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Mediation offers plenty of benefits over construction litigation

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As all construction lawyers know, construction projects regularly result in some sort of dispute: payment claims, defects in the design or construction of the work or even personal injuries that occur on the job.

Construction claimants then must choose the appropriate dispute resolution process to pursue their claims. While certain factors such as statute of limitations, mandatory arbitration clauses or jurisdiction requirements like the Illinois Court of Claims Act dictate when and where a claimant must file its claim, at some point construction litigants should evaluate whether to retain a third-party neutral to mediate the case.

Although a successful mediation and settlement inherently requires the parties to compromise and move from their positions, the efficiency of mediation offers win-win opportunity for all parties and their attorneys, especially compared to the alternative of pursuing a claim all the way through trial.

Some of the biggest problems with litigating a construction case in state or federal court are the risks, cost and time of proceeding through discovery and trial. Because of these concerns, industry-specific form contracts require mediation as a precondition to litigation.

For example, Section 15.3.1 of the AIA A201-2017 General Conditions of Contract for Construction requires "[c]laims, disputes or other matters in controversy arising out of or related to the [c]ontract ... shall be subject to mediation as a condition precedent to binding dispute resolution." Although form contracts are often modified, the preference for mediation and concern for litigation costs should not be disregarded.

For large construction projects, multiple parties are usually involved, including the owner, design and engineering professionals, general contractor, possibly a construction manager or owner's representative, material suppliers and lower tier trade contractors.

Many of the parties will not have contractual privity with the other parties on the project, but will rely on those parties to timely perform their work or contractual duties, including payment to other parties. When a complaint is filed, it may take an entire year of litigation simply to get all the parties served and responsive pleadings filed.

For both defect and payment claims, the parties' performance or breach of contract will be at issue. It may be unclear if the cause of any defect arose from faulty construction, negligent design or surveying or defective material. Oral and written discovery for such claims can be time consuming and the claims may require experts to prove liability, all of which is expensive and can drain a party's resources and lead to client frustrations often times directed to their own attorneys.

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An attorney's nightmare is to win the case at trial but lose an angry client after the fees are billed.

Mediation benefits all parties in any size construction dispute, either before or after completion, by reaching a final resolution quickly and preserving the parties' resources. In exchange, the parties must concede some of their claims and defenses. Still, given the weight of attorneys' and experts' fees in complex construction cases, the economics of mediation and settlement often outweigh taking a claim to trial.

This is particularly true in construction cases with multiple questions of facts, requiring the parties to weigh the risk that a jury or the judge will answer those questions of fact in favor of the opposing parties.

For smaller construction disputes, mediation is even more practical. Although there may be fewer parties involved with a smaller project, each status conference, deposition or other legal expense consumes a larger percentage of the anticipated value of a claim or defense than compared to larger disputes.

Even if the plaintiff prevails on its entire claim at trial, or the defendants obtain a defense verdict, the amount of money recovered or saved through defense may be dwarfed by the attorney fees and litigation costs, let alone the time and inconvenience that a party suffers by going through trial.

In addition to the financial considerations, lawyers should also consider the "soft" costs that their clients incur through litigation. For project owners, the real estate may be encumbered with a lien until resolution of the dispute, thus impeding any potential sale.

General contractors, architects and engineers may have to expend significant time searching and reviewing the project file for relevant documents to respond to discovery. And subcontractors and material suppliers may also suffer further opportunity cost by not having at least some of the payment received.

Regardless, all parties must continue to keep the project and any disputed payments on their balance sheet and will need to spend valuable time preparing for trial.

The timing of mediation can also be used strategically to benefit all parties. If the claim is relatively minor, and liability relatively clear, the parties may consider mediating the dispute before a lawsuit is filed.

If the claim is more contentious, with more money at issue, filing the lawsuit can give all of the parties an incentive to participate in the mediation process, knowing that the litigation expenses begin to run if the mediation is unsuccessful.

The parties may not want to mediate until after initial written discovery is completed to better evaluate the opposing parties' claims and defenses. If the parties to a lawsuit have solidified their positions and are unwilling to consider mediation, many circuit courts, including the Cook County Circuit Court, have mandatory mediation programs allowing a judge to order the case to mediation. See Circuit Court of Cook County Local Rules Part 20 and Part 21. These programs require parties to mediate in good faith, but do not require the parties to reach an agreement.

Although as attorneys we find the adversarial process of litigation challenging and strive to prove that our clients "are right," we must also consider the costs our clients incur in litigation. By recommending and facilitating mediation, and vigorously representing clients during the mediation process, attorneys can provide an outcome that benefits their clients and themselves significantly better than trial.