



AAA Mediation.org™

## **FN-2351720 MN-2351720 LN-2351720, Esq.**

**St. Paul, Minnesota**

**Current Employer-Title**    ADR Offices of Paul W. Berning – Principal

**Professional Summary**    Arbitrator, mediator and DRB member with 35 years' experience litigating major construction and energy disputes and 15 years' experience as neutral. Projects and participants located across the U.S. and on five continents. Deep experience as counsel and neutral with infrastructure, wind, solar, other renewable energy, fossil fuel construction. Significant experience with EPC and design-build projects. Clients included public and private owners, developers, energy companies, general contractors, subcontractors, design professionals, manufacturers. Expertise in extra work, delay, disruption, lost efficiency, labor shortage, material shortage claims; construction defects; default terminations; project finance; government contracts.

**Profession**    Arbitrator, Mediator, DRB Member. Retired Lawyer.

**Work History**    Principal, ADR Offices of Paul W. Berning, 2021-Present; Managing Partner, Law Offices of Paul W. Berning, 2011-2021; Partner, Howrey LLP, 2008-2011; Partner/Associate, Thelen LLP (and predecessor firms), 1986-2008; Extern, San Francisco Superior Court, 1986; Extern, California Supreme Court, 1985; Extern, San Francisco District Attorney, 1984.

**Experience**    For 35 years, law practice focused on construction and energy industries, representing clients in trials, arbitrations, appeals, mediations, negotiations.

CONSTRUCTION: Practice involved claims for extra work, delay, disruption, lost productivity; construction defects; terminations for default; financing; labor/material shortages; payment remedies. Clients included public and private project owners, design-build contractors, general contractors, subcontractors, design professionals, manufacturers.

Projects included new Tacoma Narrows Bridge, Eurotunnel, Fillmore Center (11- building mixed use project in San Francisco), dams, mines, process plants, pipelines, high-speed rail projects, paper mill, wastewater plant, airports, ports, condominiums, transit systems, hospitals, hotels, schools, high-speed telecommunications system, waste-handling facilities, homes.

International experience includes projects in, participants from United Kingdom, France, New Zealand, Ecuador, Uruguay, Dubai, Spain, Japan, South Korea.

Founder, Editor of ConstructionWebLinks.com, Internet portal for the construction, engineering, architecture, infrastructure industry, 1999-2011.

Matters include representing:

\* Designer-builder of major infrastructure facility in disputes with international suppliers involving defective work, late deliveries, claims for additional compensation.

\* Owner of dam at mine in default termination of contractor, including claims for additional

completion costs and defending against counter-claims.

- \* EPC contractor on paper mill in claims for extra work.

- \* General contractor for large mixed-use urban project in claims for extra work and in defending against default termination.

- \* Trade contractor in making fraud claims against construction lender for large urban project.

- \* Owner of major international transportation project in defending against claims by contractor for additional compensation.

- \* General contractor on wastewater treatment facility in making claims against owner and defending against claims by subcontractors.

- \* Owner of international pipeline project against claims by EPC contractor for extra work and in asserting counter-claims.

- \* Asset purchaser in dispute with seller general contractor.

- \* Owners, construction managers, general contractors in construction defect disputes.

ENERGY: Practice involved dispute resolution and helping clients comply with licensing laws. Clients included EPC contractors, power producers, renewable energy companies, manufacturers.

Projects included wind farms, solar power plants, fossil fuel plants, hydroelectric power systems, geothermal energy facilities, solar energy systems, smart grid systems.

Matters include representing:

- \* EPC contractor for fossil power plant in disputes with international supplier involving late and defective work and with project owner involving extra work, labor shortages, delayed completion.

- \* EPC contractor on waste-to-energy project against \$50 million disgorgement claim by owner claiming violation of contractor license law.

- \* Owner of geothermal facility against claims by general contractor terminated for default and in making counter-claims against contractor for added cost of completion.

- \* Public owner against claims for additional compensation by general contractor on hydroelectric dam project and in making cross-claims against designer, construction manager.

- \* Manufacturer of renewable energy equipment in disputes with supplier over delayed production, claims for additional compensation.

COMMERCIAL LITIGATION: Practice involved real estate, surety bond, unfair business practice, computer hacking cases, including representing:

- \* Property owner in insurance coverage claim for damages during construction.

- \* Naval architect in payment claim against America's Cup yacht racing syndicate.

- \* Gold company against mining claims.

## **Mediator Experience**

Mediation practice focuses on the construction and energy industries, drawing on 35 years of experience litigating such cases and more than 15 years of experience as a neutral.

Participants in mediations have included general contractors; project owners, both commercial and residential; design professionals; subcontractors; suppliers; tenants; developers.

Facilities at issue in mediations have included apartment buildings, transit system, parking structure, solar energy systems, federal government facilities, military bases, research facility, retail store,

business park, auto dealership, real estate development, manufacturing plant, theater, residences, modular homes.

Have mediated more than two dozen disputes. They include:

- \* Construction defect claims by owner of luxury home against general contractor, subcontractor, architect and construction manager. Multiple days of mediation sessions.
- \* Claims by commercial landlord against contractor, engineer and restaurant tenant arising from renovations and seismic retrofit.
- \* Payment and extra work claims by electrical contractor against electrical equipment manufacturer for work at research facility.
- \* Payment and related disputes between general contractor and demolition subcontractor arising from renovations to big box retail store.

#### ADR TRAINING HIGHLIGHTS:

- \* Harvard Advanced Mediation Workshop (5 days).
- \* Early Dispute Resolution Institute and AAA, "Resetting the Bar: Using Early Dispute Resolution (EDR) to Resolve Disputes Economically and Fairly."
- \* Pepperdine University, Strauss Institute for Dispute Resolution, "Mediating the Litigated Case" (6 days).
- \* Steven Rosenberg Mediation Training (6 days).
- \* Caltrans, Dispute Resolution Board Foundation DRB/DRA training (3 days).
- \* More than half dozen other training programs for mediators.

#### RELATED ADR EXPERIENCE INCLUDES:

- \* Service on three Dispute Resolution Boards.
- \* Chair of DRB for \$1.3 billion university expansion project.
- \* Chair, sole arbitrator or panel member through Final Award in 10 arbitrations and through evidentiary hearings in two others. Presided over pre-hearing proceedings in numerous other arbitrations.
- \* Chair of arbitration with 37 parties and 3 other participants involving construction defects in new apartment project. Settled on eve of hearings. More than 18 orders issued.

#### MEDIATION EXPERIENCE AS ADVOCATE:

Organized and participated in dozens of mediations. Involvement included negotiating details of the mediation, representing client at the mediation, preparing written and oral presentations for the mediation, preparing settlement agreements and organizing logistics for the mediations.

Amounts in dispute ranged from \$100,000 to \$100 million. Mediations ranged in size from two parties to multiple parties, including international participants. A number were multi-day.

Subjects of the mediations included power plants, major state infrastructure project, factory, high-speed Internet system, sewer plant, mineral upgrade technology, multi-building apartment project, conversion of warehouse to high-tech workspace, commercial tenant improvements, money obtained by fraud, movie theaters, seismic retrofit of historic building, false advertising, computer hacking, condominiums, high-end residences, home sale.

Participants in mediations included EPC contractors, project owners, general contractors, specialty

contractors, manufacturers and suppliers, tenants, mining company, insurers, condominium boards, newspaper, auto parts wholesaler.

## **Representative Issues Handled as a Mediator**

Construction, energy, business, consumer.

## **Mediator Style & Process Preferences**

Mediation has many potential benefits and few downsides if all parties are participating in good faith:

- \* Disputes can be resolved more quickly and more economically than through litigation or arbitration.
- \* Outcomes can be more nuanced than in litigation or arbitration, where results often are all-or-nothing.
- \* Business relationships can be preserved.
- \* Issues beyond the scope of legal liability and damages can be tabled for discussion and addressed in settlements.
- \* The format can be custom-tailored to the size and nature of the dispute and the wants and needs of the parties.
- \* The parties control the outcome, not third parties (judge, juries, arbitrators).
- \* The case always can be litigated or arbitrated if the mediation is not successful.
- \* Because mediation preparation involves the same factual and legal investigation as litigation or arbitration preparation - only less - there is little extra cost involved in mediating before proceeding with litigation or arbitration.

Mediators can assist parties in resolving disputes by helping each party, in confidential communications, assess the strengths and weaknesses of its position; by helping ensure that all issues that need to be discussed to reach resolution are discussed; by facilitating the exchange of offers and counter-offers; and by assisting with the negotiation process while respecting the confidentiality of communications with the parties.

For the mediation process to work, the parties' need for a sense of justice must be harmonized with the need to compromise and the practicalities of achieving a compromise. The process entails an exchange of viewpoints, with supporting evidence and authorities; consideration of the strengths and weaknesses of each side's positions; and negotiation to reach an acceptable middle ground.

Important factors in a successful mediation are the exchange between the parties of all information necessary for informed negotiations; sufficient preparation on factual and legal issues by all parties; a willingness to listen to and consider the viewpoints of other parties; and a commitment to work in good faith toward a compromise with which all parties can live.

## **Technology Proficiency**

Zoom and similar communication platforms; Microsoft Office suite of programs; litigation and other databases; website development; Westlaw.

## **Education**

University of Missouri (Bachelor of Journalism-1970); University of San Francisco (JD, with Honors-1986).

## **Professional Licenses**

Admitted to the Bar: California (1986); U.S. District Courts: Northern, Eastern, Central and Southern Districts of California; U.S. Courts of Appeals: Fourth, Ninth, and District of Columbia Circuits; U.S. Court of Federal Claims; U.S. Supreme Court. England and Wales (non-practicing).

## **Professional Associations**

State Bar of California, American Bar Association (Forum on the Construction Industry), Dispute Resolution Board Foundation. Formerly: Associated General Contractors (California Legal Advisory Committee), Building Industry Conference Board, U.S. Building Green, International Council of Shopping Centers (Building Code Task Force), Bay Area Real Estate Interest Group of Providers, Alameda County Bar Association, World Affairs Council of San Francisco,

Commonwealth Club of San Francisco.

Martindale-Hubbell: AV® Preeminent™ 5.0 out of 5; SuperLawyers (multiple years).

## **Recent Publications & Speaking Engagements**

### **PUBLICATIONS**

Comprehensive, 50-state reports for clients on total cost claims; abandonment of contract and recovery in quantum meruit; materials shortages; contractor licensing, professional registration for engineers and design-build licensing requirements. Oversaw preparation of such reports on: force majeure provisions in construction contracts, particularly regarding labor shortages; remedies available for construction defects; cardinal change; jury verdict method of determining damages for government contracts.

\* "Construction," chapter in Business and Commercial Litigation in Federal Courts (Thomson West 2d ed.).

\* "United States Construction, Architecture, and Engineering Industry," chapter in United States Country Handbook, which is part of International Contract Manual (Thomson/Sweet & Maxwell).

\* "U.S. Construction, Architecture and Engineering Industry: An Overview for International Investors," paper presented to the Shanghai Association of International Economic and Technological Cooperation in Shanghai and to the China International Contractors' Association in Beijing. Serialized in China's Construction Times newspaper.

\* "Termination Claims from Owner's and Contractor's Perspective," chapter in Proving and Pricing Construction Claims (Wiley 1st ed.).

\* "Complying with Licensing and Registration Laws," chapter in Construction Checklists (ABA Forum on the Construction Industry 1st ed.).

\* "Disputes Review Boards," paper presented to World Conference on Construction Risk, Paris.

\* "Complying with Licensing and Registration Laws: An Overview, with Case Histories," [www.ConstructionWebLinks.com](http://www.ConstructionWebLinks.com).

### **SPEAKING ENGAGEMENTS**

\* "How to Survive a Troubled Project," WPL Publishing Co., Inc. webinar.

\* "Arbitration in Construction Contracts," Lorman webinar.

\* "How to Win Construction Claims," San Francisco, 2-day seminars.

\* "E-Construction Management: Is It Just Glamour and Glitz?" International Bar Association, San Francisco.

\* "Project Websites: A Toolbox for Avoiding and Resolving Disputes," Construction Superconference, San Francisco.

\* "E-Tools: Time for a Legal Check-Up," American Institute of Chemical Engineers' Annual Engineering and Construction Contracting Conference, San Francisco.

\* "Legal Aspects of Web-Based Project Controls and Electronic Documents," Western Council of Construction Consumers, Irvine, California.

\* "Project Management Web Sites," Construction Superconference, San Francisco.

\* "Construction Project Web Sites," California AGC Legal Retreat.

\* "Total Cost Claims by the Contractor: Peril or Panacea," Construction Superconference, New York.

\* "Design/Build and Construction Management," Lorman Seminars, Oakland, California, and San Jose, California.

\* "Top 5 Topics in California Construction Law," Lorman Seminars, San Francisco.

\* "Construction Payment Remedies," Lorman Seminars, San Francisco.

\* "Construction Claims," Lorman Seminars, San Francisco.

\* "Construction Payment Remedies: Using the Right Tools at the Right Time," Lorman webinar.

## **Locations Where Parties Will Not be Charged for Travel Expenses**

No charge for travel costs in these locations:

\* San Francisco area: Alameda, Contra Costa, San Mateo, Marin, San Francisco counties in California.

\* Twin Cities metro area: Hennepin, Ramsey, Dakota, Anoka, Carver, Scott, Washington counties in Minnesota.

No charge for airfare for proceedings of three days or longer anywhere in California.

Available by Zoom through AAA for shorter proceedings in California and elsewhere at no travel cost.

**Mediation Rate** \$360 Per Hour

**Languages** English

**Citizenship** United States of America

**Locale** St. Paul, MN

The AAA's Rules provide the AAA with the authority to administer a mediation including, mediator appointment, general oversight and billing. Accordingly, mediations that proceed without AAA administration are not considered AAA mediations, even when the parties select an mediator who is on the AAA's Roster.

The information contained in this resume has been supplied solely by the individual mediator and may, or may not, be a complete recitation of their experience. The AAA assumes no responsibility for the content, completeness, accuracy, or reliability of the information contained in a mediator's resume. If you have any questions about a mediator's experience or background, you are encouraged to contact your case manager.

Mediators on the AAA Roster are not employees or agents of the AAA.