

## Construction Law Blog

### So What Is the Difference between Mediation, Arbitration and Litigation?

By Courtney Paulk and Kelly Bundy and Nathaniel Story on 10.23.2016  
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Most design and construction contracts contain “dispute resolution” provisions. Some contracts state that the parties must “mediate” a dispute before “litigation” or “arbitration.” Through mediation, the parties attempt to resolve their dispute with the assistance of a mediator. The mediator is not a decision-maker. Rather, the mediator assists the parties through facilitating a negotiation. Some mediators will offer their opinion regarding the likely outcome if the case isn’t resolved through negotiation. Neither party can be forced to settle the dispute. The benefits of mediation can be a quicker resolution of the dispute and, in many instances, there can be creative solutions rather than just an exchange of money. The parties are also in control of the outcome.

Contrary to mediation, litigation and arbitration are binding forms of dispute resolution where a judge or an arbitrator hears evidence and renders a decision. Historically, construction industry contracts and policy have favored arbitration over litigation as the preferred form of binding dispute resolution. This is primarily because the parties can select an arbitrator or panel of arbitrators with knowledge of the construction industry. Arbitrators can be design professionals or contractors but, typically, are lawyers whose practice focuses on construction matters. The arbitration process is also viewed as being more streamlined in the discovery process. However, that process really depends on the complexity of the dispute because arbitrators have a fair amount of flexibility in what discovery to grant the parties.

Litigation is where a judge or a jury decides the case instead of an arbitrator. The litigation process involves more formalized rules than in arbitration. In both arbitration and litigation, one party is typically awarded money and, unlike in mediation, there is less opportunity for a creative resolution. Of course, some judges are more familiar than others about the construction industry, depending on their experience. If you have a strong case from a legal perspective, you may prefer to litigate the dispute rather than arbitrate. This is because judges and juries are bound to follow the law. While arbitrators must base their decision on the law, they also have a little more leeway to reach an “equitable” result. In that regard, decisions by a judge/jury are going to have a better chance of being appealed than the decision of an arbitrator.