



MEDIATION- A VIABLE OPTION

By Steven R. Goldstein, Esq.

Design professionals often find themselves involved in costly and sometimes lengthy litigation. During the course of that litigation, options routinely available to the design professional include, if appropriate, requesting a voluntary discontinuance of all claims asserted against the design professional or, if such a request is rejected, proceeding with a motion to dismiss the claims. In the event such efforts are either unavailable to the design professional in the first instance, or ultimately prove unsuccessful, the design professional remains in the action at which time available options include engaging in settlement discussions or preparing for and proceeding to trial.

Regarding settlement, such efforts may be made by either face-to-face negotiations among counsel representing each party or through non-binding mediation. While face-to-face negotiations might appear at first blush to be the most expeditious manner to resolve the matter, often such an option is not optimal based on contentious relationships between counsel and/or the parties, or unreasonable settlement expectations of the parties. As such, mediation becomes a viable option. Some of the advantages of proceeding with mediation include:

- a) **The Proceedings are Non-Binding**- Unless agreed otherwise, the mediation is non-binding which means that either party may walk out of the proceedings at any time and the opinion of the mediator, to the extent one is offered, does not bind the parties;
- b) **Fact Finding Mechanism/Shared Cost**- Whether or not the mediation is ultimately successful, the mediation process assists the design professional in obtaining further information regarding plaintiff's liability and damage claims or, as the case may be, lack thereof, prior to proceeding to trial. This information often

proves to be of great assistance to the design professional in further preparing its defense. Notably, the mediator's fee is generally split equally among the parties;

c) **Cost Efficient-** Since mediation can occur at any stage of the litigation, in the event the parties are diligent at the outset the mediation may take place early on in order to save the parties the time and expense associated with litigating the matter to trial;

d) **Knowledgeable Mediator-** The benefit of proceeding with non-binding mediation is that the matter will be presented to an individual, in most instances an attorney, who is well versed in construction law and more knowledgeable about the subject area than most judges and juries;

e) **Getting Your "Day in Court"**- During mediation, design professionals are often provided an opportunity to present their position directly to both the mediator and the opposing side. Proceeding in this manner allows the design professional to explain and defend its position and assist the mediator in fully understanding its position for purposes of aiding in the resolution of the matter in the most equitable manner; and

f) **Mediation Credit-** Many professional liability insurance policies provide for a mediation credit as an incentive to attempt to resolve the matter through mediation, if appropriate, rather than proceed through litigation to trial. The credit usually takes the form of a discount on the insured's deductible.

In addition to mediation, arbitration is also an option available to the design professional. As with mediation, arbitration is presided over by one or more individuals well versed in construction law and often takes less time than a trial. The arbitration proceeding is also more formal than the mediation, requiring the presentment of witnesses testimony and introduction of evidence, but less formal than a trial involving specific rules of evidence. However, with limited exception, the final decision of an arbitrator is binding and appeals are not an option to either party as they may be following a trial.

CONCLUSION

Whether or not to proceed with mediation is a decision that should be made following consultation among the design professional, its professional liability carrier, and its legal counsel. Avoiding the time, expense and uncertainty associated with protracted litigation and trial are the primary reasons why non-binding mediation has become increasingly more popular as a means of resolving an action against a design professional.

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