right away. Still, I know contractors who have been forced out of business or into bankruptcy because of just one major lawsuit with an off-the-wall client, who had money to burn on litigation, in order to get their way. Civil litigation can cost you a lot of money, a great deal of time away from your business and emotional strain to yourself, employees, and your family. Be sure your contracts protect your rights.

Peter Merrill, CKD, is president of Construction Dispute Resolution Services, a company that specializes in mediation and arbitration for the construction industry. He is a member of the NKBA Legislative Committee, and serves as a National Director of the National Association of Home Builders and is a member of the NAHB Construction, Codes and Standards Committee and several Construction & Codes Subcommittees. For more information in mediation or arbitration, visit www.mediate.com/cdrsnm.