# *ADR: Dispute Resolution No Longer Alternative for Design Professionals*

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A Practical Guide for Design Professionals

## *Introduction*

In reaction to the high cost of litigation, design professionals, insurers, owners and contractors have searched for more rational, cost-effective and predictable alternative mechanisms for resolving construction disputes.

## *ADR: An Overview*

Alternative Dispute Resolution (ADR) refers to virtually any method of resolving disputes other than by traditional litigation; it is whatever process(es) the parties agree to utilize. Taking advantage of this flexibility, parties can craft dispute resolution procedures tailored to a specific project or to the parties' individual needs. A well thought-out ADR process will incorporate any number of the following attributes, depending on the needs of the parties who put it together:

- Have a relatively low cost, in comparison to litigation;
- Bring disputes to resolution in a relatively short time frame;
- Utilize expert decision-makers, and verify that they understand the issues in dispute;
- Reduced formality compared to litigation;
- Offer flexibility, attuned to particular needs of different design and construction parties;

- Provide opportunities to address problems, while causing less damage to ongoing relationships among the parties; and
- Vest primary control in the participants themselves.

Construction disputes are long and costly to litigate, and often complex and document-intensive. Successful ADR processes offer a shorter, less costly alternative to litigation.

*Custom Tailored for Design & Construction*

ADR is well-suited to the technical nature of construction disputes. Juries and judges often do not understand engineering or construction, or worse, have preconceptions that differ from construction realities. In trial, lawyers typically face the daunting task of teaching a crash course in design and construction before they can even introduce the disputed issues. And trial rules allow parties and their lawyers no way to know if the jury ever actually understands what the lawyers present. In contrast, most ADR processes generally choose independent third-party neutrals who have experience in construction and design law. These neutrals already understand “professional standard of care” issues and are conversant with relevant design disciplines, freeing parties and their advocates to concentrate on the dispute. And since ADR processes are informal, parties can communicate with the neutral to determine whether the essential points are understood.

*Non-Monetary Considerations*

Sometimes money alone does not lead to the most effective solution to a dispute. Litigation and arbitration primarily offer money solutions. But parties often have other significant interests, such as reputation, cash flow, future work, ownership interests, or other concerns. ADR has the flexibility to involve the parties in crafting solutions that are more likely to integrate such interests. And ADR processes can include parties not normally involved in litigation, such as insurers, lenders, sureties or other persons whose interests can prove critical to resolving a dispute.

## ALTERNATIVE TO LITIGATION

Litigation is the default that our legal system provides. It offers an entire structure, with time-tested mechanisms to allow parties to present their arguments to an impartial “fact-finder” – judge or jury – after which a court will “apply the law” to the established facts. The system represents over 200 years of society's collective best efforts. But it is also a “one-size-fits-all” system, highly technical and rule-bound, and strictly controlled by armies of judicial employees and professional advocates. For disputants, it offers the best that society can do for them, *when they cannot find a way to do better themselves, acting on their own.*

*Controlled by Parties*

Against this backdrop, ADR developed as disputing parties sought to do better themselves. Knowing both the legal system’s benefits and its limitations, parties have explored how to address disputes in the early stages, before they over-commit to positions and while they retain some degree of flexibility. These efforts take advantage of the principle that the best time to derail a dispute is early, before it gathers momentum. Even for parties in hardened disputes, there is a growing recognition that the legal system is slow, expensive and ill-equipped to accurately and predictably handle design and construction matters. In construction litigation, direct costs (attorneys’ fees, experts, etc.) frequently exceed the actual damages, and indirect costs (principals' time, business disruption, damaged relationships, etc.) can exceed those direct costs. Understandably, the construction industry has led the effort to find faster, cheaper and fairer alternatives to litigation.

*Litigation as the Backdrop for ADR*

Despite ADR's advantages, litigation retains an important role in construction disputes. Unlike most ADR procedures, an injured party can commence litigation without any agreement from other parties. And when others will not consent to ADR, litigation provides the only means to involve those parties. Many construction disputes will not resolve without extensive factual investigation, and for these disputes litigation's extensive (and expensive) discovery processes provide strong tools to obtain all relevant information. Also, litigation's comprehensive procedures and rules ensure that parties will have the opportunity to correct any errors that might occur. In contrast, no means exist to challenge errors or poorly reasoned settlements, even where the results

are manifestly wrong. However, in most instances, litigation's advantages cannot overcome its huge disadvantages of cost, delay and uncertainty.

## TYPES OF ADR

Arbitration was among the earliest forms of recognized ADR. The not-for-profit American Arbitration Association (AAA), founded in the early 1900s, offered itself as an alternative dispute resolution forum. As its name suggests, AAA initially focused on arbitration as the alternative to litigation. Over time, AAA developed special rules for the arbitrating of construction disputes, and provisions requiring AAA arbitration found their way into the standard contracts prepared by organizations such as the American Institute of Architects and the Engineers Joint Contract Documents Committee.

As arbitration became more common, it also became more formal, more costly, and less speedy. As complex arbitrations began to take on most of the characteristics of the liti-gation that arbitration was intended to avoid, other alternatives found wider acceptance, such as mediation, neutral evaluation, conciliation and use of special masters. At the same time, owners, design professionals and contractors began to focus more attention and effort on dispute avoidance; systems to identify potential disputes; and ways to intervene to resolve problems early, when they were most manageable. The fruits of these efforts can be found in modern negotiation practices, the dispute resolution proce-dures now common as part of contract administration, “partnering,” and inclusion of dispute resolution boards on large public works projects.

Today, three characteristics provide a useful system for understanding the range of ADR options used throughout the design and construction process:

- Whether the process addresses the dispute when it arises, or at some later time;
- Whether someone inside or outside the dispute decides how to resolve it; and
- Whether parties must commit to a resolution before, or after, they know the result.

In an ideal world, parties would anticipate all potential problems before any dispute ever occurred. But the reality is that every design and construction project entails countless disputes. Most will resolve within the course of the project, and others may linger until resolved in some manner. For those that linger, ADR offers a variety of options.

### Real-Time *and* Forensic *Dispute Resolution*

Generally, the most efficient time to resolve a dispute is the moment that it first arises. Immediate resolution minimizes the amount of time and effort committed to “transactional costs,” those expenses to research and understand a problem apart from expenditures to actually correct it. All other things being equal, the project benefits more if the money spent goes to actual design and construction, rather than for exercises that only assess blame and responsibility. Also, documentation and recollections available at the time of a dispute generally become more difficult and costly to assemble as time passes, and the cost of reconstructing and analyzing data months or years after the fact can prove staggering.

“Real-time” dispute resolution systems involve the parties’ working together to negotiate a solution simultaneously with their identifying issues. This is actually the most common form of dispute resolution. While it includes elements of historical analysis to determine causes and responsibility, its primary focus is on the future and how to immediately solve the problem.

In contrast, “forensic” dispute resolution looks backward and dissects a dispute after the project is over. Usually little can be done other than divide up a cost, and the main focus is on ascribing fault. Forensic procedures are costly, in part because the effort entails considerable research to reconstruct the problems, and because the discussions occur without the time pressure of having to keep the project moving. Also, with the project over, there is nothing but money to discuss.

*Decision by "Insiders" or "Outsider(s)"*

Different processes rely on persons either inside or outside the dispute to decide how to resolve it. "Insiders" typically are the disputants themselves, but can also mean another party to the project who is not part of the dispute. For example, under most standard contracts, the architect or prime engineer renders decisions regarding contractor/owner disputes. An "Outsider" is any arbitrator, mediator or evaluator to whom the parties turn as an uninvolved third-party neutral.

Insiders have the advantage of their knowledge of the project and the dispute. The par-ties to a dispute generally know the most about it; any outside third party, regardless of how technically accomplished, nonetheless must learn what the disputants already know. In addition, depending on the project stage, the parties may have continuing rela-tionships on the project and strong incentives to work cooperatively.

Recourse to an outsider has its own distinct advantages. Outsiders bring a "fresh pair of eyes"; disputants each know their own versions, but may hold inaccurate views of the other parties' actions, motives or positions. Also, the parties' personalities or emo-tional involvement often prevents them from having an objective view of a dispute. In such cases both sides may be able to hear and accept a compromise recommendation or decision only if it comes from an outsider. And sometimes all the parties, despite their superior knowledge of project-specific information, may nonetheless benefit from a neutral, third-party expert's perspective.

*"Binding" and "Non-Binding" Processes*

These terms are unfortunate to the extent that they suggest some processes lead to unen-forceable results. The words actually refer to whether, by initially agreeing to utilize a process, the parties thereby bind themselves to whatever solution the process produces before that solution is known. Contractual arbitration is referred to as "binding" because, in the event of a dispute, the parties have already pre-committed to accept an arbitrator's decision. They bound themselves the day they signed their contract with its arbitration clause. Similarly, when a party voluntarily agrees to participate in arbitration, that agreement includes the agreement to accept the arbitrator's decision, and thus the party becomes "bound" at that time.

"Non-binding" means that by agreeing to participate in a process, a party does not pre-commit to accept the process' result. Thus, mediation is typically referred to as a "non-binding" process because the agreement to mediate does not include consent to have a resolution imposed on any party. But the reason parties engage in any ADR process is to achieve a fully binding and enforceable resolution of the dispute. Thus, if the mediating parties reach agreement, their consent to specific agreement terms binds them at that time.

## ADR WITHIN LITIGATION

While ADR once meant "alternative to litigation," that distinction no longer pertains. Indeed, some of the most comprehensive ADR programs exist within state court system, and almost every non-criminal case initially gets referred to some form of ADR in most jurisdictions. Typically litigants choose their form of ADR, and the courts may order an appropriate form when the parties who cannot agree, or, in some jurisdictions, refer all cases to one form but allow the parties to opt for a different form if they agree on it.

Many court sponsored ADR programs in larger jurisdictions maintain panels of mediators and arbitrators, listed according by expertise in different areas of law. In the construction area, many cases receive reference to special masters, who manage the case under the court's super-vision. The special master is a construction litigation specialist who presides over lim-ited discovery and expert work, culminating in a mediation, after which any remaining parties may litigate their unresolved issues.

Without question, ADR has comce but alternative for most civil matters – it is integral with litigation. Virtually every non-criminal case will utilize some form of it, and the only thing "alternative" is the ability to choose which form to use. Most federal trial courts are moving

toward or already have similar requirements. ADR even remains an option during appeals after judgment; with civil disputes mediation programs that specifically target cases on appeal in some U.S. Circuit Courts of Appeals.

## *"Real Time" ADR in Everyday Practice*

Design professionals engage in ADR throughout every project, although they seldom call it by that name. From the first contact with a client, consultant, contractor or regulatory official, the designer negotiates, mediates, or renders decisions between itself and others, or among other parties. These dispute resolutions occur in real time as the issues arise, and most never see the inside of a courtroom.

Several factors contribute to the success of real-time ADR on construction projects. During a project, parties can continually negotiate differences to contain or prevent minor disputes from becoming more serious. Thisis the point when parties are most likely to work cooperatively toward the common goal of a successful project. Schedule pressures and the need to keep work going often encourage compromise and pragmatism in addressing disputes. Working relationships between participants during the project can help bridge differences, and when relationships are a source of disputes, the parties have the opportunity to resolve disputes by altering relationships. Finally, to the extent parties need access to the project to resolve a dispute, information is freshest at this time.

**NEGOTIATION**

Direct negotiation is often the most common form of ADR, but also one of the most overlooked options when a dispute develops after a project is underway. Yet it remains the simplest and fastest method of dispute resolution.

In fact, negotiation is interwoven with every part of the designer's practice, beginning when parties first negotiate contract terms and scope of services. Just being retained requires a designer to resolve numerous issues with its client, and often with other design firms, too. And throughout design, a lead design firm's coordination responsibil-ities amount to managing negotiations for the continuous resolution of competing requirements among different disciplines and the project program. Later, the design team assists the owner during bidding and negotiation of the construction contract, and then in negotiating solutions to problems throughout construction as part of contract administration. Most disputed issues get resolved in day-to-day negotiations, with the design professional either an interested party or facilitating other parties' negotiations.

In their contracts, many design professionals expressly require negotiation as the first step in dispute resolution. These provisions usually require senior members from each party to "meet and confer" in a good faith attempt to resolve disputes before the parties proceed to any more formal process. These senior members can take a larger view of the project and their firms' overall interests, and disengage from emotional issues and specific factual disputes. If the negotiations are candid and principle-based, resolution is possible for most disputes.

**CONTRACT ADMINISTRATION BY PRIME CONSULTANT**

Most owner/contractor agreements require the design professional to function as the project's "front-line" ADR provider during construction contract administration. For example, the AIA General Conditions A-201 states that the owner and contractor will initially refer all claims to the architect for decision "as a condition precedent to media-tion, arbitration or litigation."[1] The contract does not specify how the architect will resolve disputes, but as any contract admin-strator knows, successful resolution (i.e., resolution that does not result in a claim) depends on skillful

[1] American Institute of Architects, General Conditions of the Contract for Construction (AIA A-201, 1997), § 4.4.1.

application of ADR tech-niques. In disputes between the owner and contractor, the contract administrator essen-tially fills the role of mediator or arbitrator between them.

The prime consultant not only acts as third-party decision-maker, but sometimes is an interested party at the dispute's center. Under the AIA General Conditions' dispute reso-lution provisions, the owner and contractor must submit all disputes to the architect, including those alleging an error or omission by the Architect. These disputes represent the most delicate dispute resolution problems, since the designer's performance is at the dispute's core. While the contract states that the architect makes the decision, in these cases the prudent course is to treat the matter as a negotiation, and resist any temptation to impose judgment. The architect must remember that regarding these disputes, it is an "interested party and thus not perceived as neutral, that a non-negotiated resolution runs the highest risk of rejection and a subsequent claim. If direct negotiation does not ini-tially resolve the matter, the contract administrator should consider ways to escalate the negotiations to higher level decision-makers ("meet and confer"), or seek to involve a neutral third-party (i.e., employ some form of ADR through a disinterested party).

## PARTNERING

Partnering is a team-building process aimed at avoiding, or resolving, problems as they occur during a construction project. Although the aims of partnering are broader than dispute resolution, its approach is fundamentally that of an ADR process. In a partnered project, the key participants meet in a pre-construction team-building workshop to increase trust and cooperation. Each participant discusses issues that could affect the project's successful completion, and the parties commit to work cooperatively to achieve each party's success. Through this process, the entire project team discusses how it will address problems, and which parties are necessary to resolution of particular types of disputes. The parties commit to work toward dispute resolution and agree that if lower level personnel cannot resolve a problem, they will immediately refer it to a higher level that can authorize rapid resolution. This identification of problems and the rapid escalation to a level that can achieve resolution is central to partnering and a key aspect of its effectiveness as an ADR tool.

The partnering workshop can provide the foundation for ADR, even if ADR is not built into the contract. In the workshop and the partnering agreement, the parties can commit to a particular ADR technique, such as mediation, before proceeding to more formal (and costly) procedures, such as arbitration or litigation. In some instances, parties even pre-select their mediator, thus reducing the time required to organize a mediation.

## DISPUTE REVIEW BOARDS

A Dispute Review Board (DRB) functions as a decision-making panel (similar to an arbitrator, see section starting next page), but the DRB addresses disputes before any party seeks another formal ADR or litigation remedy. The parties to the project create the DRB before work commences, and the DRB remains active until completion. When disputes occur, the parties refer them to the DRB for resolution. DRB members may participate in key project meetings and have other relationships to the project, thus keeping them informed and streamlining any DRB hearings. Since contracts with DRB provisions require that parties bring all their disputes to the DRB, parties tend not to pursue weaker claims that could impair their credibility in anymore important, later dispute.

Parties typically choose DRB members for specific expertise, i.e., high-rise construction, tunneling, etc. The DRB often has authority to conduct its own investigations and issue reports, so it need not rely solely on information from the disputants. Thus DRBs are well-suited to highly-specialized, complex, large-scale construction projects. This combination of specialized expertise, active involvement in the project and investigative powers allows the DRB to render decisions in a time frame that can help guide the parties regarding completion of the remaining the work.

But DRBs are expensive to set up and maintain; and, therefore, generally inappropriate for small projects. Unlike other ADR processes, a project incurs the DRB cost even if no one ever refers a dispute to it. And if the parties perceive the DRB as biased toward one party, the board cannot function properly, and that perception can create a negative atmosphere for the entire project.

While the most effective DRBs render binding decisions, frequently parties empower DRBs to issue only non-binding, advisory opinions that serve as a basis for further negotiation. Generally, this is not as useful as binding decisions would be, and most parties would prefer more than an independent opinion in exchange for the expense of a DRB. But public works contracts often only permit non-binding DRBs because public agencies cannot legally agree to a binding DRB. However, the parties can enhance a non-binding DRB's effectiveness by committing in their contract to make all DRB opin-ions admissible in any subsequent arbitration or litigation.

## *After-the-Fact ("Forensic") ADR Options*

Among after-the-fact ADR procedures, those involving third-party decision-makers can result in either a binding award, or what amounts to an advisory opinion – a non-binding decision that the parties have the option of accepting or rejecting.

**ARBITRATION IN GENERAL**

At its base, arbitration is an adversarial process in which the disputing parties present arguments to a neutral arbitrator, who then makes an award. In this regard, arbitration resembles litigation as providing a forum where the parties argue against each other in an effort to convince the third party, not the other disputants, of their particular points of view. At an arbitration hearing, the parties present testimony and other evidence to sup-port their claims, as they would a trial. But unlike litigation, arbitrations lack strict rules regarding admissibility of evidence. This informality hastens the proceedings, but it can allow the arbitrator to consider evidence that might otherwise be barred in a court of law.

After the arbitrator (or arbitrators) concludes the hearing, he (or they) renders a decision in the form of an "award." Depending upon the arbitration rules, the award may include a written decision; or it may state only who pays, how much, and to whom. Depending on the parties' agreement, the parties may have pre-committed to accept the arbitation award as a final resolution ("binding" arbitration), or have the option to veto the award ("non-binding"), and proceed with other ADR or liti-gation options.

**TRADITIONAL "BINDING" ARBITRATION**

For many years, "binding" arbitration was the most popular ADR process used in Amer-ican construction, and it continues today as the preferred approach in most international contracts and many large domestic contracts. Most standard construction contracts[2] require that parties agree to accept arbitration for the final resolution of disputes, usually based on clauses that incorporate the rules and procedures of administering agencies, such as AAA. In addition, many states provide a complete structure for arbitration procedures that apply as a default if parties have not expressly agreed to other procedures.[3]

In recent years, AAA has responded to the needs of the construction industry by developing a variety of arbitration procedures.[4] Arbitration under the AAA's Construction Industry Rules can occur before either a single arbitrator or a three-arbitrator panel. Special rules and procedures

[2] See, for example, the American Institute of Architects, General Conditions of the Construction Contract (AIA A-201, 1997), as well as other standard forms prepared by organizations such as the Engineers Joint Contract Documents Committee, and others.

[3] For example, see California Code of Civil Procedure §§ 1282 – 1284.2.

[4] The American Arbitration Association's web site, http://www.adr.org, includes extensive information on construction dispute resolution rules and procedures, forms for arbitration and mediation demands/requests, and links to the ADR sections of other websites maintained by design and construction associations and organizations.

apply to "small" matters involving less than $50,000 in dispute, which facilitate economical handling of such matters. And for disputes over more than $1,000,000, the AAA offers the services of its Large and Complex Case Panels – "blue ribbon" groups of construction attorneys and professionals, pre-qualified by AAA based on their special expertise in design and construction disputes.

*Arbitration Hearing & Award*

Typical arbitrations involve a preliminary hearing before the formal hearing on the dis-puted matters. The preliminary hearing serves to focus the issues in dispute and also handles discovery and scheduling issues. Unless provided for by the parties, or by state statute, parties generally have no discovery rights against each other. But most rules grant arbitrators the power to require that persons testify and produce documents at the time of the hearing.

Once an arbitrator makes an award, a disgruntled party can only challenge it on very limited grounds, generally requiring a showing of arbitrator misconduct or bias.[5] This sets a barrier that effectively bars most attempts to overturn arbitrator decisions, even when the arbitrator's award clearly departs from established law. Once rendered, the Award is usually final and unappealable, and prevailing party(ies) can have it reduced to judgment that is enforceable against the losing party(ies), similar to a trial verdict.

*Binding Arbitration's Advantages... and Disadvantages*

Arbitration's primary advantages are access to specialized neutrals, speed, cost and finality. Specialized neutrals reduce the risk that an erroneous award and, unlike a judge or jury, do not need education regarding basic law and background information. In most instances, arbitration proceeds faster than litigation, and the shorter time frame and the limitations on discovery reduce the cost of obtaining the final award. And arbitration almost eliminates the cost of appeals, since an award is usually not appealable.

The main disadvantages are speed, cost, lack of discovery, inability to appeal, and loose evidentiary standards – many of the same attributes also listed as advantages. While arbitration is faster and somewhat cheaper than litigation, it is substantially slower and more expensive than other ADR techniques, such as mediation. The lack of discovery, while saving cost, may deprive parties of access to information necessary to assemble the defense to a claim. Compared to litigation, parties face a higher possibility that another party may blind-side it during the hearing with a surprise fact. The loose eviden-tiary standards also make it difficult to present a technical defense to a claim. Finally, a party cannot rectify even a clearly wrong award because of the inability to appeal it. Thus, although arbitration has significant advantages, it is not a panacea.

*Arbitration Variants*

The standard arbitration model consists of an arbitrator (or arbitration panel) issuing an award after a hearing, without any limitation on how the arbitrator may award or its amount. But there are other approaches to arbitration.

**"Hi-Lo" Arbitration.** In a "Hi-Lo" Arbitration, the parties agree before the hearing to ceiling and floor levels regarding the award. In most instances, the parties do not dis-close these high/low limits to the arbitrator. Regardless of what the arbitrator awards, these limits define a range that the parties will honor, which reduces the risk to all par-ties. Since the risk is lower, the parties can reduce the length and comprehensiveness of preparation for the arbitration.

**"Baseball" Arbitration.** "Baseball" Arbitration requires that the parties set down, in writing, their best and final positions before the arbitrator issues the award. These posi-tions are given to

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[5] For example, see California Code of Civil Procedure § 1286.2 ("Grounds for Vacating Award"), which lists the only bases on which a court may vacate an award: corruption or fraud in obtaining the award; arbitrator corruption or misconduct; action by the arbitrator beyond his/her authority; substantial prejudice due to the arbitrator's refusal by the arbitrator to postpone a hearing or hear evidence; or that the arbitrator should have been disqualified from making an award.

the arbitrator or a third party, after which the arbitrator issues a preliminary award. That preliminary award is compared to the parties' best and final positions, and the written position closest to the preliminary award becomes the final award. This process pressures parties to make compromises in their final written posi-tions, since the more realistic their settlement demands and offers, the better the chance that theirs will become the final award.

**"Party" Arbitration.** In "Party" Arbitration, each party selects an arbitrator, and the two "party arbitrators" select a third arbitrator who chairs the panel. In a multi-party dispute, coalitions of parties must initially agree on a selection – in most instances defendants select one party arbitrator, and plaintiffs choose the other. Unlike traditional arbitration, which seeks neutral arbitrators on the panel, party arbitration assumes that the party arbitrators will promote the positions of the respective constituencies and thereby assure full consideration of each party's position.

## NON-BINDING DECISION BY THIRD PARTY

Some parties will not, or cannot, agree to binding processes, but still want a full presentation and decision by a third party. In such cases, parties can elect to use a non-binding process. Typically these processes entail preparation and pre-sentation costs similar to those for a binding arbitration. But, since the parties do not bind themselves to the third party's decision before knowing its contents, there is less risk. Consequently, parties may not feel the need to prepare as fully as they might for a binding arbitration, which may in turn reduce the utility of these procedures. Proper preparation requires an investment on the order of that for binding arbitration, but these procedures lack that process's finality. Thus, these procedures generally do not prove cost-effective as true alternatives to litigation, and instead are mostly used as steps in conventional litigation. As effective ADR, in most cases mediation offers a superior and more efficient alternative.

### *Non-Binding Arbitration*

Among non-binding processes, "non-binding" arbitration[6] is the most familiar. These procedures ar similar to binding arbitrations, with the principal difference that any party has the option to reject th award within a set time, such as 30 days. If no party rejects the award within that time, it becomes a final arbitration award, enforce-able by or against every party to the dispute, as the case may be.

When non-binding arbitration occurs in the context of an active lawsuit, the the relevant statute may provide that normal discovery rules apply. Such procedures run the risk of incurring greater costs than binding arbitration, while providing less certainty that it will reach a resolution. In practical terms, this may be useful for litigants seeking a reading on how their case plays to a third party, but it is less likely to actually resolve the dispute.

### *Early Neutral Evaluation*

In Early Neutral Evaluation an attorney or expert provides each party with a critical, independent assessment of its claims and the likelihood of success. Early Neutral Evaluation succeeds only if the parties respect the evaluator and approach the process with an open mind. Often, the independent evaluation causes the parties to shed unrealistic expectations, opening a path toward eventual settlement. If parties seek such an evaluation early in a formal dispute, it can help the parties avoid investing extensive resources in pursuing or defending flawed positions.

This procedure most often occurs after parties retain attorneys and invest in developing legal theories to support their positions in the dispute. In rare cases, the evaluation occurs before parties have substantial information developed through discovery or other processes. But premature resort to the process runs the risk of producing a flawed evalu-ation, which can create inflated expectations that move parties further apart.

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[6] California courts utilize the term "judicial arbitration," which refers to arbitrations conducted under the Code of Civil procedure §§ 1141.10-1141.31 and 1776, *et seq*., and California Rules of court §§ 1600 *et seq*. These statutes and rules establish a strucctiure fo non-binding arbitrations within the context of civil litigation.

## *Decision by the Disputants*

Processes that place decision-making authority in the disputants' hands have several advantages. These "non-binding" processes often are less adversarial or damaging to the relationships between parties. Because parties retain more control, they need not invest in over-preparation, which helps them remain more flexible regarding settlement. And the active involvement of the parties provides the opportunity to develop creative settle-ment terms and proposals that can accommodate legally irrelevant issues, such as busi-ness relationships, personal pride, or political considerations. And if a party feels the result is unfair, the other parties cannot force his or her acquiescence.

Finally, for some public entities, the only legally permissible form of ADR involve those that leave the decisions to the disputants. In many instances statutes or ordinances prohibit a public body from pre-committing to submit to any non-judicial procedure, such as "binding" ADR processes. For such agencies, disputant-controlled ADR mecha-nisms may provide the only options.

### MEDIATION

Considered novel even a dozen years ago, mediation currently reigns as the most popular form of party-controlled ADR process. Starting in the mid-1990's, the Ameri-can Institute of Architects added mediation provisions to the dispute resolution sections of its standard documents, and today the AAA performs more mediations than arbitra-tions. Even in the context of litigation, the majority of construction disputes go to mediation, and a majority of those settle as a result of mediation.

At its most basic, mediation consists of a negotiation between several parties, facilitated by a neutral third party – the mediator. After a successful mediation, the parties execute a settlement agreement that resolves some, or all, of the matters disputed. The mediator guides the process, but has no authority to order any result, and does not issue any award or other determination. The parties themselves create any settlement and deter-mine terms. The settlement becomes an enforceable, binding document once the parties sign it, thus achieving finality comparable with "binding" arbitration, but without the risk of having to pre-commit to an unknown result.

Mediation is fast, flexible and relatively inexpensive when compared to other ADR pro-cesses or litigation. And if parties want a binding process, such as arbitration, they often resort to mediation as a first step. Even an unsuccessful mediation often serves to define issues in dispute, or eliminate some elements from the dispute. And complex disputes often require several mediations to whittle down the dispute to an eventual settlement.

Because of mediation's importance in construction disputes, this paper includes A Mediation Primer and sample mediation clauses in the final sections.

### CONCILIATION

Conciliation closely resembles mediation, but with one, critical difference: In concilia-tion, the facilitator attempts to reach the result that he or she believes is "just." Thus, the conciliator, unlike the mediator, has an agenda of his or her own, and pressures the par-ties accordingly.

Conciliation has the superficial appeal of a neutral party pursuing a just settlement among partisan disputants. But the conciliator's advocacy role affects the process, making it more adversarial and less cooperative. Because parties know the conciliator will take a position, they battle to win the conciliator to their side and, consequently, avoid disclosing negative information while discounting their adversaries' arguments. A neutral mediator would typically use such negative information and honest assessments of other positions to move parties away from inflexible positions and toward a settle-ment. But the conciliator's role precludes access to these powerful resources. In the end, conciliation can polarize the process and make it more difficult to achieve

an acceptable settlement. And further damage may occur if the conciliator openly expresses an opinion concerning the merits of the parties' positions – if the case does not settle, memory of that opinion erroneously can entrench a party and create an obstacle to settlement on other terms.

**MINI-TRIAL**

A mini-trial is a limited hearing where the parties preview the important aspects of their claims in front of each party's key decision-makers. In some instances, a mediator may facilitate the session. After the presentations, the key decision-makers negotiate the claims, either directly or with the mediator's assistance.

Mini-trials occur almost exclusively during the later stages of litigation. They depend on elaborate presentations, and require extensive factual and legal investigation and expert analyses. Mini-trials are most useful where projects and claims are so complex that the parties cannot communicate their respective positions without well-scripted presentations, and where the key decision-makers lack immediate and intimate understanding of the dispute or claim. Since mini-trials require crisp and clear presentation of complex information, they often feature extensive (and costly) exhibits and preparation. While less expensive than an actual trial or arbitration, mini-trials generally cost more than other party-based ADR processes.

The mini-trial's timing also contributes to its high cost. Because it occurs after extensive discovery and expert analysis, it does little to avoid the vast majority of litigation expenses. Typically, by the time of a mini-trial, all that disputants can avoid by settlement are the costs completing the pre-trial work-up and actually trying the case.

## *Hybrid ADR Forms*

Some recent developments in construction litigation capture elements of the best – or the worst – aspects of several ADR processes within hybrid procedures.

**SPECIAL MASTER**

Courts increasingly turn to special masters in design and construction disputes. A spe-cial master takes over a case that is already in litigation, and manages it using a process that draws liberally from mediation. However, it is typically a relatively long, drawn out mediation that becomes a simplified form of litigation. Thus, it can – for some parties, in some circumstances – effectively reduce litigation cost by facilitating negotiation, while also lowering some discovery-related costs for some disputants.

If the previous assessment of the benefits of the special master process sounds qualified … that is because it is. The process often has a mixed value for design professionals. Relatively minor parties in a dispute can find themselves swept along for an expensive ride, when they might otherwise achieve a speedy dismissal from a lawsuit. But due to the special master's typical limitations on discovery, designers often find that they must wait months or years while the special master focuses on hashing out the issues with more significant parties. This often happens when a design professional is named in a "kitchen sink" list of parties in a construction defect case. In such cases, the designer may have to wait until late in the process, when depositions finally occur, before securing its dismissal.

Some designers elect to save money by representing themselves before special masters. They do so at their own peril. The process, despite certain similarity to mediation processes, carries all the risks of litigation, and the advice of competent legal counsel can provide essential protection.

**COMBINED MEDIATION/**

Parties can choose to blend mediation with arbitration. If a mediation fails to resolve a dispute, the parties sometimes request that the mediator then act as an arbitrator, hear additional evidence as

**ARBITRATION**

necessary, and issue a binding award (or a "non-binding" opinion). But many mediators refuse to arbitrate any matter that they have mediated. Such mediators recognize that even the potential of transforming a mediator into an arbitrator burdens the mediation with the same deficiencies as occur in conciliation. If the parties know that the mediator might eventually issue a binding decision (or an advisory opin-ion), they will refrain from full and candid exchanges with the mediator, fearing that disclosures could damage them in the possible arbitration. This impairs trust and com-munication, and thus undermines the mediator's role as a facilitator. Accordingly, many effective mediators will not agree to do it.

However, one particular arbitration function can in fact aid a successful mediation. Some parties agree in advance that, if they reach a mediated agreement, the mediator will become an arbitrator for the sole purpose of making an award of the mediated agreement. This enhances the mediated agreement because a court can confirm an arbitration award and enforce it immediately if any party later fails to live up to the agreement. Otherwise, the mediation agreement is only a contract, and to enforce it would require filing another lawsuit and/or pursuing further ADR.

## *CONCLUSION*

ADR is now a fact of life for the design professional, and design firms should integrate ADR into their contracts and their practice. Techniques and options vary, depending on the nature of disputes and timing of resolution efforts, but timely and proactive use of ADR can mitigate the effect of claims and disputes on a firm's financial and personnel resources. Given the broad array of ADR tools available, techniques exist to fit almost any design or construction project.

Negotiation-based techniques, such as mediation, are less harmful to business relation-ships and allow firms to disagree – yet continue to do business. Even when preparing contracts and documents for others, such as construction contracts, a designer should consider how ADR provisions will affect its role in the project and relationships with other project participants.

# APPENDIX A: Mediation Primer

Mediation is a favorite ADR technique because it is quick, relatively inexpensive, and effective. Some commentators recommend mediation for virtually every claim, and also contend that mediation should always occur at the earliest possible moment in any dispute. But indiscriminate use of mediation dilutes its effectiveness. And premature mediation may harm relationships and confuse the issues, weaken resolve to find a solu-tion, or lead to results that parties later reject as they learn facts. Mediation is most effective when the parties understand the dispute, it is ripe for resolution, and the parties have properly prepared and chosen a skilled mediator.

## INITIATING THE MEDIATION PROCESS

Getting to mediation may involve a formal notice under the terms of a contract. But anyone can request a mediation for any dispute by simply suggesting it to the other party(ies). Once the parties to a dispute decide to mediate their differences, the process is simple and informal: they choose a mediator, and then prepare for and attend the session.

### *Selecting the Mediator*

The mediator chosen will have a tremendous impact on the probability of a successful resolution. It is essential that the mediator understand the issues, have technical media-tion skills, and have the right personal style for the dispute and the disputants. It seems as if almost every lawyer or construction expert now holds himself or herself out as a mediator, but only a small number of these individuals are technically proficient in a broad range of design and construction matters and are truly skilled facilitators.

Construction-proficient mediators are available through services such as the not-for-profit AAA and the for-profit JAMS/Endispute, and are listed on panels maintained by most federal and state courts. Other mediation services exist for smaller disputes through various community boards and other not-for-profit mediation centers, and many well-qualified mediators practice independently or through private law prac-tices. Unless a design professional has experience with particular mediators, he or she should seek recommendations from a professional liability insurer, attorney or someone who regularly works with mediators.

The best approach is to develop a short list of mediator candidates, and then contact ref-erences from recent mediations. The mediator’s knowledge of the subject matter and the law are important. But sometimes the most critical skills will be the ability to work with the participants’ personalities and command their respect. Such information often does not show up on a resume, but only through interviews with past parties.

### *Preparing for the Mediation*

Once parties agree on their mediator, the next step is preparation for the mediation. Although this does not require the rigor of trial preparation, it should not be undertaken lightly. Someone, often an attorney, will analyze the issues and prepare a pre-mediation statement to the mediator on behalf of the designer. This leader should assemble the evidence on the key issues in dispute. If an expert opinion is important on issues such as standard of care or damages, the expert should prepare a coherent presentation that the design professional, the expert, or the attorney may make during the mediation.

Drafting a pre-mediation statement is an important part of preparation because it focuses the party on clearly understanding its own position and interests, as well as those of others. A well-drafted statement also goes a long way to establish credibility with all other parties and the mediator. The importance of credibility with other parties cannot be overstated: ultimately, they are the ones who have to be convinced in any final agreement. The pre-mediation statement will not achieve this end, but it plants the seeds for it and serves as the mediator’s guide regarding the party’s interests.

If the mediation is substantial, the individuals making presentations on behalf of the designer should meet well before the session to run through the substance of their remarks or presentations. When completed, the presentation, should accomplish three goals:

- communicate both the designer's position and interests to the mediator;
- persuade opposing decision-makers of the designer's arguments, or at least raise doubts regarding their own arguments; and
- demonstrate that the designer has a compelling case that would "play well" to an arbitrator, judge or jury, if the matter does not resolve in mediation.

This is also the time to further research the other parties. If personality or political issues will affect the other parties' positions, then the designer's preparation should include deciding how to use this information to the best advantage. Does it figure in the pre-mediation statement? Or is it more effective if first used as part of the opening statement at the mediation? Or should the designer reserve it for confidential use with the mediator?

## THE MEDIATION SESSION

### *Confidentiality*

While most states have statutes that protect all mediation communications as confidential and inadmissible in court, many mediators will have everyone attending the mediation sign a confidentiality agreement before the session. This allows participants to speak freely during the mediation without fear that a misstatement – or an honest admission – can be used against them in subsequent legal action.

### *Opening Statements*

Most mediators begin the session by inviting each party to make an opening statement in a joint session. This is the prime opportunity for each party to present its argument directly to the key opposition decision-makers, as well for each to hear what the others have to say. While a well-thought-out presentation is important, it is vital to keep it con-cise and directed at the other parties' decision-makers. An overly long, technical presen-tation will have little effect if it puts its audience to sleep. And the parties should remember that the mediator is the secondary audience: it is the opposing side that the designer must convince to move from its position – with the mediator's help.

The most effective opening statement presentations involve a key decision-maker from the party in some portion of the presentation, and never rely entirely on experts or attor-neys.

Just as a party needs to carefully prepare and deliver its opening presentation, it also must listen carefully to all the other parties' presentations.

- Is there anything new that might change any other party's evaluation of the case?
- Does the presentation suggest a new movement or weakness on any party's part?
- Are additional considerations alluded to – considerations that could provide new opportunities for creative settlement?
- How will other parties' arguments and presenters play to an arbitrator, judge or jury if the mediation does not resolve the dispute?

### *Negotiation Through the Mediator*

After the opening statements, most mediators generally separate the parties or divide them into groups with common interests, to meet with the mediator individually. These caucus sessions require preparation, too. Generally a party should know who will speak for it, what authority that person has, and what the party realistically hopes to achieve through the session. Mediation participants should not err by confusing "winging it" with flexibility.

While the mediator ultimately controls the flow of information, a party should carefully monitor the mediator's progress and use the caucus sessions to influence how the nego-tiations progress. Failure to take an active role in these sessions will cede control to the other parties' negotiators, or to an overly aggressive mediator. Thus it is crucial for par-ties to have thought through a reasoned strategy before the session.

**BATNA.** In developing its mediation strategy, a party must understand its basic inter-ests and bottom-line goals, and how those relate to the specific dispute. The designer participating in a mediation must know its BATNA – its Best Alternative to a Negotiated Resolution. In other words, if the mediation fails, what is the designer's best option, including all the costs to realize that option. If significant non-monetary considerations exist, those should factor into the valuation negotiations. If it means proceeding to an arbitration or trial, what will that cost in time, money, emotional stress, etc.? And what, realistically, is the designer likely to recover from a judgment? This is not a simple cal-culation, and it typically requires readjustment over the course of the mediation. With-out careful preparation, a party can easily find itself unsure of its BATNA and either let the negotiations push the party beyond its BATNA into a bad settlement, or it might pass up a one-time-only opportunity at a favorable resolution.

The BATNA and strategy are best determined before entering into mediations. Once negotiations begin, they develop a momentum that can push a party further than its BATNA.

*Mediated Settlement Agreement*

If the mediation achieves an acceptable result, the parties and mediator should reduce the agreement to writing and have all parties execute it. The parties should not leave a mediation without at least a signed skeleton agreement, even if everyone intends that a more formal document will supersede it. Although it is possible, and sometimes prefer able, to conduct the mediation without lawyers, you need professional help in drafting any settlement or release agreement.

In some instances, after reaching an agreement, the parties convert mediation into an arbitration for the limited purpose of allowing the mediator to issue the parties' agreement as an arbitration award. Such an award can then be reduced to an enforceable judgment, in the event that any party later resists fulfilling its promises under the agreement.

## AFTER THE MEDIATION

Generally one party will convert the settlement drafted in the mediation session from a messy, handwritten draft into a formal settlement agreement. Sometimes additional dis-putes surface in drafting this final document, and are either referred to the mediator or require further negotiations. In any event, these agreements have significant legal impli-cations and should be reviewed by a party's attorney before execution.

If problems arise after the mediation, the parties must remember that the written settle-ment agreement is their enforceable contract. But confidentiality rules prevent a party from asserting other, unwritten terms from the mediation, and the parties cannot ask the mediator to testify to resolve disputes regarding the extent of the agreement. Thus, after the mediation, the parties must rely on their written agreement for the material terms for their settlement. Thus, the parties must make sure that their written agreement contains all the material terms of their settlement.

## *APPENDIX B: Sample ADR Contract Provisions*

The following are sample dispute resolution paragraphs for

- Mediation, and
- Meet and Confer, followed by Mediation and Arbitration.

Additional contract information can be obtained from, among other sources, the Ameri-can Arbitration Association, or from most professional liability insurers.

**SAMPLE MEDIATION CLAUSE**

The following Mediation clause is for use in basic contracts. Any provider's name may be used in the place where it includes reference to AAA, or the entire provider reference deleted. However, it is generally best to identify a default provider, since other parties to a dispute may not communicate well at the time that dispute develops.

The following Mediation clause is for use in basic contracts. Any provider's name may be used in the place where it includes reference to AAA, or the entire provider reference deleted. However, it is generally best to identify a default provider, since other parties to a dispute may not communicate well at the time that dispute develops.

**Mediation.** All disputes between Designer and Client will be subject to mediation. Either party may demand mediation by serving a written notice stating the essential nature of the dispute, the amount of time or money claimed, and requiring mediation of the matter within 45 days from service of a demand notice. The mediation will be administered by the office of the American Arbitration Association closest to the project site, in accordance with their most recent Construction Mediation Rules, or by such other person or organization and rules as the parties may agree upon.

No party may commence any legal action or demand arbitration regarding a matter unless one of the following occurs:

(1) The parties failed to participate in a mediation of the matter within 45 days after service of notice; or

(2) Mediation of the matter has occurred, but did not resolve the matter; or

(3) A statute of limitation would elapse if suit were not filed prior to 45 days after service of notice.

**MEET & CONFER/ MEDIATION/ ARBITRATION CLAUSE**

This language provides a more comprehensive dispute resolution regimen than the clause above. This clause includes more comprehensive steps that provide mandatory, less costly early “meet and confer” measures, which escalate only if the parties fail to achieve resolution in the earlier stages. The form is written for an agreement with an owner, but could be adapted for use in a prime consultant/subconsultant agreement.

**1. Scope of Clause.** The dispute resolution procedures of this section apply to any and all disputes between Owner and Designer which arise from, or in any way relate to, this Agreement, including, but not limited to, interpretation of this Agreement, enforcement of its terms, any acts, errors or omissions of Designer in the performance of this Agreement or any dispute between Designer and Owner concerning the amounts owed Designer for performance of services.

**2. Notice of Dispute.** When a dispute occurs, the party seeking relief will serve the other party with a written notice specifying the nature and amount of the relief sought, a description of the reason relief should be granted, and a citation of the appropriate portions of this Agreement that authorize the relief requested.

**3. Meet and Confer.** (a) Within 10 days of receipt of the Notice of Dispute, the parties agree that they will meet and confer in a good faith attempt to resolve the dispute. Participants in the Meet and Confer must have the authority to enter into a resolution on behalf of each party. Attorneys representing the parties may not be present at this meeting.

(b) If the parties reach an agreement resolving the dispute during their Meet and Confer session, the parties will immediately reduce their agreement to writing, setting forth the terms of their agreement, and all parties to the Meet and Confer will execute this written agreement before concluding the session.

**4. Facilitated Mediation.** (a) If the parties do not reach agreement during their Meet and Confer session, or if the agreement does not resolve all of the issues encompassed by the Notice of Dispute, either party may request facilitated mediation. The requesting party will serve its written Request for Mediation upon the other party within 7 days after the Meet and Confer meeting.

(b) Within 30 days of the service of the Request for Mediation, unless the parties agree in writing to extend such time, the parties must participate in mediation facilitated by an independent third party. Principals of each party with authority to resolve the dispute must attend the mediation, and may be assisted by legal counsel. The parties will share the mediation cost equally. In the event that third parties participate in the mediation, the mediation costs will be borne on a per capita basis.

(c) Within 7 days after the service of the Request for Mediation, the parties must confer to select an independent mediator. If the parties cannot agree on a mediator, then the parties agree that any party may request that the American Arbitration Association, at its office closest to the Project Site, provide the parties with a list of construction mediators utilized by that organization.

**5. Mediation Agreement as Arbitration Award.** If the parties reach an agreement in mediation, that agreement will be reduced to writing and executed by the parties present at the session. The parties agree that upon execution of any such mediated agreement, the mediator will be appointed as arbitrator for the sole purpose of making an award that embodies the precise terms of the parties' mediated agreement. Further, the parties agree that any party to the mediated agreement may move any court of competent jurisdiction for entry of judgment based on the arbitration award.

**6. Arbitration Demand.** If the mediation is unsuccessful, any party may file a Demand for Arbitration with the American Arbitration Association at its office closest to the Project Site, under their then current Construction Industry Arbitration Rules.

**7. Arbitration.** After, and only after, a party has complied with the require-ments of the forgoing pro-visions regarding Meet and Confer and Mediation, that party may submit any controversy or claim arising out of or relating to this contract, or the breach thereof, for settlement by arbitration. Such arbitration will be administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.