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peace talks

architectural design detail / mediation can be a speedy, inexpensive way to resolve disputes.

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Credit: Carey Sookocheff

Architects who've never been involved in a professional liability claim should count themselves lucky—and knock on wood. Those who have know how quickly a lawsuit can turn ugly. Litigation typically takes on a life of its own, consuming the feuding parties emotionally and financially. And in the end, the winners often find that the settlement amount wasn't worth the disruption to them and their families. The fallout from a court trial is broader, too. After each side finishes bringing out the big guns, any lingering hope of mending a broken relationship is gone. For all of those reasons, nearly a decade ago, insurance companies began asking policy-holders to use mediation to settle claims out of court. It's a voluntary, nonbinding process that involves hiring an impartial third party to help resolve the conflict—usually within a day.

Back in the late 1980s, when architects began to hear about the use of mediation to clear up disputes, most shied away from the idea. Even after it began to gain widespread acceptance as a speedy way to resolve charges in the areas of civil rights and consumer protection, architects continued to view it as a sign of weakness, as though it would signal to their opponent that they didn't have a strong case. Enter the litigation-happy environment that grew out of a number of failed condo projects in the 1990s, and that attitude began to shift. Architecture firms began to realize how expensive and time-consuming a court trial is. Nowadays, mediation is considered standard, and AIA contracts typically mandate mediation as a practical first resort.

Of course, not every case should be mediated. Frank Musica, a risk management attorney at liability insurance provider Victor O. Schinnerer & Co., Chevy Chase, Md., says that when there is a clear-cut case of designer error, it's better to rectify the problem immediately. Conversely, when it's obvious a design firm is being dragged into litigation frivolously—say an injured construction worker is seeking more damages than he could get through workers' compensation—those cases are usually successfully fought in court. Of the 4,500 claims among Schinnerer/CNA's policy-holders each year, less than 1 percent go to litigation. They're either settled or mediated—80 percent of them successfully. Even among professionals who make a living in the judicial system, mediation is part of the protocol. “If you get all the way to trial, judges are going to ask, ‘Have you mediated?’” says attorney (and architecture-degree-holder) Stanley Martin, a partner in Holland & Knight's Boston office. “If you say no, they're going to look at you sternly over the bench and suggest you do.”

the blame game

The nature of clashes arising from design and construction snafus make them particularly well suited to mediation. Usually the quarrel is about work quality or cost, and the lines of responsibility for project management often overlap. “Mistakes get made a lot, and no one is perfect, so black-and-white seldom exists,” says Tom Gallas, a partner at Torti Gallas and Partners, Silver Spring, Md. Mediation is less confrontational and less threatening than litigation, and it gets everyone talking.

Gallas recalls a claim that arose after the firm had completed a large multifamily project in Tampa, Fla., a few years ago. According to the project's developer, the problem—inadequate head clearance on an exterior stair leading to a second-story apartment—would cost $125,000 to fix. The two parties agreed on a mediator—a former judge with construction knowledge—and Torti Gallas spent several days researching the file and preparing briefs with its attorney. On the big day, the judge got the two sides together to lay the ground rules and then sent them into different rooms. He spent time listening to each side's key points privately, and then reported back to the opponents. “He tried to get further information and share with us things that were salient to their point of view and [then] allow us a chance to rebut those, and vice versa,” Gallas says.

After ping-ponging back and forth for the better part of the day, the judge recommended a resolution. But it took several more rounds to reach a compromise: Torti Gallas would pay $35,000, based on the discovery that both sides bore some responsibility for the error, which arose from incomplete drawings. The stair's height dimension had been noted on one drawing but not on a subsequent one. “We never say our drawings are perfect or totally complete,” Gallas says. “If there was confusion, we maintain that that's what the request for information process is for—asking the architect to clarify.”

Still, Gallas admits, “We did a few things that weren't exactly right, and so did the developer. Each party going in thought it was more clear-cut against the other party than it turned out to be. The value of mediation was to bring out those other points.” And once each side was able to cut through the animosity and posturing—it took awhile, he says—the mediator was superb at drilling down to the real issues. “A lot of times, when it gets to this stage, people have to feel somewhat vindicated,” Gallas says. “It's always an ego deflator when you realize that, well, you're mostly right but not 100 percent, and it's reasonable that there ought to be some way of acknowledging that to your client.”

Not all powwows have a peaceful resolution, however. Alan Weiskopf, AIA, a managing partner at Perfido Weiskopf Wagstaff + Goettel Architects, Pittsburgh, wasn't impressed by his one mediation experience. The case, involving mechanical and electrical systems in a condo building that didn't perform up to specs, still isn't resolved. “The mediator didn't seem to have consensus-building capabilities,” he says. “I don't think he was forceful enough. You have to listen, but eventually you have to push people toward a resolution.” In this particular case, he adds, “it just didn't happen.”

the middle man

Boston attorney Martin has heard it said, only half-jokingly, that the M.O. of mediators falls into one of three categories—hashing, trashing, or bashing. At one end of the spectrum are those who try to get people to hash out an agreement on their own. The trash-style mediator tries to plant seeds of doubt on the viability of the opposing positions. The bashers are those who knock heads and apply a little more force to get people to agree. “You have to have parties who are thick-skinned for that to work,” Martin says. For example, he once hired a tough-guy mediator, someone whom a lot of attorneys thought was rude, to successfully resolve a dispute between two hard-nosed contractors. “I think mediation is more likely to be successful when you look at the personalities of the clients and try to find someone who's going to be a good match,” he says.

Unlike architecture or law, there is no licensing board or even certification for mediators. Most who have successful practices have hundreds of hours of course training, but they need only a basic 40-hour course to begin, and many sign on with private alternative dispute-resolution providers (ADRs) that establish their own requirements, such as the American Arbitration Association (www.adr.org) or JAMS (www.jamsadr.com), which specializes in the construction industry. Although mediators come from all professional backgrounds, most are retired judges who bring credibility from 25 years on the bench. “While anyone can become a mediator, there's a huge difference between hanging out a shingle and getting hired,” says Los Angeles mediator and educator Lee Jay Berman, who heads up the Mediation Alliance. “This marketplace operates ... on a word-of-mouth basis.”

For 26 years, attorney Paul J. Weinberg, Irvine, Calif., helped clients choose mediators before becoming one himself. A potential drawback he's noticed among some retired judges is that they're used to handing down decisions. “When you're a mediator, you're not the boss of anyone, and it takes a very different skill set to come to a middle ground gently,” he says. So what does it take to help people get conciliatory? Humility, for one thing. Empathy for people, tremendous patience, creativity, and an ability to read plans and engineering reports, he says. Berman agrees, adding to the list exceptional communication skills, trustworthiness, and the power of persuasion. “They have to be people who can roll up their sleeves and sit with a bunch of experts, unroll the plans, and talk about them, or sit in a room full of lawyers and talk about the law. They're a bit [like] chameleons, able to make the parties comfortable while inspiring confidence.”

shuttle diplomacy

What happens when someone wants to sue for damages? Usually that person's lawyer sends a certified letter to the opposing party stating that such-and-such clause in the contract requires mediation and asks the defendant to respond within 10 days. Included with the letter is a list of potential mediators, with the stipulation that the fee will be split 50–50. The two parties agree on a mediator together—and, of course, it's crucial that they choose someone with a solid track record on the issue at hand.

To prepare a brief, the architect's lawyer needs to have a good chronological history of the project from the architect's point of view. In a case relating to, say, a construction defect, the attorney will ask for original copies of plans and engineering drawings, manufacturer specs showing how the failed item was to be installed, as well as recollections from site visits and correspondence showing how the problem developed. “Photos and video are the [top] tools mediators use to see graphically where the problem first came up and how,” Weinberg says. “If the problem was water intrusion, the architect could also draw a section showing that a threshold was missing or [that] the flashing wasn't done right,” he says. “Those visual aids are wonderful in educating the mediator about where the problem lies.”

On the day of reckoning, mediators differ in their preferences for giving the two parties face time initially or keeping them totally separate. Regardless of the setup, the mediator signs a confidentiality agreement with both sides that allows him to learn of concerns they might not want to express publicly. So while the mediator can't divulge private information, he can go back and forth between the opponents, making them aware of the weaknesses in their case. And because he's in a position to know more than each party, his evaluation is taken seriously.

Unless a claim has no basis, it's the mediator's job to create a sense of urgency and opportunity, says Mehrdad Farivar, FAIA, a mediator, architect, and attorney with Morris Polich & Purdy, Los Angeles. “You have a chance to settle this case and not worry about it anymore. In cases where the opponents are far apart in terms of their positions, a mediator can make a proposal somewhere in the middle. It's easier for litigants to accept a mediator's proposal without losing face.”

As Farivar points out, greed can backfire. He once mediated a dispute in which an auto dealership sued an engineering firm over the collapse of a retaining wall. The plaintiff refused to settle—perhaps because the defendant had a generous insurance policy—even though an agreement was imminent. Later, when the dealership took the case to court, it didn't get a dime. “Many of these issues that will have to be investigated in detail in court won't have to be investigated if you reach agreement in mediation,” Farivar says. “That's a powerful argument to settle and walk away.”

Edward T.M. Tsoi, FAIA, senior principal of Tsoi/ Kobus & Associates, Cambridge, Mass., made that judgment recently when faced with a six-figure wrongful-termination lawsuit brought by a window subcontractor on a project for the Massachusetts Institute of Technology. As they neared the end of a long day of mediation in what was shaping up to be a no-win situation, the MIT reps and the general contractor were ready to walk away because the sub wasn't budging on the settlement amount. “They all felt that the case had no merit whatsoever, and I did, too,” Tsoi says. But then he considered the time, money, and aggravation that had already been wasted and urged his fellow defendants to figure out how much more money they'd lose if they had to do it all over again.

In the end, the case settled for a quarter of what the plaintiff was demanding. “That's the unfair thing about litigation,” Tsoi says. “It's not just a matter of who's right and wrong. The cost of getting through the process begins to play a bigger role than the substance of the argument, and you have to be aware of that. I felt the day was worthwhile because we did get it off the table.”

Mediation doesn't always mete out justice. But in an imperfect world, it can be the best way to cut your losses.

at the bargaining table

The late Chief Justice of the United States Warren E. Burger once observed, “The existing judicial system is too costly, too painful, too destructive, too inefficient for a truly civilized people. ... Reliance on the adversarial process as the principal means of resolving conflicts is a mistake that must be corrected.”

Here, then, are a half-dozen good reasons to try mediation first, adapted from “Mediation: A New Way to Resolve Land Use Conflicts” by Edith M. Netter, Esq. and from the Land Use Mediation Program of the State of Maine Judicial Branch.

1. It's confidential. Parties present their ideas to the mediator in an informal, private setting, with their lawyers by their side if they wish. There's no need for grandstanding when the disputants and their mediator have signed a confidentiality agreement.
2. You can control the outcome. The parties are not obligated to reach an agreement. You can withdraw from the process if you wish and move on to arbitration or litigation.
3. It's a way to separate facts from feelings. Mediation often exposes motivations for people's behavior, such as personal animosity, that litigation does not. The mediator is trained to defuse the tension and help the two sides discuss their differences on neutral ground.
4. It's creative. You may discover choices you didn't know you had. For example, courts can generally only award money in design- and construction-related disputes.
5. It improves professional relationships. When there's a successful outcome, the parties are more likely to work cooperatively in the future. And for controversial projects, such as view loss in a community, mediation reduces the political fallout for the decision-makers.
6. It's quick and relatively inexpensive. Mediation is typically a day-long affair, and fees range from $150 to $500 per hour compared to litigation, which can cost $25,000 to $100,000-plus per side for land-use disputes. Mediation helps you reach an agreement that will let you get on with your life—and possibly keep you out of court in the future.

Keywords

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Architects, Legal Issues, Construction Contracts, Design, Liability
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Tom Gallas

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