

7 BENEFITS TO USING

MEDIATION

in

**CONSTRUCTION
DISPUTES**



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Introduction

The term "mediation" broadly refers to any instance in which a third party helps others reach agreement. More specifically, mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. The process is private and confidential. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates the process.

Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training. As the practice gained popularity, training programs, certifications and licensing followed, producing trained, professional mediators committed to the discipline. Mr. Charles received his training from the American Arbitration Association.

The benefits of mediation include:

- **Cost**—The mediator charge a fee usually an hourly or daily fee, the mediation process generally takes much less time than moving a case through standard legal channels. While a case in the hands of a lawyer or a court may take months or years to resolve, mediation usually achieves a resolution in a matter of days. Taking less time means expending less money on hourly fees and costs.
- **Confidentiality**—Court hearings are public, mediation remains strictly confidential. No one but the parties to the dispute and the mediator(s) know what happened. Confidentiality in mediation has such importance that in most cases the legal system cannot force a mediator to testify in court as to the content or progress of mediation. Many mediators destroy their notes taken during a mediation once that mediation has finished.
- **Control**—Mediation increases the control the parties have over the resolution. In a court case, the parties obtain a resolution, but control resides with the judge or jury. Often, a judge or jury cannot legally provide solutions that emerge in mediation. Thus, mediation is more likely to produce a result that is mutually agreeable for the parties.
- **Compliance**—A negotiated settlement is attained by the parties working together and accordingly is mutually agreeable; compliance with the mediated agreement is usually high. This further reduces costs, because the parties do not have to employ an attorney to force compliance with the agreement. The mediated agreement is, however, fully enforceable in a court of law.

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- **Mutuality**—Parties to mediation are typically ready to work mutually toward a resolution. In most circumstances the mere fact that parties are willing to mediate means that they are ready to "move" their position. The parties thus are more amenable to understanding the other party's side and work on underlying issues to the dispute. This has the added benefit of often preserving the relationship the parties had before the dispute.
- **Support**—Mediators are trained in working with difficult situations. The mediator acts as a neutral facilitator and guides the parties through the process. The mediator helps the parties think "outside of the box" for possible solutions to the dispute, broadening the range of possible solutions.

Mr. Charles primarily practices evaluative mediation which focuses on providing the parties with an evaluation of their case and directing them toward settlement. During the evaluative mediation process, and when the parties agree that the mediator should do so, the mediator will express a view on what might be a fair or reasonable settlement.

As an evaluative mediator Mr. Charles has somewhat of an advisory role in that he evaluates the strengths and weaknesses of each side's argument and offers his experienced opinion about what would happen should they go to court. Because of Mr. Charles years of construction and business management experience, he is able to direct the parties away from the trivial and focus on the major issues that usually lead to a negotiated resolution acceptable to the parties.



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Mediation is one of the most successful tools for settling all types of disputes, and it can be especially effective for those involved in construction disputes. It has recently grown in popularity in the construction industry and many have found that it allows them to move projects forward more quickly, even when the occasional snag does occur. If you do business in the construction industry or you are involved in a construction dispute for any reason, mediation can help you find a resolution. What are the seven most important benefits of mediation in construction disputes?

1

Schedule Flexibility



When a dispute is settled through litigation, those involved are required to abide by the court schedule. Often, court cases can take months to be heard, and the date and time required for disputing parties to appear in court are inflexible. Mediation, on the other hand, provides flexibility in scheduling. Disputing parties have control over when they will meet.

Additionally, if both sides of a dispute are interested in moving things along at a speedy pace, they have the freedom to accomplish this. When both sides of a dispute are fully prepared for the session and willing to compromise during the negotiations, construction mediation can take as little as a day or two. Finally, disputing parties also have control over the location of the mediation session. This can be especially helpful when those involved live or work far from one another, but have collaborated on a joint project.

2

Less Expensive

One of the most important benefits and often the reason people are so willing to participate in construction mediation is because it is inexpensive. Building a court case can take months and when you are paying attorneys and expert witnesses by the hour, costs can add up quickly. Mediation puts more control into the hands of the disputing parties, so they can better manage the cost. In some cases, disputing parties even choose not to have individual legal representation, so the only fee they are paying is that of the mediator.

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Furthermore, when a dispute is settled quickly, it means parties are away from their work for fewer hours and able to move forward with whatever project is the focus of the dispute. In the end, many of the specific benefits of construction mediation affect a company's bottom line.

3

Avoids Unnecessary Conflict

Unfortunately, when litigation is necessary to settle a conflict, it often severs the existing relationship. Disputing parties go their separate ways, even if it means sacrificing a mutually beneficial business arrangement. Mediation can help to preserve this relationship and even provide the skills necessary to manage future conflicts, should any arise. Mediation makes it possible for each side to express thoughts and opinions about a situation, and many find this to be cathartic. It gives a dispute a "human side," which can be important even when dealing with issues that are related to business.

4

Control

Another of the most important benefits of construction dispute mediation is the control the process gives to the disputing parties. Mediation means everyone has a say in the outcome and it is possible for both of the disputing parties to walk away from the negotiations satisfied with the outcome. In a courtroom, there are winners and losers, but in mediation it is possible for both sides to feel as if they have won.



5

Confidentiality

One of the things business owners like most about mediation is that it is a confidential process. Arbitration and litigation often become a matter of public record and everyone knows the details of the process and the resolution. For business owners who are concerned about negative publicity, mediation provides a private means by which to solve a problem.

6

Flexibility for Multi-Party Disputes

Though many disputes only involve two sides, problems that arise in the construction

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industry have multiple players. A dispute might be between design professionals, property owners, general contractors, subcontractors, or a variety of other professionals. Regardless of who is involved, mediation is an effective way to bring all the parties together and find a resolution that works for everyone.

7

Successful



There is no denying what statistics show: mediation is reportedly successful in 80% of all construction cases. This means that only a small percentage of disputes must proceed to another form of ADR or litigation to be settled. Essentially, by choosing mediation, you are giving yourself an 80% chance you will “win” your dispute.

Involvement in a construction dispute is never fun. It takes up your time, exhausts your financial resources, and for some, can damage your life-long dream of owning a home or a business. The best way to deal with a construction dispute is to find a cost-effective and efficient means for solving the problem.

Since 1967, Lyle Charles has been involved with the construction industry in a variety of roles. From his 18-year tenure with Joe Brashears Steel to his 25-year history of ownership in and management of major subcontracting companies to his 16+ years spent serving as a construction consultant for companies all over the world; Mr. Charles has gained a tremendous amount of experience. This includes subcontracting work on commercial construction projects such as high rise office buildings, stadiums, arenas, schools, hospitals and large shopping malls, as well as consulting work for the construction of bridges, airports, fossil fuel power plants and more.

In addition, Mr. Charles is a construction claims consultant and structural steel expert. He has testified in a number of large construction trials, prepared and analyzed numerous construction claims, and has participated in several arbitration and private mediation cases. To learn more, contact Mr. Charles at 334.798.2527 or by email at lyle@lylecharles.com.

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