



# Mediation: How to Take Litigation out of the Construction Process

By: Myron A. Walker, Jr., Perry, Watts & Associates, L.L.C.

In every construction project, disagreements arise. Owners v. contractors. Contractors v. architects. Suppliers v. subs, and so on. Ultimately some of these disputes end up in litigation where, as we know all too well, the only real winners are the lawyers. Some construction professionals have been heard to complain that they spend as much time litigating as they do building!

This article presents an overview of a tool for avoiding or minimizing the expense or delay of litigation, and for voluntary and informal resolution of

disputes that engender lawsuits: mediation.

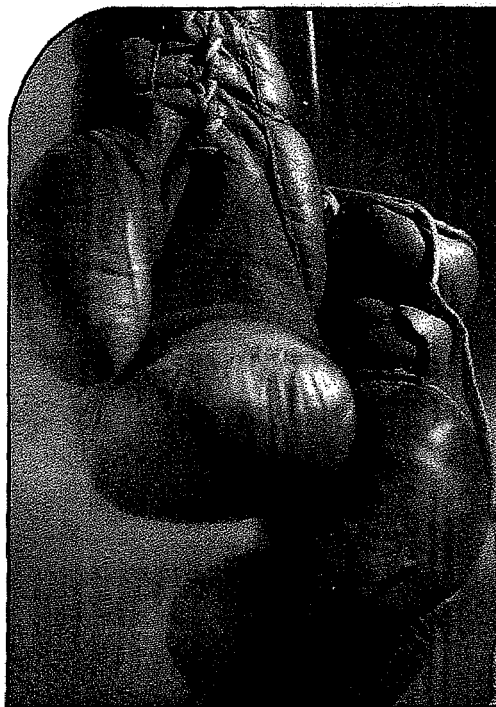
Mediation is a process in which the parties to a dispute agree to meet informally with a trained dispute resolution professional who acts as a neutral third party to assist the parties in settling their differences. The process is confidential, thus preventing later use of information obtained in the mediation should a settlement not be reached. It is also voluntary and nonbinding, unlike arbitration. Mediations generally last a day or less, as opposed to the usual civil trial, which typi-

cally takes from several days to several weeks.

Most mediations begin with a "general" or "plenary" session, where the parties in turn make a brief statement of their position to the mediator. The parties then are placed in separate rooms and begin conducting "caucuses" with the mediator, who explores alternative settlement possibilities with both sides. This is where the real advantage of the mediation process becomes clear: parties are free to be completely open with the mediator, who is prohibited from

conveying such information to the other side without the consent of the party from whom it comes. Perhaps more importantly, the use of caucuses allows the mediation to proceed with minimal danger of deterioration into emotional exchanges and outbursts which could well end negotiations. The mediator is also trained to present in an objective, non-judgmental fashion, alternatives which might form the basis of a negotiated settlement satisfactory to all parties. Unlike trial, there are no depositions, no cross-examinations, no juries, no "pros-

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cuting” attorneys to confront, hostile judges, or uncomfortable atmosphere. The entire process is conducted in a friendly, non-threatening way designed to allow the parties to focus on a satisfactory resolution to their problem without the usual heated exchanges and accusations which, as we all know too well, can completely prevent resolution of the problem. Mediation, then, recognizes the significant value that closure can have in the context of a dispute, and allows the parties to direct their energies toward obtaining that closure and getting on with their lives. At the end of the day, successful mediation will

yield a written settlement agreement signed by both (all) parties.

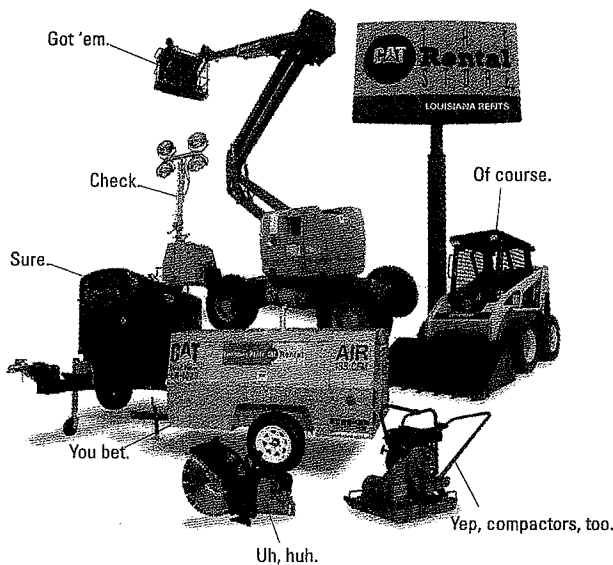
Through adherence to this procedure, the great majority of construction disputes can be resolved for a fraction of the expense, inconvenience, risk and disruption occasioned by a full-blown trial. Courts and insurers have already embraced mediation. Its use has been found to be quite effective in disputes of all types, ranging from contract, personal injury, domestic employment, and business disputes. If you as a construction professional would be interested in efficiently resolving disputes

which may arise in your projects, putting those disputes behind you and getting on with the business at hand, then mediation is for you.

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*tended the University of Texas Law School’s course on mediation of employment disputes. Mr. Walker has successfully conducted numerous mediations and can be reached through Perry, Watt: & Associates, L.L.C. at 225-769-1890.*

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*Robert F. Kennedy*



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