Engineers In Mediation A Growing Trend

By Adam T. Mow, AIA, Esq.

In ever increasing numbers, parties to design and construction disputes are using mediation as a means of resolution. Many contracts under which engineers perform their work, including AIA Document C141–Standard Form of Agreement Between Architect and Consultant, require mediation as a primary means of resolving disputes arising under the contract. Participation in mediation can also be voluntary, which increases the likelihood of settlement. Because of the growing trend to use mediation in settling design and construction disputes, this article explains the basics of the mediation process.

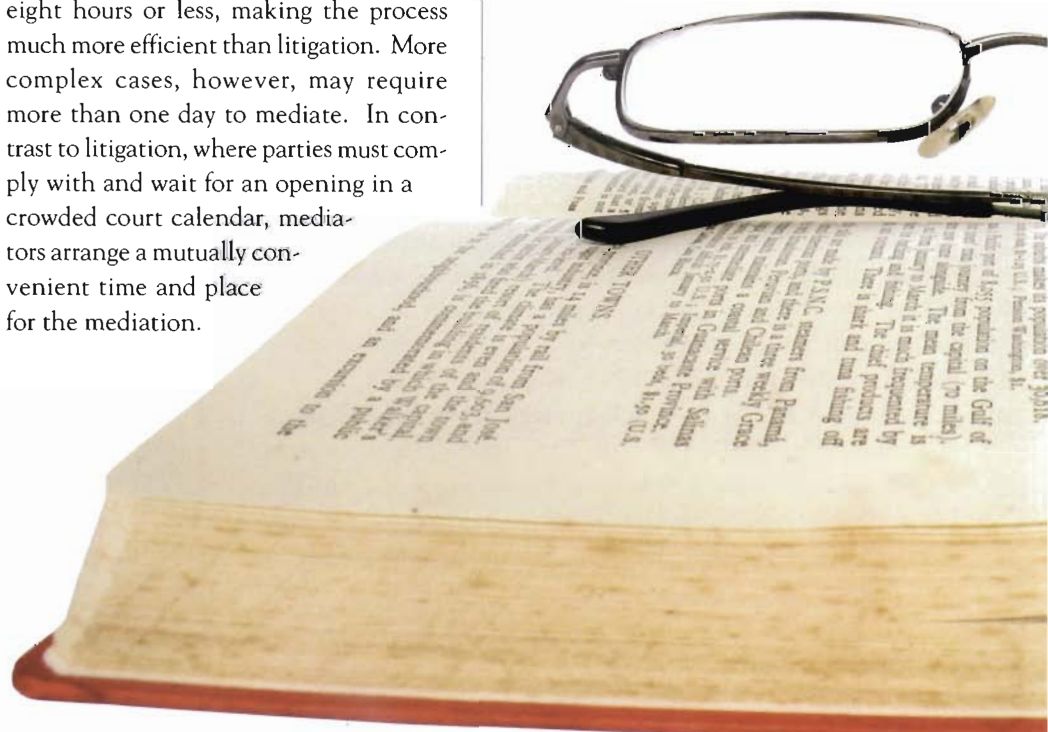
Mediation is an alternative to litigation that is effective, efficient, and typically cheaper. It is an informal process in which a trained, neutral third party, the mediator, assists the parties in reaching a negotiated settlement. Mediation is forward-looking; the goal is for the parties to reach a mutually acceptable solution. The process focuses on solving problems, not assigning blame or uncovering "the truth." While there is no authoritative study on the success rate of mediation, the American Arbitration Association reports an eighty-five percent success rate for their construction dispute mediations. This high percentage is evidence that mediation is a very effective alternative to litigation.

The mediator is a neutral facilitator of the process. Unlike a judge, jury, or arbitrator, the mediator does not decide who is right or wrong and has no authority to impose a settlement on the parties. Instead, the mediator helps the parties to jointly explore and reconcile their differences through communication and problem solving. One benefit of mediation is that the parties may jointly select a mediator who is familiar with the type of dispute in which they find themselves. For design and construction disputes, the parties may select a design professional, contractor, or construction attorney to act as the mediator. This familiarity often streamlines the discussion and settlement options.

Every mediation is different and unique. While the length will vary, the majority of mediations are completed in eight hours or less, making the process much more efficient than litigation. More complex cases, however, may require more than one day to mediate. In contrast to litigation, where parties must comply with and wait for an opening in a crowded court calendar, mediators arrange a mutually convenient time and place for the mediation.

For a successful mediation, persons empowered to settle the dispute must be present. It is rarely acceptable to have final authority reside in a person not in attendance. Additionally, attorneys often represent their clients at mediation. Parties may also decide to invite other persons with important knowledge of the dispute if their contribution will be helpful.

Mediation is only as successful as the parties' willingness to resolve the dispute. Because the mediation process emphasizes the input and freewill of the parties, those who enter the mediation with optimism for resolution and negotiate in good faith are more likely to find



an acceptable resolution than those who begrudgingly participate. Agreements reached through mediation help maintain relationships because the process avoids much of the hostility associated with litigation. This is especially important because the Utah design and construction community remains somewhat small and parties often work together more than once.

Experienced mediators use a format that is best suited for the particular dispute. Generally, the process of mediation falls into six stages. First, the mediator will make an opening statement that introduces the parties and explains the goals and rules of the mediation. Second, the parties make opening statements to explain, in their own words, what the dispute is about, its effect, and ideas for resolution. Third, the mediator may facilitate direct communication between the parties regarding what was said in the opening statements. This allows the mediator and parties to determine what issues need to be addressed. Fourth, the mediator may meet privately with each party in a "caucus" to discuss the strengths and weaknesses of the party's position and brainstorm ideas for settlement. Fifth, after caucuses with each party, the mediator may bring the parties together again for direct negotiation, especially when resolution is probable. Finally, if the parties have reached an agreement, the mediator will likely put the main provisions in writing.

Mediation is only as successful as the parties' willingness to resolve the dispute. It is one process for resolving design and construction claims and is often included in engineering contracts. Mediation is flexible, efficient, and cost-effective.

If the parties wish, they may draft and sign a legally binding agreement at the mediation. An agreement reached during mediation is enforceable in court just like any other settlement agreement. If no agreement has been reached, the mediator will review the progress made in the mediation and future options, such as meeting again for further mediation, arbitration, or litigation.

All aspects of the mediation are confidential. This confidentiality is especially important if sensitive matters are part of the dispute. Documents created for the mediation and discussions during the mediation may not be introduced during a subsequent trial if the dispute is not settled. Likewise, the mediator cannot be compelled to testify at a subsequent trial.

In conclusion, mediation is one process for resolving design and construction claims and is often included in engineering contracts. Mediation is flexible, efficient, and cost-effective. While it is not appropriate for every dispute, mediation has the advantage of allowing the parties to choose the outcome rather than have it determined for them by a judge, jury, or arbitrator. The final decision to settle and on what terms always remains with the parties. By understanding mediation, engineers can be better prepared for and less intimidated by what is typically a beneficial dispute resolution process. ■

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