



BACKGROUND

Industry estimates provide that more than 95 percent of lawsuits involving professional liability claims are settled before they go to trial. However, settlements are often reached only after months or years of interrogatories, depositions, countersuits, legal maneuvering and mounting legal fees. Of course, no party ever enters into a contract expecting it to result in a dispute; however, the original contract is the best opportunity to create a mechanism to cost-effectively resolve any eventual claims.

Mediation and arbitration are two alternative dispute resolution methods other than litigation which are often used to resolve claims. Mediation is a structured process where the parties voluntarily consent to have an impartial third party separately negotiate with each party to the dispute in an effort to reach a settlement. Not only is mediation less costly than other dispute resolution methods, some professional liability carriers even offer a credit back to the insured on its policy deductible for the early resolution of a claim within a certain time period. Arbitration, on the other hand, can work well in certain situations but it has several disadvantages (e.g., no evidentiary or discovery rules and virtually no appellate rights) that can render it an unsatisfactory and ill-advised method for resolving disputes. Ultimately, the preferred approach utilizes a stepped process of good faith negotiations, followed by mediation and, if necessary, litigation in a county of competent jurisdiction.

SAMPLE CONTRACT CLAUSE

In the event of a dispute arising out of or relating to this Agreement, Client and Consultant agree to attempt to resolve the dispute in the following manner:

First, the parties agree to attempt to resolve the dispute through direct negotiations between the representatives of each party who are fully knowledgeable of the issues raised in the dispute and are authorized by said parties to fully and finally resolve the dispute.

Second, if such negotiations are not fully successful, the parties agree to attempt to resolve any remaining disputes by formal nonbinding mediation conducted in accordance with the rules and procedures established by the American Arbitration Association or any other mutually agreed upon dispute resolution service.

Third, if the dispute or any issues therein remain unresolved after the above steps, the parties agree to seek final resolution by filing suit in the Superior Court in the county where the project is located or in any other county of competent jurisdiction.

At your request and as a courtesy to you, Dealey, Renton & Associates (DRA) provides the above to assist you in reviewing and negotiating proposed contractual provisions specific to the insurance issues in design contracts. It is not to be regarded as opinion or advice for any specific contracts. If legal advice or expert assistance is required, the services of a competent professional should be sought. You should develop your own language based on your firm's procedures and experience in reviewing and approving contracts written by other parties