# 19 Nonbinding Alternatives to Court Litigation for Resolving Construction Disputes

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# I. [19.1] INTRODUCTION

Construction disputes are common, and there are many reasons they arise, including poor communication among the parties involved; failed product and system performance; unanticipated conditions such as pandemics, weather, soils, and governmental approvals; inadequate supervision of the design and/or construction process; questions about the validity of change order requests; unrealized expectations about project cost and function; financial difficulties of contractors and owners that result in pay and mechanics lien disputes; delay from expected finish times and the consequences of that delay; potential for multiple points of financial responsibility, including insurers and sureties; design and construction errors; and insurance coverage disputes.

Construction project planning should therefore anticipate disputes, and contracts with all project participants should include methods to resolve these disputes in a timely, fair, and cost-effective manner. Court litigation may not be the best process to resolve construction project disputes, as there are good alternatives. They are generically called alternative dispute resolution (ADR) procedures and are popular in the construction industry. The term "ADR" is expansive and encompasses many processes that serve as alternatives to adjudication in court. With planning, parties can contractually elect to implement various forms of ADR to govern project-related disputes. Properly implemented ADR can avoid both the inherent delays of the court system and its high costs while preserving business relationships.

## A. [19.2] Why Not Let Court Litigation Run Its Course?

While it is understandable that some litigants want a trial for certain kinds of disputes, construction disputes are infrequently resolved through trials, especially in larger court systems. Judges often have busy dockets and do not want to commit valuable hearing time to fact- and document-intensive construction cases that often involve experts, numerous disputed issues, and counterclaims among the litigants. Judges increasingly refer parties to mediation or other "court-annexed" forms of alternative dispute resolution. Judges also encourage cases to be settled in pretrial conferences, which can lead to unsatisfactory compromises. The net result is that businesses often pay their attorneys the high cost to prepare for trials that are very unlikely to ever occur.

Construction disputes are expensive to resolve in the court system. Courts often focus more on process and procedure than on efficient dispute resolution. Courts allow for extensive discovery (including depositions) and electronic discovery, even if the subjects of discovery are not essential for the parties to make a decision to settle. Tactical motions requiring legal briefing and oral argument, plus weeks or months of delay in waiting for the judge to rule, are common in the court system. Judges often require frequent status reporting from attorneys, which can lead to additional court appearances and expense. (NOTE: Court procedure changes related to the COVID-19 pandemic, including a move toward the use of videoconference hearings, might mitigate some of the time and expense associated with certain routine in person court appearances.) The difficulty of scheduling the rare construction trial may lead to short nonconsecutive hearing days that can inefficiently span weeks or even months. Court trials use restrictive rules of evidence, especially when juries are involved. Judicial determinations often also include a right to appeal interim and final determinations, further expanding the cost of litigation.

Judicial resolution of disputes can lead to unsatisfactory outcomes, particularly for litigants who know more about design and construction than the decision-makers. The court system uses triers of fact, *i.e.,* judges and juries, who rarely understand the design and construction process. Those triers of fact who lack experience with design and construction are often unable to understand the legal and factual intricacies of issues like calculation of damages and schedule disputes. Often, triers of fact struggle to identify which disputed facts are outcome-determinative.

Construction disputes can delay project completion and increase the parties' damages and difficulties if they are not promptly resolved. Construction contracts often contain terms requiring the contractor to continue to perform — and the owner to continue to pay undisputed sums to the contractor — during the dispute resolution process. Therefore, when disputes end up in court, these "continuation of the work" clauses may require parties to continue to perform or pay even though final resolution of their dispute is years away. The lack of certainty that comes with the delay in resolving a dispute can be difficult for businesses to manage and plan around, and this uncertainty of delay is inherent in the judicial resolution of design and construction disputes.

Construction and design are also unique in the way liability is allocated and insured, and these differences can lead parties to take entrenched positions in court disputes. Construction contractors and vendors who perform nonprofessional services can limit their liability, to some extent, by doing business through corporate entities. By contrast, architects and engineers, like other professional service providers, have less ability to shield themselves from professional negligence through corporate entities. Construction contractors and vendors insure risk through commercial general liability insurance, which has many limitations and will not completely insure their risks. Architects and engineers use professional liability insurance with broad coverage that can cover liability from professional negligence claims. It is common for professional liability insurance to be a major asset pursued by claimants. However, unlike commercial general liability insurance, which tends to have comparatively small deductibles, professional liability insurance often requires the insured to pay for defense costs up to the amount of what can be large deductibles. As a result, construction cases can be difficult to settle because of the multiplicity of interests among the parties and potentially liable insurers.

While ADR is no panacea, ADR processes are inherently flexible and customizable. ADR processes are often facilitated by third-party neutrals with deep knowledge and experience in the construction industry. ADR allows the parties to opt into dispute resolution processes that consider the nuance of design and construction disputes. ADR also allows the parties to free themselves of the formalistic and inefficient manner that courts resolve disputes. Parties and their counsel can, of course, abuse ADR in ways that lead to delay and extra costs similar to those inherent in court systems. However, when disputants engage in thoughtfully designed ADR processes with a sincere desire to resolve their disputes, those disputes can often be resolved more cost-efficiently, and with less delay and harm to business relationships, than through judicial resolution.

### B. [19.3] Alternative Dispute Resolution

Mediation and arbitration are different forms of alternative dispute resolution. Arbitration, like litigation, is a form of "binding" dispute resolution. Arbitration awards are enforceable as court

judgments after they are confirmed through streamlined judicial processes. By contrast, mediation is an effectively voluntary and "nonbinding" process. Participating in mediation does not prevent the parties from retreating to binding dispute resolution processes and resuming battle through arbitration or litigation whenever they decide that approach is in their best interests.

Construction project participants can customize other popular forms of ADR on a project-by-project or contract-by-contract basis according to their needs. These ADR processes can have both "binding" and "nonbinding" elements. Some popular forms of ADR are described in §§19.4 – 19.9 below.

### 1. [19.4] Step Negotiation

When negotiations reach an impasse, the parties should consider changing the dynamics of the negotiation by including people higher in management of the stakeholder companies. Parties can often defuse emotions and reduce conflict by changing negotiators from the day-to-day project participants to more senior managers. This change can help resolve disputes without requiring the parties to enlist the help of third-party alternative dispute resolution neutrals. Like mediation, step negotiation is an effective and essentially voluntary process. Nothing prevents parties from retreating to their entrenched positions or proceeding on to the next stage of the dispute resolution process if a party deems doing so to be in its best interests.

### 2. [19.5] Dispute Review Boards

Dispute review boards are standing boards of neutrals. Dispute review boards have become widely used in major infrastructure projects based primarily on government initiatives. The dispute review board process typically arises from a predispute agreement in which the parties select several neutrals (often two industry professionals and an attorney) to monitor the project and to render advisory opinions on controversies submitted to them. Dispute review boards meet at regular intervals at the project site and issue their opinions in real time during the project. The parties generally decide whether the dispute review board's opinions will be binding. The opinions are typically not binding but may be made admissible in a later court or arbitration proceedings. A variation involves "dispute adjudication boards," whose opinions are typically binding. A detailed description of dispute review board processes and methods can be found on the Dispute Resolution Board Foundation's website, www.drbf.org.

### 3. [19.6] Med/Arb

Med/Arb combines "nonbinding" and "binding" elements. Med/Arb contemplates that the same neutral can act first as a mediator and then, if the parties cannot settle, as an arbitrator. Critics of this process argue that mediators may learn facts about a party or a dispute during mediation they would not learn during arbitration and that this knowledge might affect their impartiality. Med/Arb is sometimes used to empower the mediator to arbitrate disputes about implementing settlement agreements. Med/Arb also may be appropriate in very specific situations involving sophisticated parties. In most cases, however, it should not be a default method of alternative dispute resolution in predispute ADR agreements.

### 4. [19.7] "Initial Decision Maker"

The contract documents issued in 1997 by the American Institute of Architects (AIA) required the architect to make an initial determination about disputes between the owner and contractor. But contractors were concerned about the ability of an owner-hired architect to be impartial in these disputes. These concerns led the AIA, in its 2007 and 2017 contract documents, to allow the owner and contractor to contractually designate an "Initial Decision Maker" who may be the architect or another party. If either the owner or contractor find the initial decision unsatisfactory, they can file for nonbinding mediation or binding arbitration or litigation. The initial decision can become final and binding, however, if not timely appealed through the contractually mandated dispute resolution process. AIA contract documents also provide that the architect's decisions about aesthetic issues can bind the other parties if those decisions are rendered in a manner consistent with the intent of the contract documents.

### 5. [19.8] Court-Annexed Procedures

Many courts have adopted "court-annexed" nonbinding dispute resolution procedures for smaller claims, bodily injury cases, or proceedings that involve highly specialized legal issues.

One example is the Cook County Circuit Court Municipal District Mandatory Arbitration Program, which is governed by Illinois Supreme Court Rules 86 – 95 and Cook County Circuit Court Rules 18.1, *et seq.* The program applies to certain types of comparatively small civil actions in which the plaintiff seeks only money. The actions include property damage, breach of contract, and personal injury actions. The program provides for an expedited hearing before three Illinois-licensed attorneys, called "arbitrators," who have passed an arbitrator training program certified by the court. At the hearing, the parties may either be represented by an attorney or proceed pro se. The arbitrators render a written "award" after the hearing and deliberations. Either party may file a rejection of the award within 30 days by paying a fee to the clerk of court. The fee, which is waived for indigent parties, discourages frivolous rejections. If the award is rejected, the case is returned to a standard judicial track for ultimate decision by judge or jury (unless the court bars a party from rejecting the award because the party failed to participate in good faith). An award not rejected may be entered as a court judgment, terminating the case.

The Cook County Circuit Court also facilitates several court-annexed mediation programs governed by S.Ct. Rule 99, including general civil case mediation and specialty mediation programs for mortgage foreclosures and domestic relations cases. Cook County Circuit Court Rule 20.02(a) empowers individual calendar judges and motion judges to order, and enables the parties to agree to, mediation of any issue at any time during litigation of certain kinds of civil actions. Civil cases seeking damages over $30,000 are eligible to be referred to the Circuit Court of Cook County's Major Case Court-Annexed Civil Mediation Program, including personal injury claims, complex contract cases, products and professional liability actions, and commercial litigation. See Court-Annexed Civil Mediation Process, www.cookcountycourt.org/department/court-annexed-civil-mediation.

More information about the Cook County Circuit Court's court-annexed ADR procedures is available on the court's website, www.cookcountycourt.org. The rules and procedures governing the various Cook County Circuit Court Mandatory Arbitration Program vary based on the district or division in which a case is assigned.

### 6. [19.9] Other Flexible Processes

Other alternative dispute resolution processes exist on the continuum between the extremes of "binding" arbitration and "nonbinding" mediation. Some processes, like "partnering," seek to foster communications between important party participants both before and during the project as a way to proactively avoid disputes. Other ADR processes are implemented after disputes arise, including neutral evaluations, minitrials, and other variations. These processes use a third party to "evaluate" the merits of the dispute. When third parties are employed after a dispute has arisen, they are often called "neutral evaluators." In "early neutral evaluation," an expert respected and trusted by the parties is selected to evaluate disputes. When employed predispute based on construction project agreements, third-party evaluators are often called "standing neutrals," who typically do not visit the project site at regular intervals, or may be members of dispute review boards. While the parties' agreements may or may not provide that these evaluations are binding, the parties may also agree to have the neutrals' opinions admissible in later arbitration or litigation, if desired.

## C. [19.10] Contractual Election of Alternative Dispute Resolution

Numerous well-respected agencies provide resources to help construction contract drafters design and implement alternative dispute resolution processes. They include the American Arbitration Association (AAA), www.adr.org; the AAA's international subsidiary, the International Centre for Dispute Resolution (ICDR), www.icdr.org; JAMS (formerly Judicial Arbitration and Mediation Services), www.jamsadr.com; ADR Systems, www.adrsystems.com; and the International Institute for Conflict Prevention and Resolution (CPR), www.cpradr.org. The AAA's ClauseBuilder Tool (www.clausebuilder.org) is a good resource for drafting agreements to mediate and arbitrate. Another good resource is the AAA publication *Drafting Dispute Resolution Clauses: A Practical Guide* (2013), https://uat.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf (case sensitive).

Contract drafters should become familiar with ADR agency rules and procedures, which are typically available on the various agencies' websites, before selecting an ADR agency in a predispute contract clause. This chapter cites examples from the AAA's Construction Industry Arbitration Rules and Mediation Procedures (https://go.adr.org/rs/294-SFS-516/images/ConstructionRules_Print%20Final.pdf (case sensitive)), as amended and effective March 1, 2024, an important document for those who participate in mediation and arbitration under the auspices of the AAA. Other agencies, including the ICDR, JAMS, CPR, and ADR Systems, also have highly regarded mediation and arbitration rules and procedures.

For more discussion about other forms of "binding" and "nonbinding" ADR, and for discussion about drafting predispute ADR clauses, see Jeremy S. Baker and Jonathan Berjikian, Ch. 13, *Alternative Dispute Resolution Terms in Construction Contracts,* CONSTRUCTION LAW: TRANSACTIONAL CONSIDERATIONS (IICLE®, 2025). See also Judith Meyer and Ty Holt, *On Professional Practice: New Sequences, Techniques, and Approaches for Commercial Mediation,* 23 Disp.Resol.Mag., No. 3, 28 (Spring 2017) (discussing these alternative formats categorized as "Mixed Mode").

## II. [19.11] MEDIATION

Mediation is a flexible, nonbinding process in which an expert facilitator or "neutral" helps the parties determine whether and when settlement is in their best interests. Mediation, a creature of party agreement, allows disputing parties to establish a formalized settlement process when informal negotiation has failed to resolve the dispute.

### A. [19.12] Benefits of Mediation

An optimal mediation — in which the stakeholders work together in an earnest and good-faith effort to overcome impasse — can spare the parties the expense and inconvenience of litigation or arbitration proceedings. Mediation cannot fulfill its potential to create cost-efficient settlements, however, if it is not used before parties spend money on extensive discovery, including complete exchanges of project documents, many interrogatories, and numerous depositions. In most cases, mediators should be hired as soon as it appears to the parties that the matter is headed toward discovery and motion practice in court or arbitration, if not sooner.

Ideally, mediation should begin before the parties' relationship has so deteriorated that they cannot negotiate something that resembles a win-win solution. This means that the parties should consider hiring the mediator even though they may need to exchange additional information to become ready to begin to try to negotiate a settlement. Among other things, good mediators know that one of their primary jobs, when hired early in a dispute, is to make sure that the parties have enough information to negotiate and make an informed decision to settle; they know this is usually much less information than is necessary for the lawyers to try the case; and they know how to convince parties it is in their best interests to exchange information collaboratively.

Federal law and state law provide, to varying degrees, that mediation is confidential. Illinois has adopted the Uniform Mediation Act, 710 ILCS 35/1, *et seq.,* which provides confidentiality protection in both formal mediation agreements and informal agreements to mediate. A mediator has the unique power under Illinois and other states' laws to receive information in confidence. Based on that privilege, even if the case does not settle, mediators cannot be required to disclose what they have learned. Further, the parties typically cannot be required to disclose why they did not settle or what positions they took during the mediation. This confidentiality can foster more open and honest discussions than if the parties are "officially" on the record.

Even when initial mediation negotiations do not lead to a settlement, mediation often changes the atmosphere in which the parties subsequently attempt, and often succeed, to negotiate a settlement. Because of its flexibility, mediation can occur before, during, or even after litigation or arbitration, including when potential appeals loom. The best mediators are negotiation and human behavior experts who understand how to turn the parties into more effective negotiators.

### B. [19.13] Contractual Election of Mediation

Many lawyers incorrectly think of mediation as just a court-style pretrial settlement conference. Mediation is inherently flexible and can be a much more dynamic process. Mediation is best used early in the life of a dispute. For mediation to most effectively prevent cost and delay, parties should incorporate the requirement to mediate into contracts when they are negotiated at the outset of the project — and before any dispute arises.

Disputing parties can also agree to use alternative dispute resolution processes after a dispute arises, although getting an agreement at that point may be challenging. Even if mediation is not required by contract, an attorney, judge, or arbitrator can suggest the parties voluntarily agree to mediation. However, without a contractual obligation to mediate, parties may resist using mediation at an early stage of the dispute, before they incur the expense and time of the court system. By the time a dispute arises, the parties may not be able to agree to anything, let alone the use of mediation or other nonbinding forms of ADR in lieu of binding forms of dispute resolution.

Many standard form agreements include mediation clauses, including those of the AIA, ConsensusDocs, and the Engineers Joint Contract Documents Committee (EJCDC). These forms also incorporate by reference the American Arbitration Association's Construction Industry Mediation Procedures in effect on the date of the contract. Mediation agreement drafters may also use rules of mediation agencies such as the International Institute for Conflict Prevention and Resolution and JAMS. These rules are similar to the AAA mediation rules.

A mediation clause for construction and design contracts based on the AAA's Construction Industry Mediation Procedures is set forth below:

> **If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its [**Construction Industry**] Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.** See AAA, *Clauses,* www.adr.org/clause-drafting.

Participants can minimize the need for long agreements to mediate by incorporating into their contract the rules of the agency that will administer the mediation, *e.g.,* AAA, JAMS, or CPR. Note that participants can use these rules without using the agency to actually facilitate the mediation. The Uniform Mediation Act, which Illinois has adopted, further reduces the need for the parties to enter into long, formal mediation agreements.

The parties face little downside if they agree to participate in mediation, either by predispute contract or by postdispute arrangements. Even when a party is contractually obligated to mediate, it can end the mediation and retreat to its default binding dispute resolution processes at any time it deems that course to be in its best interests. While a party's participation in mediation is essentially voluntary, note that a party's unilateral and unjustified failure to participate in a contractually mandated nonbinding ADR procedure has, in some cases, been held to bar the party's ability to assert claims and defenses in litigation that should have first been submitted for a nonbinding determination. *See generally Mayfair Construction Co. v. Waveland Associates Phase I Limited Partnership,* 249 Ill.App.3d 188, 619 N.E.2d 144, 188 Ill.Dec. 780 (1st Dist. 1993) (contract required initial submission of disputes to architect as prerequisite to binding dispute resolution).

That mediation is an essentially voluntary form of ADR is both good and bad. Parties may not treat the mediation process seriously even though they have a contractual obligation to mediate, and one party or the mediator may need to resell the value of mediation to the other party. But even

if the parties are not ready to negotiate, they can engage a mediator to help them confidentially investigate the reasons settlement has not occurred and design a settlement process that addresses what the parties need in order to begin to negotiate. The parties should be discouraged from commencing settlement negotiations before they are ready to take that step.

### C. [19.14] Initiating Mediation

If the parties are contractually required to mediate and want an agency to facilitate their mediation, they can file what is typically called a "Request for Mediation" form. When disputing parties have no predispute agreement to mediate, they may initiate mediation by filing what is often called a voluntary "Submission to Mediation" form with the agreed-on mediation agency. These forms can be found on the agency's website. The parties can also agree to mediate without using an agency if they so desire.

If the parties did not agree to predispute mediation, they can revisit the issue when filing a "Demand for Arbitration" with the American Arbitration Association. See AAA, Construction Arbitration Rules Demand for Arbitration, www.adr.org/media/gcufci4u/construction_demand_form042020.pdf. That form allows a party to check a box indicating the party prefers to first explore mediation, facilitated by the AAA, before moving into arbitration. Additionally, even if the parties have no predispute agreement to mediate, under AAA Construction Industry Arbitration Rule R-10, in all cases in which a claim or counterclaim exceeds $100,000, the AAA presumes that the parties have consented to explore the use of mediation unless one or more parties opt out by giving notice to the AAA.

### D. [19.15] Choosing a Mediator

After the parties agree to mediate, they face the challenge of selecting a mediator. Mediation is heavily influenced by the mediator's style, preferences, and approach. Selecting the right mediator can make the difference between the parties achieving an early mediated settlement or having to endure the cost and time of litigation or arbitration.

The best mediators and the best arbitrators have different skills. Because arbitrators act in many ways like judges, their experience and knowledge of the facts, the law, and construction project custom and usage is critical. That knowledge is important for mediators as well, but mediators must also be familiar with the human psychology of why people adopt positions and may resist changing them. A good reference work for mediators and advocates is Jennifer K. Robbennolt and Jean R. Sternlight, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING (2013). Depending on the nature of the dispute and identities of the stakeholders involved, some well-qualified arbitrators and construction lawyers may not be well suited to serve as mediators.

Mediation agencies can help the parties agree on a mediator by suggesting qualified neutrals. Agency assistance can also help parties expedite any mediation. Parties frequently use the forms and processes of mediation agencies because doing so can speed up the hiring of the mediator and reduce the likelihood of disputes over the specifics of the mediation process. These agency rules also incorporate confidentiality requirements and require proposed mediators to investigate and

disclose any conflicts of interest that may exist based on the mediator's past interactions with the disputing parties or their counsel. While undisclosed conflicts are generally not a basis to set aside a mediated settlement agreement, undisclosed conflicts can raise issues of trust that are important to the dynamics of mediation.

At the outset of the mediation process, a mediator must gain enough understanding of the facts underlying the controversy to gain the parties' trust. The best mediators view their role as helping the parties reach their own conclusions about the risks they face, rather than deciding the odds of who is right and who is wrong. Qualities of a good mediator include the following:

- an ability to investigate and understand the real reasons a dispute has not settled — whether the reasons are legal or factual or are based on human and organizational behavior — and to design a mediation process that overcomes any obstacles (this understanding and work must occur before mediated settlement negotiations begin)

- an ability to encourage collaborative and efficient information exchange and an ability to convince people not to begin negotiations until they have enough information

- an ability to help the parties identify existing and possible future reasons for impasse to avoid surprises during negotiations that can prematurely end the mediation

- a willingness to work hard and creatively even when the parties are at an impasse

Lawyers must search out mediators with these traits. Reviewing mediator résumés is a start, but that is not enough. While lawyers may begin their search with email inquiries to their colleagues, lawyers searching for mediators must follow up on any responses they receive in order to assess the feedback. For example, their colleagues may criticize a mediator for reasons that were not the mediator's fault.

Good mediators are willing to be interviewed about their experience and philosophy ex parte by counsel. Questions to ask during the mediator selection process may include the following:

- Will the proposed mediator work to understand how the parties arrived at their different settlement positions and who was involved in that process? Do they understand the phenomena of fear of loss and uncertainty and how they affect settlement offer evaluation? Frequently, if a dispute does not settle, it is because the parties have inaccurate assessments of their case and the risks they face, often created by lawyers or experts, or because of the psychological negotiation style of the decision-makers. See Daniel Kahneman, THINKING, FAST AND SLOW (2013).

- Will the proposed mediator discourage scheduling the mediation until after the mediator has had confidential conversations with the parties' attorneys, and perhaps their retained experts, to determine all the factors causing the settlement stalemate? These factors may include not only issues of law, fact, and opinions but also biases and heuristics that affect the parties' positions.

- Will the proposed mediator discourage the parties from engaging in formal settlement negotiations until the mediator is satisfied that the parties have enough information to engage in meaningful settlement negotiations? When a lawyer states that a client is not ready to mediate, the lawyer often means that the client does not have enough information to make a business decision to settle.

- Is the proposed mediator committed to finding ways to achieve the earliest possible resolution of the dispute and ways for the parties to obtain needed information efficiently? A mediator can help the parties informally exchange information, including expert opinions, quickly, cost-effectively, and on a nonadversarial basis.

- Is the proposed mediator willing to discuss, publicly or privately with the parties, what issues may lead to impasse and how these impasses can be overcome? Overcoming impasse may include additional information exchange, perhaps including limited depositions, and sending important motions on potentially dispositive issues to be decided by an arbitrator or judge on a binding or nonbinding basis.

- Is the proposed mediator willing to be available to consult even if the parties have adjourned settlement negotiations? As long as the mediator continues to have the parties' trust, the mediator should in most situations continue to try to facilitate a settlement during the arbitration or litigation process.

Lawyers may also seek mediators certified or vetted by professional organizations. The International Mediation Institute, https://imimediation.org, was formed by major mediation providers and posts lists of qualified U.S. and international mediators that are certified based on references from people who have used their services at https://imimediation.org/find-a-mediator. The American Arbitration Association posts the qualifications of its national mediation panel on its website, www.aaamediation.org, which also contains an extensive list of mediator profiles. JAMS also lists the members of its neutral panel on its website, www.jamsadr.com, as does the International Institute for Conflict Prevention & Resolution, www.cpradr.org, and ADR Systems, www.adrsystems.com.

### E. [19.16] Customizing the Process

After the parties choose a mediator, the mediator should work with the stakeholders and their counsel to design a mediation process customized for the particular dispute and parties. The best mediation practices do not come out of formbooks; rather, they require active participation by counsel and the parties to tailor the mediation to the needs of the specific dispute.

A well-designed mediation may require the participation of a variety of parties. For example, in a construction dispute, there may be parties involved in the controversy, including insurers and sureties, who are not contractually required to participate in the mediation. However, a good mediator often can persuade parties whose participation may benefit the mediation to play a role in the process. If such a party agrees to voluntarily participate in the mediation, but not as a party, it should join the other mediation participants in a confidentiality agreement.

### F. [19.17] Settlement Agreements in Mediation

While the parties' principal settlement efforts may focus on settlement demands and offers of money, the parties should not overlook the importance of the settlement agreement itself. Parties should consider issues including the following as part of the overall settlement negotiation process: the timing of payment; the scope of release; any agreement to defend or indemnify; confidentiality; enforcing the agreement; and whether any party may be responsible to perform future work or services. If the parties settle, the advocates, not the mediator, should reduce the essential terms to a memorandum of understanding before the mediation session is adjourned. Settlements agreed to in principle at mediation can fall apart when the parties later attempt to reduce the deal to a formal written settlement agreement.

## III. [19.18] ALTERNATIVES TO TRADITIONAL MEDIATION

Mediation is an inherently flexible process. It is limited only by the creativity of the mediator, the parties, and their lawyers and by their collective commitment to work toward a settlement. The problems typically associated with traditional mediation can be overcome if all parties share a sincere and good-faith desire to negotiate an acceptable resolution to the dispute without resorting to more expensive and time-consuming binding dispute resolution.

### A. [19.19] Problems with Traditional Mediation

Mediation is frequently delayed until the parties have incurred considerable expenses. This delay occurs, in part, from uncertainty about the optimal time to negotiate a settlement. The expense and animosity that can result after protracted arbitration or litigation proceedings often dulls a client's interest in settlement. Yet experience and empirical evidence show that the vast majority of design and construction disputes settle before final verdict or arbitration award.

While lawyers think they understand mediation, many offer misguided reasons why mediation is not appropriate early in a dispute. Those reasons include the following:

- "The other side is unreasonable, and mediation is a waste of time." At the early stages of a dispute, parties are often angry at their opponents. Lawyers may give their clients unrealistic evaluations of the cost, time, and probable outcomes, leading them to reject mediation in favor of arbitration or litigation.

- "Suggesting mediation to my opponent is a sign of weakness." "Before we can settle, we need to show them they are wrong." These assumptions are mistaken, particularly in construction disputes where mediation is common.

- "We do not know if the case will settle. Therefore, we must leave 'no stone unturned' in the discovery process to protect the client." This approach forgoes mediation or delays it until after expensive discovery — even though a more limited information exchange is, frequently, all the parties need to settle the case.

These self-fulfilling attitudes lead attorneys to reject using mediation early in the life of a dispute. Many lawyers do not understand that, from the financial and business perspective of their clients, the time when a case is settled can be as important as the terms on which the dispute is settled. Late settlements can be disruptive to business and cost avoidable expenses, so clients may perceive delayed settlements as Pyrrhic victories.

There are good reasons for parties to work to overcome the problems with traditional mediation. Skilled mediators can often settle cases fairly quickly. They encourage parties to exchange information before any negotiations begin. With this information, disputing parties can evaluate each other's positions efficiently. Parties and their counsel can identify legal issues and factor them into settlement discussions without the formality, cost, and delay of binding dispute resolution. Many professional liability insurers of architects and engineers even give discounts off of their insureds' deductible obligations for cases settled in mediation. These features mean clients may save substantial money by resolving their disputes through mediation.

Parties can continue trying to settle through mediation even if they have reached impasse and proceed to arbitration or litigation. Even when cases are not settled by an initial mediation, the issues in dispute often are narrowed, making it easier for the dispute to settle after arbitration or litigation begins. And at the point of impasse, the mediation process, even if it has not resolved the dispute, offers an opportunity for parties to design an effective arbitration process tailored to their needs in areas including discovery and expedited hearings.

### B. [19.20] Guided Choice: A Flexible Alternative

Because most construction cases settle before trial or arbitration hearings, clients appreciate lawyers and mediators who know how to resolve disputes earlier and avoid the cost and delay of preparing a case for an unlikely trial or arbitration hearing. The Global Pound Conference Series, https://imimediation.org/research/gpc, which focuses on dispute resolution in commercial disputes, is demonstrating that people perceive successful mediators and lawyers as those who know how to provide value by delivering earlier settlements.

For these and other reasons, disputing parties may want to consider using Guided Choice, a form of mediation that focuses on facilitating earlier settlements. There are no formal rules or requirements for using Guided Choice. Rather, it is a collection of best mediation practices used by the best mediators. Guided Choice has received much favorable attention from the construction community in recent years. See, *e.g.,* Judith Meyer and Ty Holt, *On Professional Practice: New Sequences, Techniques, and Approaches for Commercial Mediation,* 23 Disp.Resol.Mag., No.3, 28 (Spring 2017). The principles behind Guided Choice are not new. Skilled construction lawyers and mediators have long employed its strategies and processes to help disputing parties reach early, cost-efficient settlements.

Guided Choice requires lawyers and mediators to reconceive the role of mediators. The goal of Guided Choice is two-fold: to settle the dispute, and to do so early to avoid the expense involved in postponing the settlement until later in the litigation or arbitration process.

Traditional conceptions of mediation view the mediator as someone who presides over negotiations — often a single-day mediation event — where the parties make oral and written presentations. The traditional mediator focuses on the negotiations and pays less attention to exploring why the dispute is at an impasse. Traditionally, if the parties cannot settle quickly, the mediator's role terminates and the parties go back to spending money on discovery to prepare for what can be an unlikely trial or arbitration hearing. Without the continued presence and involvement of a mediator, the subject of settlement often does not arise until the eve of trial or arbitration hearing and after the parties have incurred substantial legal costs.

Guided Choice suggests the parties use the neutral as a "mediator guide" to help them gather facts to gauge the probability of litigation or arbitration success early and to compare the option of settlement to the likely alternatives. A Guided Choice mediator becomes involved at the earliest possible time so the mediator can help drive the process. The mediator then identifies any relevant legal, factual, or psychological attributes that are obstacles to settling the case. The Guided Choice process relies on collaborative information exchange rather than on formal discovery. Guided Choice also involves a good-faith commitment by the parties and the mediator to work through impasses until they reach a settlement. Parties need not fear this commitment because they maintain a right to terminate the process, without cause, if they objectively believe that litigation or arbitration will produce a net benefit greater than a mediated settlement.

The principles of Guided Choice are described on its website, https://gcdisputeresolution.com, and include the following:

**Commitment to mediate as early as possible.** To gain the advantages of early dispute resolution, a mediator must be engaged as soon as possible. If the parties are bound to standard forms requiring administration by the American Arbitration Association or a similar agency, the parties initiate the mediation process by filing a request for mediation. The parties should emphasize to the agency their desire for a list of mediators who understand the early dispute resolution process, *i.e.,* the principles associated with Guided Choice. The parties should insist on interviewing the mediator candidates the agency proposes. Alternatively, the parties can agree to mediate and work to select a mediator without agency assistance. Once the mediator is chosen, the parties should ask the mediator to require a process with both pre-negotiation and negotiation phases.

**Confidential discussions with mediator and diagnosis of the reasons for impasse.** Lawyers typically become involved in disputes when the stakeholders are at an impasse and cannot resolve the dispute on their own. Disputes are more likely to be resolved if the mediator understands the reasons the parties have reached impasse. This knowledge helps the mediator customize the process to overcome any obstacles. But mediators must do more than simply read legal briefs to effectively diagnose an impasse. Parties and their counsel do not always understand the reasons for impasse. That is no surprise: the reasons are wide ranging, including personal, emotional, or cultural factors that lie beneath the parties' public positions.

The mediator's most important tool is the ability to speak to the attorneys and their clients and experts on a confidential basis. To set the stage for an effective mediation, each party must be open, frank, and without fear that its disclosures to the mediator will help their adversaries gain an

advantage in any later binding dispute resolution proceedings. The mediator should work to understand the key stakeholders and to determine what information the mediator needs to understand their positions and interests; the financial, legal, timing, or other constraints they may face; and the potential for the conflict to escalate if it is not thoughtfully managed. The mediator's work may require insurers or other third parties to become involved in the process. The mediator can also help the parties' decision-making process and address any organizational or administrative issues they may confront, including biases, coalitions, hostilities, risk aversion, antisocial patterns, or other psychological factors that have contributed to an impasse.

**Process design and option generation based on diagnosis.** After the mediator identifies the reasons for impasse, the mediator helps the parties to design a custom mediation process. Too often mediations are viewed as a singular — often single-day — event at which the mediator is expected to facilitate a compromise between the parties' entrenched positions and "bottom lines." The parties often ask the mediator to suggest a settlement proposal if the first rounds of settlement demands and offers fail to yield a compromise. If a settlement is not quickly reached, the mediation process is often abandoned. Guided Choice avoids such a "positional" negotiation. For example, if the mediator determines that the parties lack enough information to understand the best, worst, and likely alternatives to settlement, the mediator can help design a custom mediation — and sometimes arbitration — process for the parties to use as a basis to resolve their dispute. Mediation may be more likely to succeed when the parties have an agreed arbitration process in place.

**Information exchange in accordance with agreed process.** A Guided Choice mediator can also help the parties prepare for a successful mediation. When a lawyer states that a client is not ready to mediate, the lawyer probably means that the client does not have enough information to make a business decision to settle. Typically, this lack of information leads to expensive and time-consuming discovery, conducted on an adversarial basis, in arbitration or litigation. Using Guided Choice tools, a mediator can help the parties informally exchange information, including expert opinions, quickly and cost-effectively. The parties can agree on a limited information exchange, with a possible broader exchange of information and documents reserved for the future if they need binding dispute resolution. This approach to information exchange can be particularly useful and cost-efficient if the dispute involves substantial volumes of electronically stored information.

**Anticipating impasse.** After the parties exchange information but before they start settlement negotiations, it can be useful for the parties to meet with the Guided Choice mediator to anticipate areas of potential impasse and how they might be overcome. This meeting can help the mediator understand what additional information may be necessary to overcome impasse and help the parties to avoid the feelings of frustration that may develop if they deadlock during negotiations. If each party understands in advance the position its adversary is likely to take in the mediation, the parties are less likely to reach a premature impasse based solely on dollars demanded and dollars offered during negotiations. Using this approach, a Guided Choice mediator, acting as a process facilitator, can help the parties consider a range of possible outcomes and the likelihood they can improve on their best or likely alternatives to a settlement.

**Overcoming impasse.** Sometimes parties share a desire to settle but face disputed issues that prove so overwhelming they impair the parties' ability to think beyond them. A Guided Choice

mediator can help parties anticipate impasse even before negotiations begin by conducting "what if" exercises. This process, called scenario planning, is similar to the preconstruction "partnering" process often used in pre-project planning. The mediator helps the parties think about what could happen during anticipated future negotiations and how any impasses could be overcome.

If impasse develops during negotiations, the mediator can use creative techniques to help the parties overcome it. These techniques include providing for additional information exchange, perhaps including limited depositions, and sending important motions on potentially dispositive issues to be decided by an arbitrator or judge on either a binding or nonbinding basis. If a disagreement among experts is driving impasse, the mediator may suggest a meeting with all the experts to narrow their differences of opinion. Because these meetings are part of a settlement process and mediation, what is said at a meeting cannot be directly used against an expert in later testimony. There may also be advantages to asking an expert to provide binding or nonbinding opinions on key issues to overcome impasse. Arbitration or conciliation (in which an expert gives preliminary views or a nonbinding proposal) can be a useful adjunct to mediation (and vice versa). The Guided Choice mediator can play a key role in customizing this process, working with the parties, their counsel and experts, and sometimes arbitrators or judges.

**Ongoing role of facilitator if negotiations are suspended.** Guided Choice also helps the parties understand that the settlement process is not a single day, one-off event. Occasionally, in a Guided Choice mediation, the parties will suspend negotiations to allow depositions or limited discovery, conducted under the auspices of arbitration or litigation, to proceed. Hiring a mediator early can help the parties determine, based on the mediator's confidential investigation, whether they should start arbitration or even litigation proceedings. The Guided Choice mediator can continue to play an important role in these circumstances. The mediator understands the parties' procedural needs because the mediator has already diagnosed the reasons the dispute did not settle. The mediator may help control the time and cost of the adversarial process by customizing discovery and motion practice. Judges and arbitrators should encourage this mediator participation. The Guided Choice mediator's ongoing involvement can remind the parties that channels of communication for settlement remain open even though they have started binding dispute resolution. The mediator may facilitate settlement discussions to occur in parallel with developments in the adversarial binding process.

Additional written information and informative videos about the Guided Choice Mediation process can be found on the authors' website, Baker Law, *How Guided Choice Mediation Achieves Earlier Settlements of Design and Construction Disputes,* https://buildchicagolaw.com/how-guided-choice-mediation-achieves-earlier-settlements-of-design-and-construction-disputes, and *Why Are "Process Design" and "Generation of Options" Essential to Guided Choice Resolution?,* https://buildchicagolaw.com/video-category/guided-choice-mediation.

## IV. [19.21] CONCLUSION

Disputes are inevitable in the construction process, whether a project is big or small. And participants must accept that disputes can end in impasse, regardless of the good faith of the parties, based on their different understandings of the law and the facts. Nonbinding alternative dispute

resolution is frequently used and often successful at resolving these disputes. For this reason, lawyers should consider whether it is in their clients' best interests to explore the use of mediation, or other forms of nonbinding ADR, before engaging in binding dispute resolution processes — and even if litigation or arbitration proceedings are already underway.