

BENEFITS TO USING

# Mediation as an Alternative

..... *to* .....

CONSTRUCTION LITIGATION



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# WELCOME

Hello. I'm Roger Bradley. I would be pleased to answer your questions regarding Mediation. While my primary area of practice is construction law, my mediation practice includes business, contract disputes, and other civil disputes. I appreciate your interest in my mediation services, and look forward to combining my legal and mediation experience to help you successfully resolve your dispute.

With the benefit of 40 years practice, I am able to offer legal and practical insights into problem solving. After all, that is what mediation is all about.

My Philosophy: Let me share with you my philosophy and key principles which I apply in mediation. It is simple. Mediation is a "can do" process. It works not because it is a "winner takes all" process; but precisely because it is not. Each party is focused on what they need and what they can live with, not unrealistic hopes that can be prohibitively expensive in litigation.

The Rules: All parties are to join the Mediator in listening, being open-minded, being respectful of the other side and taking all personal issues out of the process.

The Beginning: It begins with a pre-mediation telephone conference with the parties' attorneys separately. Each side can speak freely. This sets the stage for the actual Mediation session and helps give early focus to the process. A Mediation Memorandum from each party is helpful.

The Mediation Session: Each side is required to be represented by someone having settlement authority and familiar with the facts. This assures that an agreement can be reached which binds the parties at the Mediation then and there.

After the Mediation Session: If no agreement has been reached at the Mediation, I am willing to continue the dialog by joint and/or individual telephone conferences. This can be important since good things do not always happen overnight. However, given time and an ongoing effort, logic, and the desire to avoid the costs and uncertainty of litigation, often produces success.

I would be pleased to discuss how Mediation could help with your dispute.



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# Alternative to Construction Litigation

Whenever money is involved, any conflict can very quickly grow out of control. Few industries involve as much money as even a modest construction project, and one of the frequent points of dispute concern construction – a money- and labor-intensive business that exposes all parties to uncertainty and unavoidable risk.

Unfortunately, when disputes arise in the construction business, too many think first of litigation. It's often the scale of the project that makes everyone automatically assume that the only workable resolution – but in most cases, mediation conducted by a professional, trained mediator will result in a superior resolution. Benefits of utilizing mediation as opposed to litigation to resolve construction conflicts go on and on – but focus can be given to seven essential points.

## 1 Control

In mediation, as opposed to litigation, both parties retain control over the situation. While each may have opposing desires for the overall outcome, both also certainly share some mutual interest. When putting your fate in the hands of a judge or jury, you cannot guarantee that those mutual interests will be cared for – or even that your own interests will be considered. A judge or jury can instead dismiss your claims and goals.



In mediation, you retain control and can have a direct and measurable effect on the final resolution. Nothing can happen without your consent.

## 2 Certainty

Mediation is a transparent and predictable process, unlike litigation. In a courtroom, the final decision by a judge or jury can come with unexpected surprises that lead to appeals and further expense and time spent often trying to “get back to zero.” In mediation, both sides are fully aware of the proposals on the table and can see where the process is leading.

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Since the mediator has no power or authority and is present solely to guide and advise, there is no danger of an unexpected ruling that satisfies no one.

### 3 Cost

Litigation is expensive. Aside from lawyer fees, which can be immense in and of themselves, there are associated costs for expert witnesses, research, discovery and court fees. Mediation's only required cost is the mediator's fee. Save legal and expert costs and other litigation expense. These are costly enough and represent dollars from the corporate till which could otherwise be used to settle a dispute or for business purposes.

### 4 Time



Cost of time weighs heavy in litigation: Time in reaching a final result and lost executive time in litigating them instead of conducting business. Litigation moves according to the calendar and time frame of the court, not yours. While your executives or spending their time in a court or consulting with lawyers, your project is at a halt and your business is distracted and weakened.

Mediation is conducted on an agreed-upon schedule that can be as swift and efficient as you can make it, freeing your top people to do their jobs instead of sitting in court room or dealing with depositions, discovery orders, and other problems.

### 5 Risk Avoidance

Mediation is also a "best practice" when it comes to risk avoidance. The risk of an adverse decision can affect not just the bottom line, but stock prices, public perception and employee morale. There is no such thing as an adverse decision in mediation, because the final settlement must be agreed to by both parties. Mediation also offers privacy. Litigation and other court proceedings are matters of public record, and any testimony or admissible discovery becomes public – a risk no company wants to take. Mediation is a private matter and thus is fully protected by privacy laws.

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### 6 Creativity

Because the mediator isn't bound by the law to a narrow choice of remedies, (s)he can be creative and can draw from their experience to propose unexpected solutions. A mediator can also identify the true goals of each party – goals which are often not officially stated in a lawsuit, and work to incorporate those goals into the final solution in a way that is simply impossible through the rigid framework of the legal system.

This sort of “outside the box” thinking can transform mediation into a truly powerful tool for conflict resolution that goes far beyond what the courts can offer. The human touch that an experienced mediator brings to the conflict can be the difference between getting back to work and everyone going home unhappy with the result.

### 7 Civility

Litigation does one thing extremely well – it fans the flames of conflict. Few people entering into lawsuits emerge on better terms than before court – litigation is, by its very nature, an aggressive, adversarial process that requires both parties to attack each other in an effort to prove their side.

Mediation is the opposite: A collaborative process that seeks common ground and proposes compromise. A successful mediation ends with a handshake, and instead of an enemy you have the possibility of rebuilding a relationship and working together – or even resuming the stalled project that inspired the dispute in the first place. No one needs to make enemies – mediation allows us to resolve our differences without making new ones.

Mediation is almost always the better solution. In the rare cases where mediation fails, litigation remains a final alternative, removing the final argument against mediation in general. If you find yourself in a conflict over construction or real estate, you owe it to yourself to consult a professional mediator before launching litigation. You will likely save money, time and stress.

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