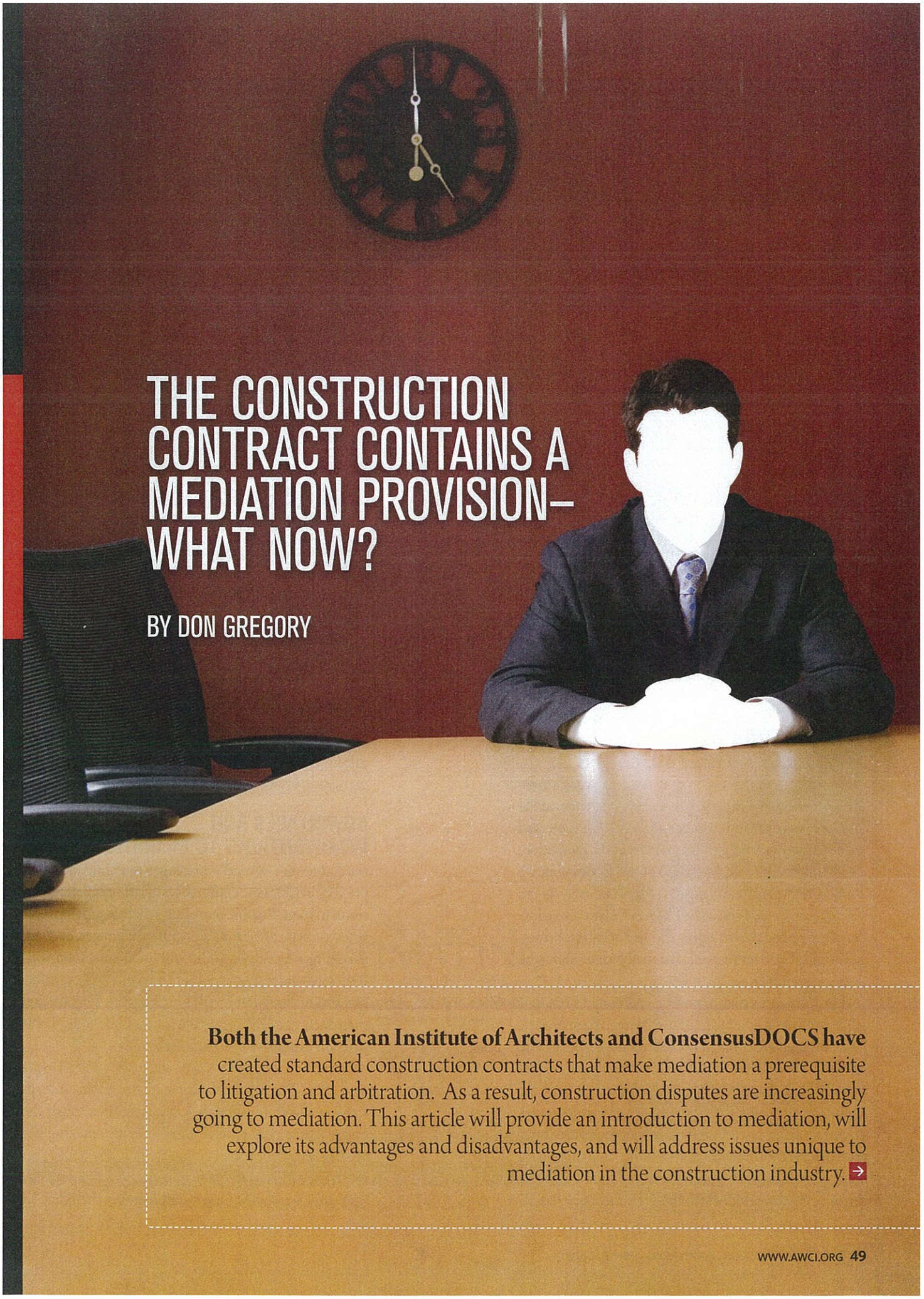

THE CONSTRUCTION CONTRACT CONTAINS A MEDIATION PROVISION– WHAT NOW?

BY DON GREGORY

Both the American Institute of Architects and ConsensusDOCS have created standard construction contracts that make mediation a prerequisite to litigation and arbitration. As a result, construction disputes are increasingly going to mediation. This article will provide an introduction to mediation, will explore its advantages and disadvantages, and will address issues unique to mediation in the construction industry.

INTRODUCTION TO CONSTRUCTION LAW MEDIATION

AIA and ConsensusDOCS construction contracts mandate American Arbitration Association mediation as the first step in resolving disputes. The AAA has created well-defined procedures for construction mediation. Mediation is initiated when one of the parties makes a request to the AAA and notifies the other party. Next, the parties select a mediator. The AAA maintains a roster of professionals (including the author) that is browsable online. Parties may select a mediator or allow the AAA to appoint one.

The mediator's role is somewhat different from that of an arbitrator or a judge in a settlement conference. First, the mediator's goal is not to force a settlement. The mediator seeks to facilitate the flow of information and to foster a satisfactory resolution. Second, the mediator maintains the parties' confidentiality. He or she agrees to refrain from testifying in subsequent proceedings, to restrict access to mediation sessions, and to keep no stenographic record of the mediation. There is no filing fee for initiating mediation, but each mediator has an hourly rate listed on the AAA's roster, with a four-hour minimum charge. The parties pay equal shares of the mediation expenses unless they agree otherwise.

ADVANTAGES AND DISADVANTAGES TO MEDIATION

Mediation has several advantages over litigation and pre-trial settlement conferences. First, mediation can result in more flexible remedies, whereas judicial remedies are typically limited to money damages. Second, parties may be more candid with mediators than with settlement judges because there is no fear that the information will bias a later trial. Third, parties in mediation share facts cooperatively, saving time and money compared to expensive pre-trial discovery.

Parties who seek to save time and money often choose mediation. The AAA says that mediated claims are typically resolved in under two months. By contrast, the organization cites federal court statistics putting the median length of construction trials at just under two years. Even the average mediated case with claims above $500,000 is resolved nine months sooner than that. In

my experience, more than 80 percent of construction disputes resolve themselves at mediation.

Federal court statistics also reveal the advantages of mediation over litigation. In 2006, the U.S. District Court for the District of Nebraska polled its attorneys and parties regarding their mediation and litigation experiences. That year, attorneys who resolved disputes in mediation reported saving an average of 104 hours per case, and attorneys and parties estimated that they saved almost $60,000 per case. The respondents also answered questions aimed at measuring more qualitative advantages to mediation, like whether parties felt they had been treated fairly, and whether they felt in control of and involved in the process. Mediation scored well in all of these qualitative categories.

However, mediation is not without disadvantages. Clients and attorneys accustomed to adversarial judicial proceedings may bring counterproductive habits to mediation. They may put more effort into persuading the mediator than the opposing party, or withhold information that could encourage settlement.

As contract documents often mandate mediation as a condition precedent to litigation or arbitration, parties can be forced into a mediation when one or more parties are not yet ready to resolve the dispute. This can lead to unnecessary delays while a fruitless mediation is conducted, which can lead to a hardening of settlement positions.

Furthermore, mediation is a bad fit for some cases. When the outcome of a case turns on a new legal question, mediation may not be appropriate. Likewise, fundamental factual disputes—like the credibility of key witnesses—may also cause mediation to fail. Finally, mediation may be impossible when the parties have lost all trust and ability to find common ground. Such

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cases, however, are rare. Typically each party has an interest in maintaining a business relationship and in resolving the dispute quickly. Mediation is an effective tool at achieving both.

SOME ISSUES TO CONSIDER WHEN ENTERING MEDIATION

A key to successful mediation is recognizing the ways it is unlike other forms of dispute resolution. Because mediation is non-binding and need not end in resolution, parties must approach mediation with a different mind-set than that of litigation or arbitration. They should avoid overzealous advocacy and instead come to mediation with the goal of solving problems creatively. A collaborative approach not only helps ensure the mediation's success, it also helps clients maintain their business relationships with adverse parties.

Parties should also carefully consider the type of mediator they want to hire. While every mediator has a unique style, mediators generally break down into two categories: facilitators and evaluators. Facilitators use diplomacy to help parties communicate and find common ground. Evaluators provide analysis of each sides' strengths and weaknesses. To ensure their expectations are met, parties should investigate potential mediators' styles. Given the thorny nature of complex construction disputes and the personalities associated with such a "rough and tumble" industry, most experienced practitioners and parties favor a mediator with an evaluative approach.

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CONCLUSION

It is rare to encounter a significant construction dispute that is not mediated at some point. Given the high costs of construction litigation, mediation is an important tool in any contractor's toolbox. ●

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