POOLE Professional Ltd.

# THE POOLE PERIODICAL

A LOSS PREVENTION COMMUNICATION FOR THE DESIGN INDUSTRY

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## Event Corner

*Education Opportunities*

We're offering education opportunities to earn PDH/LUs. Below is a schedule for our upcoming courses.

*There are currently no scheduled education opportunities.*

For more information and to register for any of our educational opportunities, please visit our calendar, here.

# Make Mediation Your Dispute Resolution Technique of Choice

*The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*

There are basically two ways to resolve a project dispute. One is to bring in a third party decider of fact, such as a judge, jury or arbiter and have the two parties duke it out, often publicly, to see who can make the most convincing case and win a binding judgment over the other. The second method is for the parties to the dispute to sit down together, preferably with a neutral negotiator, discuss the issues and consensually reach a mutually agreeable settlement.

With the first method, one party wins, the other loses, and their working relationship likely takes a big hit. With the second approach, both parties feel they have reached an acceptable if not perfect solution and their relationship might actually be stronger than before the dispute arose.

What is this second approach that seeks voluntary agreement to a mutually acceptable solution to a project upset? It's the technique we have long been pushing as the preferred method of dispute resolution in the design and construction industry-- mediation.

Mediation has proven to be the most amicable and least costly form of dispute resolution. In fact, it has been so successful that many insurance companies provide monetary incentives to their insureds if their contracts with their clients stipulate that mediation will be the first dispute resolution method used to try to resolve project problems.

There are major advantages to mediation for both parties involved:

- It is nonbinding and consensual. Both parties must agree to any settlement reached.
- It facilitates communication. Dialogue and negotiation is the key, not fault-finding and blame-laying.

## For Your Information

- NYSDOT now accepts the Acord Form.

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Managing Scope Creep & Other Project Changes "Plan the work, then work the plan."

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- It is private and confidential. All information discovered and exchanged remains behind closed doors.
- It's controllable. The two parties to the dispute make all decisions. You are not at the mercy of an arbiter, judge or jury.
- It seeks consensus. The objective is to reach a win-win resolution, not find a winner and a loser.
- It is forward-looking. The focus is to solve the problem and get the project on track, not place blame for past mistakes.

## Start Before A Dispute Arises

Don't wait until a dispute arises to try to get your client to agree to use mediation as your prerequisite method of dispute resolution. Push for mediation during your initial talks with your client.

Ask clients if they are a proponent of mediation. If they are not, convey the advantages. Explain that it's a low cost method that seeks mutually acceptable solutions to any project dispute that arises. Explain that a third-party neutral mutually agreed to by you and your client uses a proven method of negotiation to find common ground and seek an amicable solution. Emphasize that this is a nonbinding process. If your client is not satisfied with any of the proposed solutions offered during mediation, it can reject them all and move on to a binding form of dispute resolution such as arbitration or a trial. The only commitment the client is making is to at least try mediation and make a good-faith attempt to solve the problem through this alternate dispute resolution technique.

Make it clear to the client that mediation is just as beneficial to them as it is to your firm. They stand to save as much on legal fees and time lost to lengthy litigation as you do. In fact, you might suggest the client use mediation as the dispute resolution method of choice in its dealings with contractors, building tenants and others.

## Explain the Basics

If your client is unfamiliar with mediation, you will likely need to explain how it works. While there are many variations to the process and much flexibility in how it is executed, the following is a common approach:

**Seek agreement**. When a dispute arises, the designer and the client meet to discuss the issue. Hopefully, a solution can be reached and the project commences as the parties agree to.

**Seek a mediator.** If resolution of the problem cannot be reached, the parties take the issue to a mutually agreed-to mediator. Typically, the parties will seek a mediator who has experience in the design and construction industry and hopefully have knowledge of the specific issue in dispute. Search the Web for qualified mediators in your area, or check with your industry associations and legal counsel for recommendations. As liability specialists for your industry, we can also likely help you find a mediator with extensive A/E industry experience.

**Meet the mediator**. The two sides meet with the mutually agreed-to mediator at a neutral location, often the offices of the mediator. This pre-mediation conference can take place via phone conference if necessary. The representatives from

the design firm and the client who attend the conference should have decision-making authority to reach agreement on the resolution of the dispute. This can include company principals, lead project managers and designers, and/or legal counsel.

**Go over the ground rules**. During the pre-mediation conference, the mediator will likely make an opening statement explaining how mediation works in general and how it differs from arbitration and litigation. He or she will go over how his or her specific ground rules of mediation will be applied and what role the mediator will play. (Sometimes the mediator primarily plays the role of communication facilitator for the two parties; other times the mediator takes a more active role in gathering information and recommending settlements.) Often times, a strict confidentiality agreement is signed.

**Join a joint session**. Typically, the mediator sets up an initial joint mediation session with representatives from both parties. Each party, in turn, gives a statement, explaining their understanding of the dispute and giving a chronological explanation of how the problem arouse. Documentation may be shared. There are no cross examinations. The mediator facilitates communications, gathers facts, evaluates the relationship between the two parties, tries to specify the exact nature of the root problem, and seeks areas of agreement.

**Seek settlement**. Once both parties have presented their cases negotiations can being. Sometimes, but not often, the mediator can help the parties narrow the issue down to a single problem or set of problems, explore options for correcting the problem and reach a mutually agreed-to resolution during this initial joint session. More likely than not, however, an impasse is reached. The parties cannot find common ground after this initial discussion and mediation moves into its second phase.

**Hold private caucuses**. If no agreement has been reached in the first joint session, the mediator schedules private caucuses with each party. Parties may call in outside experts or key witnesses to gain more specificity or provide a third-party's opinion to the matter. The mediator may ask probing questions, take voluntary depositions or apply limited discovery to gain a greater understanding of the situation. Once the matter has been thoroughly discussed, the mediator helps the party brainstorm alternate solutions and possibly reach a revised settlement position. Hopefully, the caucus ends with a proposed settlement or alternative settlements that have a more reasonable chance to be accepted by the other party.

It is important to note that information shared in the caucus will be held in strict confidentiality and will not be revealed to the other party except at the request of or with agreement from the disclosing party.

**Joint session, round two**. Following the caucuses, the two parties meet again with the mediator to seek resolution. The mediator typically emphasizes new areas of agreement between the two parties and focuses on movement toward an agreeable settlement. Often, this second round of sessions leads to substantial movement toward agreement if not an actual settlement. The mediator summarizes the advancements in negotiations and identifies as specifically as possible any remaining issues that keep the parties from a full settlement.

**Rinse and repeat**. The rounds of joint sessions and caucuses continue as long as progress is being made. If an agreeable settlement is reached, the agreement is put into writing and signed by both parties. If talks stall, the mediator may offer his or her own

proposed settlement and present it to the two parties for approval or rejection.

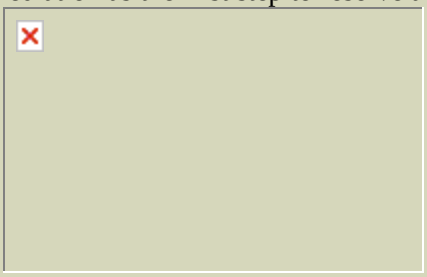
**Calling it quits**. If no settlement is reached and no progress is being made, the mediation sessions end and the parties are free to move onto arbitration, litigation or some other form of dispute resolution. The mediation proceedings are typically considered "without prejudice," and any information or opinions voluntarily revealed or any settlement offers made cannot be used or referred to as evidence during any future arbitration or litigation hearings.

## Get Mediation In Your Contract

You've brought up the subject of mediation and explained the process to your client. The client is intrigued and open to the idea. It's time to get the commitment to mediation in writing.

Include a clause in your client contract that calls for mediation as your required first step in dispute resolution. You don't want to try to convince a client to use mediation after a problem has occurred and tempers have flared. Get it in your contract before the project begins.

Many of the A/E professional associations, including the AIA, EJCDC, ASFE and CASE, have published contract clauses that call for mediation as the first step to resolve a dispute between designer and client. Your insurance company may also have recommended language, or your legal counsel may be able to draft a custom clause that best fits your particular situation.



Regardless of how it is drafted, the mediation clause should ideally include:

- An agreement between you and your client that all disputes arising out of the services you agree to provide in the contract will be submitted to nonbinding mediation as the first attempt to resolve the dispute. You can provide a caveat that this requirement can be removed only if both parties agree to forego mediation -- this allows for parties to mutually agree to a settlement prior to calling in the mediator.
- An agreement by you and your client to make a good faith effort to include a mediation clause in all agreements with contractors, suppliers, fabricators, subcontractors and subconsultants who work on the project. You might also seek to require those parties to include mediation with any of their subs, and so on down the line to include all parties to any project contract.
- A stipulation that the mediator must be agreed to by both parties and selected only after a dispute arises. This allows you to select a mediator that not only has expertise in the design and construction industry, but with the subject of the specific dispute as well.
- An agreement as to who will pay the costs of mediation. Mediators typically charge for their services on an hourly or daily basis. The cost can be split evenly between the two parties, or they can be divided proportionately as agreed to in the settlement.

If mediation is contractually required as the initial form of dispute resolution it makes sense that the contract spell out the subsequent methods of dispute resolution to use if mediation fails. For example, the contract may stipulate that disputes not resolved in mediation will

be addressed in binding arbitration or, alternately, moved directly into litigation.

## Mediation Works

How effective is mediation in resolving disputes between design professionals and their clients? Consider this: forward thinking insurance companies give their insured design firms a deductible credit of up to 75% (up to $25,000) if a claim is resolved through mediation. Yet another reason to choose mediation as your first choice for dispute resolution.

### *Can We Be of Assistance?*

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.*