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## Alternative Dispute Resolution — Mediation, Arbitration or Litigation?

Owners and Architects are now afforded an opportunity to resolve disputes they may have with each other through mediation, prior to arbitration or litigation. In fact, the 1997 version of the American Institute of Architects Document B141-1997, Standard Form of Agreement Between an Owner and Architect with Standard Form of Architect's Services, mandates that all claims, disputes or other matters in question arising out of or relating to the agreement shall be subject to mediation as a condition- precedent to arbitration or litigation. In my opinion, this is an extremely good clause to have in your agreement with an owner.

Mediation is a process that involves a neutral mediator, selected by the parties, who will meet with the disputing parties attempting to get them to reach their own settlement of the dispute. The mediator will usually explain the mediation process to both parties at the same time. He/she will answer any questions anyone has regarding the process. Following that explanation, the mediator may meet with each party alone, or meet with both parties involved in the dispute at the same time. The usual process is to meet with one party at a time, while the other party waits, and then alternate the process. During these meetings, which are referred to as "caucuses", the mediator is informed by each party of their perspective regarding the matter. Each party will secretly indicate to the mediator what terms and conditions it might accept in order to settle the problem. The mediator will work with each party separately, evaluating and suggesting the weaknesses and strengths of that party's position. He/she will review documents and any other evidence supporting the party's position. The mediator will hold in confidence and not divulge the secret information received from each of the parties. Caucuses will be conducted back and forth between each party and the mediator, with the mediator attempting to persuade each party to reconsider their position and move toward the position of the other. The mediator may suggest what the other party might accept as settlement of the problem, but has no authority to bind either party. The mediator will present any respective

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offers and counteroffers of each party to the other. It is the hope that after several sets of private caucuses, the parties themselves will each make appropriate concessions in their positions which would allow them to ultimately reach common ground and the dispute would then be settled.

The beauty of mediation is that the parties actually settle the dispute by themselves. The mediator is merely a facilitator of settlement, having no power whatsoever to dictate the terms of settlement to either of the disputing parties. Mediation is a non-binding process utilized in an attempt to settle a dispute. If the parties fail to reach settlement, or if the parties believe that their respective positions are too far apart, they can each reject the mediation, get up and leave. If they wish to pursue their claim after mediation fails, they can proceed to the next step of arbitrating or litigating the dispute.

Mediation takes a relatively short amount of time to prepare for and actually complete the mediation process. Most mediations take a few hours to complete, by either reaching settlement of the dispute or by a party's rejection of the process. The fee for the mediator is usually a few hundred dollars from start to finish, billed hourly, usually in the range of \$150.00 to \$250.00 per hour. The only other costs normally associated with mediation include possible attorney's fees and AAA costs. Mediation can be conducted by the parties themselves, without attorneys being involved, or the parties can be represented by their attorneys. The attorneys' fees do add to the cost of mediating, but there is much less attorney time required in preparation for a mediation than for the preparation of an arbitration or litigation. Mediation also has an advantage in that it can be scheduled and conducted much quicker than either an arbitration or litigation.

If mediation of the dispute is not successful, B141 allows for arbitration of the matter. Arbitration is binding and the parties must comply with the decision of the arbitrator. Arbitration is less formal than litigation and is usually faster and less costly. Arbitration usually has limited discovery procedures, which may preclude interrogatories, depositions of witnesses, witness lists, expert or opinion witness designations, and statements of what the experts will testify to. Arbitrations are usually performed by attorneys, but occasionally, parties are allowed to and will conduct the arbitration process by themselves. It is strongly suggested that you do not arbitrate a matter by yourself when the other side is represented by an attorney. In that circumstance, you will be at a distinct disad-

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vantage, as the attorney will be knowledgeable of all the rules of arbitration and you will not. Arbitrations are usually scheduled for resolution quicker than cases to be litigated. Once a decision is reached by the arbitrator and that decision is given to the parties, the parties have very little chance of appealing the decision. At that point, the matter is usually concluded.

Arbitrators are compensated on an hourly basis. Usually that cost will range from \$100.00 to \$400.00 per hour or more. An arbitrator, or three arbitrators, in larger cases, will also be paid for research and review time, conference calls and other time spent on the case. In addition to the arbitrator's costs, there is a filing charge to institute the arbitration proceeding with the service conducting the arbitration. Such services include the American Arbitration Association, Endispute, and several others. Arbitration filing fees typically range from \$500.00 for a \$10,000.00 dispute to \$8,000.00 for a \$1,000,000.00 to \$5,000,000.00 dispute, the exact fee depending on the magnitude of the amount in controversy. Additional fees often apply. Finally, in addition to all of the fees above, each party has his own attorney's fees to consider. Depending on the amount of time required for preparation for the arbitration and for the time actually spent in doing the arbitration, these fees can be substantial. It is not unusual for attorney's fees to range from a few thousand dollars to tens of thousands of dollars.

Litigation is familiar to everyone, so I will not elaborate on its benefits and detriments, other than to say it is very costly and takes a great deal of time to resolve the case. Usually the decision at the trial level can be appealed. Attorney's fees are the highest with litigation due to extensive trial preparation and the initial discovery process required to protect the client's interests. Even if you win the case, most parties are upset with the costly, time consuming process.

As a point of clarification, the contract can call for arbitration or for litigation, but not both. If you arbitrate, you forgo your original right to litigate. If you delete the arbitration clause in your agreement, you, or the other party, can precipitate litigation of a dispute. If there is no arbitration clause in the agreement, you may be able to persuade the other party to arbitrate the matter. If the other party refuses to arbitrate, you will have no choice but to litigate.

The above paragraphs dealing with arbitration and litigation indicate how expensive and time consuming each process is. As you can readily conclude, it is probably going to be to your distinct ad-

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vantage to resolve all disputes through mediation. This is by far the best approach in resolving all problems.

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