

RESOLVING LEGAL DISPUTES

by
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I. Introduction

If there is a dispute regarding a design issue, architects and engineers typically should seek the advice of legal counsel. Initially upon learning of such a dispute, architects and engineers should contact their insurance carrier who covers their errors and omissions policy and inform the carrier of the facts and related material in dispute. Thereafter, the errors and omissions (“E&O”) insurer will retain, when the circumstances dictate, counsel to protect the interests of the architect and engineer. The architect and engineer will deal directly with such insurance counsel who is retained specifically to protect the interests of the architect and engineer of insurance does not apply, the design professional should consider hiring its own counsel, at least for an initial assessment of the situation.

Legal disputes generally have phases that fall into the following order:

II. Negotiation

A. Design Professional

While informal negotiation can occur directly between a design professional and the party alleging the grievance or creating the dispute, such negotiation should be minimized by the design professional, because:

§ The design professional is too closely attached to the project and the dispute to provide objective intercourse.

- § The design professional, while skilled as an architect or engineer, may not be fully equipped with all the legal ramifications of the dispute to most-adequately represent him or herself.
- § Personalities of those directly involved often should be removed from, rather than in the mix of, the dispute.

B. Attorney

Understanding a lawyer's role and responsibilities in the negotiating process will assist in determining your goals with your lawyer. It seems obvious that lawyers must always negotiate in an ethical manner. But when does this really mean? Sometimes negotiation is best served by delay in resolution so that other events can develop. Rule 4-3.2 requires that a "lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." What happens when the client's interests are to slow down the process, not speed it up for a prompt conclusion?

Clients sometimes demand that their lawyer huff and puff in negotiation, expecting their lawyer to threaten all manner of horrible events if the other side does not succumb to the client's demands and expectations. Yet these same clients have confided with their attorney that they will settle at all costs. Rule 4-3.1 provides that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

This language essentially is the same as Rule 55.03 of the Missouri Rules of Civil Procedure, relating to a lawyer's good-faith representation about pleadings and other documents that are signed and filed with the court. Clearly, negotiation should not be treated with less regard for accuracy and truth than a pleading, yet lawyers frequently feel that oral negotiations enjoy a lower standard. Rule 4-3.1 makes clear that this should not be the case. Some may argue that this Rule only comes into play if there is a pending proceeding, but of course, the Rules should be read for their widest application when it comes to candor and honesty.

Rule 4-4.1 provides that a lawyer shall not knowingly "(a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." The Comments to the Rule, however, state that a "lawyer is required to be truthful

when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.”

Does this mean a lawyer can remain silent during negotiations when he or she knows the other side is not aware of important facts that would affect how a case should be evaluated? After all, negotiation does not mean doing opposing counsel's homework.

Negotiation at the earliest stage always is the best course to resolving a matter with the least emotional sacrifice, financial downside, and personal involvement that otherwise diverts the design professional from his or her true talents and most-productive use of time; namely, to design and supervise construction projects. Therefore, early reliance upon a lawyer, while resulting in some fee up front, often yields disproportionately favorable results over those who choose to wait until later stages in the dispute.

III. Mediation

Somewhere between 90 to 95% of all lawsuits settle. Mediation has proven to be an extremely effective tool in facilitating many, if not most, of these settlements. In many instances, mediation by contract is a required first step before a case can be pursued through traditional court or arbitration or before hearing or trial.

Mediation is the process of negotiating a dispute with a mediator who assists the parties in reaching their own agreement on the terms and conditions of any settlement. The mediator does not decide the dispute.

Mediation, almost without exception, is nonbonding unless the parties reach a mutual agreement to settle and the terms of the settlement. Mediation can occur by contract, consent or court order, such as pursuant to Rule 17 of the Missouri Rules of Civil Procedure, which provides in part: “counsel shall advise their clients of the availability of alternative dispute resolution programs.” Rule 17(b).

Forms of Mediation

A. Contract

An example of a general mediation provision is “The parties to this Contract agree to submit all disputes to nonbinding mediation with a mediator to be selected and agreed upon by all parties.” A construction

industry standard provision on mediation between owner and general contractor is Article 4.5, AIA Document A201-1997, General Conditions of the Contract for Construction. It provides:

4.5.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

4.5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

4.5.3 The parties shall share the mediator's fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

B. Consent

Mediation is available at any point before or after a lawsuit is filed or a demand for arbitration is made. Consent is all that is required. Since almost all cases settle, consent to mediate should be given early, even if

the parties wish to delay the timing of the mediation. Asking to mediate is not a showing of weakness.

C. Court Order

Both the Federal and Missouri state courts encourage the parties to mediate shortly after the lawsuit is filed. The mediators come from a pool of certified mediators in federal court and approved mediators in state court, per the following:

1. Federal Court, Eastern District of Missouri, Local Rule 16-6.01 through 16-6.05
2. Missouri Court, Supreme Court Rule 17 Alternative Dispute Resolution Program – Establishment Purpose – Definitions” . . . and “Counsel shall advise their clients of the availability of alternative dispute resolution programs.” Rule 17.02(b).

Mediators are required to report to the court if the parties and counsel mediated “in good faith.” Court sanctions can be imposed. Parties generally split equally the fees and the costs of the mediator.

D. Other Items to Consider

Counsel and the design professional need to take an active role in determining the timing of when to mediate. Sometimes discovery is needed before the mediation will be fruitful.

All mediations should be conducted pursuant to a written agreement between parties, counsel and the mediator to protect confidentiality. See §435.014, R.S.Mo., Supreme Court Rule 17, and Rule 408 of the Federal Rules of Civil Procedure.

Parties can designate in the agreement (i) a specific mediator and (ii) the level and type of experience required of the mediator and can select the type of mediator, such as facilitative, evaluative or transformative.

IV. Arbitration

Arbitration rather than a court proceeding requires a written agreement between two or more parties that a particular, defined dispute or a potential dispute in the future will be decided by binding arbitration.

Arbitration is the “submission for determination of disputed matter to private unofficial persons selected in a manner provided by law or agreement.” *Black’s Law Dictionary*. This makes the arbitrator the decision maker who must, without bias or compromise, reach a “just and equitable” result (under AAA’s Rules) consistent with the parties’ agreement.

Arbitration Items to Consider:

A. Governing Law

1. Federal Arbitration Act: 9 U.S.C. §1-15
2. Missouri Arbitration Act: Chapter 435 R.S.Mo.
3. Uniform Arbitration Act

B. Arbitration Provisions

Arbitration can only occur by specific agreement, either through a pre-dispute contract (typically in the original contract between the parties) or by consent (typically after the dispute unfolds). Often, there is a standard form agreement between Owner and Architect that will cover arbitration. An example is:

ARTICLE 4 ARBITRATION

§ 4.1 Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise.

§ 4.2 A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations.

§ 4.3 No arbitration arising out of or relating to this Agreement shall include, by consolidation, joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement signed by the Owner, Architect and any other person or entity sought to be joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties to this Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

AIA Document B727 (1988) between Owner and Architect

The following items can be considered to customize standard ADR provisions (such as the above provision). While most of these items should be discussed with a lawyer, in general they are worth noting, as follows:

1. The parties must select a forum for resolution of their dispute. Among the choices are:

- a. American Arbitration Association
- b. U.S. Arbitration & Mediation
- c. Pinnacle
- d. Other professional groups
- e. Private

2. A critical item to consider is the scope of dispute or potential dispute that the parties wish to be subject to arbitration. The parties may decide that the agreement should be to arbitrate everything, no matter what is the dispute over the construction project. Or, they may want to limit the arbitration in one or more ways, such as:

- a. Minimum or maximum dollar amount of dispute
- b. Specific type of claims (fraud, tort, personal injury)
- c. Claims involving non-parties to the arbitration agreement are excluded

- d. Claims for emergency relief are excluded: TROs, injunctive relief.

3. Everyone should give thought to whether the agreement should include some provision on the applicable arbitration law that the parties wish to be in effect. Possible choices are:

- a. To specify the law or leave silent
- b. Federal law (Federal Arbitration Act, 9 U.S.C. §1-15)
- c. Local law, such as Missouri Arbitration Act, Chapter 435 R.S.Mo. (modeled after the Uniform Arbitration Act)
- d. If Missouri law applies, the draftsman needs to place the following language adjacent to or above the space provided for signature, in ten-point capital letters:

**“THIS CONTRACT CONTAINS A BINDING
ARBITRATION PROVISION WHICH MAY
BE ENFORCED BY THE PARTIES.”**

4. A determination should occur for the applicable substantive law. The choices include:

- a. Federal
- b. State
- c. Silent (nothing is specified)
- d. Declaration that the arbitrator does not have to follow any specific law

5. The arbitration provision can include specific procedural rules on how the arbitration will take place. Items to consider are:

- a. Incorporation of the rules of a specific forum, such as AAA
- b. Incorporation of rules of civil procedure of state or federal court
- c. No rules (usually by being silent on this point)
- d. Rules other than those specified above

6. Perhaps the most important decision in an arbitration is the selection of the arbitrator. Just like no lawyer actually “picks a jury,” arbitrators, while seemingly “selected” by the parties, typically are the product of elimination of potential arbitrators not acceptable to one of the parties, rather than the product of consensual choice and agreement. Even in those instances when the parties agree on an arbitrator and he or she is truly “selected,” the parties’ decision may be based more on culling out those rejected as unacceptable choices than on finding the one truly chosen by all concerned to be acceptable to all. Regardless, the opportunity is there to truly play a key role in finding the right arbitrator for everyone involved. Qualifications of the arbitrator that should be considered are:

- a. Specific industry experience or license, such as lawyer, P.E., architect
- b. Number of years' experience
- c. Geographic location of arbitrator
- d. Nationality of arbitrator

7. Generally, the number of arbitrators is determined by the parties’ agreement and their pre-determined choice on the financial threshold levels in moving from one to more than one arbitrator. The general choices in number of arbitrators are:

- a. One
- b. Three
- c. If more than one, are any party appointed or are all of them truly independent
- d. Two out of three is enough or is a unanimous decision necessary?

8. There are many methods of selecting an arbitrator and to the extent possible, the agreement should so specify the method, so as to avoid later disagreement and possible stalemate. Possible choices include:

- a. Mutual agreement
- b. Ranking by parties with strikes from a pool of potential arbitrators
- c. Selection by court

- d. Selection by forum
- e. Selection by president of state or local bar associations

9. The location of the hearing is critical in many instances to a successful result, and certainly can aid in reducing costs and logistical considerations in having witnesses and other proof available on short notice at the hearing. All good advocates should request a specific location in the agreement where the arbitration will take place. Amazingly, many lawyers will not object, for they are focused on other items in the agreement or do not try many construction cases, so they view a venue provision to be unimportant or if important, it will be someone else's concern, at a later time. By contrast, others consider the hearing's location, much like the venue in a trial, to be an important factor in victory or defeat.

In reality, venue may be more important at a trial than at a hearing in arbitration. Arbitrators often travel from different states to hear cases, and they have a more national rather than local perspective, thus reducing the perception that the "locals" will win or the out-of-towners will be "home-towned." National arbitrators tend to be less focused on the place where the arbitration is occurring and more concentrated on deciding which party is entitled to a ruling in its favor. Regardless, location is still important and can be provided in the agreement as follows:

- a. Specified in the agreement
- b. Put into the demand for arbitration
- c. Provided by default as the location of the project

10. Discovery can be spelled out in the agreement, but it often is not mentioned or it is not given sufficient thought by lawyers prior to execution to the arbitration agreement. Possible options to consider on whether to include discovery requirements in the agreement are:

- a. None allowed
- b. No provision made
- c. As allowed by the Forum
- d. As allowed by federal or state rules

- e. Specific, defined discovery only (such as five depositions, 8 hours each)

11. An arbitration agreement can address who will be the parties to the arbitration agreement. This sounds so simple, yet when not followed, leads to many problems. Possible parties to the agreement include:

- a. Corporations
- b. Individuals
- c. Incorporation by reference from another contract
- d. Third parties
- e. Assigns, successors

12. An arbitration agreement can include specific requirements on pre-hearing motions. This is not a typical provision but under the right conditions, it may be a very important item to include in the agreement.

13. The time for the hearing is seldom set out in the agreement. Invariably, one side wants the hearing to take place tomorrow and the other side is content with sometime in the next decade. The agreement can provide that this decision is:

- a. Left up to the arbitrators
- b. Specified in the agreement

14. What evidence should the arbitrator consider in reaching his or her decision? Unlike a traditional court of law, where the rules of evidence and the practices of the judge will dictate what goes into evidence, the parties to an arbitration agreement can make their own binding decisions about what evidence will be received. The agreement may include:

- a. No provision made
- b. All evidence allowed under the federal and/or state rules of evidence
- c. As allowed by the forum's rules, such as AAA
- d. Limited as decided by the arbitrators
- e. Use of subpoenas for evidence depositions of witnesses outside locale of hearing

- f. Hearsay
- g. Affidavits and declarations of witnesses

15. Although not typically an issue in Missouri construction disputes, some arbitration agreements spell out the language to be used at the hearing, such as:

- a. English
- b. Translators

16. The parties to the arbitration agreement should give consideration to the type of award they wish the arbitrator to render with his or her decision. There are several options from no explanation at all to a very detailed written opinion. Forms of the award can be:

- a. Standard (no reasons are provided for in the decision)
- b. Some reasoning provided in the written decision
- c. Complete findings of fact and conclusions of law

17. The agreement may also provide the time within which the arbitrator must render the decision after the evidence has been presented. A typical time period is 30 days. In addition, some parties wish to limit the arbitrator's decision to preset ranges such as

- a. Baseball (each side presents a number and the arbitrator must select one of the two numbers)
- b. High-low agreement (the parties agree but do not tell the arbitrators that no matter what the decision it will fit within the parties' preset range).

18. The arbitration agreement should cover the powers of the arbitrators. Possible considerations of what powers the arbitrator may have are:

- a. Same as judge
- b. "Just and equitable" result, per AAA Rules
- c. Specifically limit, such as no sanction power

- d. Interim relief, such as an accounting, TRO or preliminary injunction
- e. Specific performance
- f. Other non-monetary relief

19. The agreement may contain limitations on what can and cannot be awarded. Some parties wish to limit the scope of the award in one or more of the following ways:

- a. No punitive damages (except as allowed by statute)
- b. No consequential damages

20. There are three ways that attorney fees can be awarded in an arbitration: They are:

- a. By arbitration agreement
- b. By statute
- c. Request of all parties during arbitration

The parties should consider whether a specific provision should be included in the agreement to cover when and how the arbitrator can award attorney fees.

21. While typically not covered in the arbitration agreement, post-award relief is another consideration that parties should give after the award is rendered. Possible actions are:

- a. Request to arbitrator for modification
- b. Confirmation of Award in court per FAA, §9 or Chapter 435 R.S.Mo. (2000).
- c. Convert award into judgment

22. An arbitration is not per se confidential, but the parties can make it confidential but incorporating such a provision into the agreement. Typically, the arbitrator is bound to confidentiality without the need for such a provision.

23. The parties may want to place a statute of limitations provision in the agreement.

- C. Discovery
- D. Hearing
- E. Confirmation of Award

V. Litigation

Litigation, of course, involves the court and traditional rules of procedure and evidence. Lawyers almost always are involved in this process. While the court dockets traditionally have been long, cases can now be reached in one to three years for trial in both state and federal courts.

Traditional litigation offers the protections of court-supervised discovery, a predictable process (of course, each judge offers differing perspectives on the procedural process that will be in play), and the maximum safeguards of rights through trial and appeal.

A neutral judge will supervise the proceeding and in most instances a jury will decide the result. The jury will consist of six or twelve disinterested “peers” who will decide the fate of the parties. Typically, the jurors will have little to no knowledge of the specific subject matter of the dispute, and generally will not be familiar with any design professionals or even the construction industry as a whole. Some view this with favor and others view it as a reason to choose instead arbitration.

Litigation also is grounded in precedent through prior reported decisions at an appellate court level to offer some form of predictability of how the courts should interpret the law. In addition, if the trial does not go well, there is a right to an appeal, although only about 10%, more or less, of appeals result in reversal of the trial court’s decision or the jury’s decision and either a new trial or a completely different result. Therefore, while an appeal is a safeguard and does in some instances yield considerable fruit, it more often than not results in a confirmation of what occurred at the trial court level.

VI. Advantages of Arbitration

The advantages of arbitration include:

- A. Quicker resolution
- B. Arbitrators are experienced in construction and design-related disputes

- C. “Confidential” proceedings
- D. Perhaps more limited recovery; thus, saving more money
- E. Accountability of arbitrators
- F. Picking the arbitrator
- G. More relaxed rules of evidence (hearsay allowed)
- H. More predictable results
- I. More flexible awards
- J. Arbitrators generally do not “split the baby”
- K. Possible recovery of attorney fees
- L. Parties have greater control over the process
- M. Better conditions for the hearing (more relaxed, less formal)
- N. Finality (very limited appeal rights)
- O. Depending on the applicable, the arbitrators may be bound to reach a “just and equitable” result consistent with the parties’ agreement

VII. Advantages of Litigation

The advantages in a traditional court of law include:

- A. Judges may be better equipped to decide purely legal issues
- B. Pretrial motions more available
- C. Virtually unlimited discovery, for those cases when discovery is critical
- D. Parties can rely on legal precedent to guide them
- E. Parties do not have to pay the arbitrators or the ADR forum for their fees and costs
- F. Judges and juries must follow the law
- G. Better use of subpoena power of courts around the country to at least compel attendance at a deposition for those witnesses who cannot attend trial
- H. Joinder of several parties into one case