

CDR.13

Are You Prepared for Mediation?

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INTRODUCTION

The purpose of this article is to discuss mediation as an alternative dispute resolution (ADR) process. This article identifies why we ought to study the mediation process and discusses some of the good and the bad points concerning the use of mediation as a form of dispute resolution. Finally, the article offers a number of suggestions concerning how to prepare for and win at a mediation session.

MEDIATION—THE PROCESS

What Is Mediation?

Mediation has been discussed in a number of publications over the past few years. One publication described mediation in the following manner [5]: mediation is the private, confidential, and informal submittal of a dispute to a non-binding dispute resolution process. In the mediation process, the parties (generally, the project owner and the prime contractor) work together to craft a solution to the dispute. The parties are assisted in their dispute resolution effort by an outside neutral, the mediator. The parties may opt for a single mediator or a mediation panel.

Mediation is a very flexible process, much more flexible than arbitration or litigation. For example, in mediation there are no formal rules of procedure for the mediation session; testimony is not offered under oath; there is no formal transcript of the mediation; there is no cross-examination by opposing counsel; the rules of evidence so well practiced in court are inapplicable in mediation, etc.

The role of the mediator is quite different from that of an arbitrator or a judge. In essence, a mediator is a negotiation facilitator. As a neutral negotiation facilitator, the mediator's role is to help each party objectively analyze their own position, identify both the strong and the weak points of their position, and assist the parties in structuring an acceptable settlement. Thus, the mediator is an advisor, of sorts, to both parties in analyzing their position and finding ways to settle a dispute.

The power to resolve the dispute actually rests with the parties to the dispute, not with the mediator. The parties

control both the process and the outcome. Thus, one of the keys to success in mediation is self-determination by the parties. The disputants pick their own solution; nothing is imposed upon them by outside forces as in arbitration or litigation.

Due to its inherent flexibility and the fact that the outcome of the process is solely under the control of the parties, mediation is capable of going well beyond traditional settlement negotiations. Mediation can broaden potential resolution options and can even go beyond the strict issues in dispute to resolve multiple issues, if the parties determine that is the desirable outcome.

Why Study Mediation?

Over the past few years, mediation has gained popularity as a form of ADR in the construction industry. More people in construction are aware of mediation and thus it is now more often suggested as a possible way to resolve disputes. Additionally, mediation is now required in some nationally known (US) contract document forms. For example, Clause 5.4.1.1 of AIA document A511 mandates the use of mediation [1] as does Article 10.2 of DBIA document 535 [2]. Thus, some owners and contractors may find themselves contractually bound to the mediation process, whether they want to or not.

Additionally, the parties may be operating in a jurisdiction where mediation is mandated by statute. The National Conference of Commissioners on Uniform State Laws, together with the American Bar Association's Section on Dispute Resolution, did a survey in which they determined that mediation is ". . . embodied in more than 2,000 state and US federal statutes . . . [3]." Like it or not, the parties may be statutorily required to mediate a dispute. In the alternative, the parties may be "judicially mandated" to mediate a dispute. That is, in some of the more crowded court jurisdictions, judges are suggesting in the strongest possible terms that the parties would be smarter to mediate their construction dispute than litigate it. While they may not have the legal right to compel mediation, "strong suggestions" from the trial judge prior to litigation generally carry great weight.

Further, mediation needs to be studied as an ADR process because it is different from other forms of ADR. It

is a non-binding process, not a binding process like arbitration. It is a facilitated negotiation rather than a hearing like a mini-trial. As noted earlier, it does not have most of the formal, lockstep rules and procedures like litigation. Mediators cannot make decisions as they can in arbitration or litigation. And, unlike a dispute review board, mediators often will not even make recommendations.

Finally, anyone considering mediation as an ADR form needs to study mediation because the parties are allowed to control both the process and the decision. That is, they find their own solution and do not look to a third party to craft a solution for them.

The Mediation Process

In the author's experience, mediation typically develops in the following manner. A claim is filed, generally by the contractor against the project owner. The owner analyzes the claim and attempts to settle the issue(s) by direct negotiation. After numerous attempts, negotiations deadlock or fail altogether. At this point, the contractor either files a demand for arbitration or initiates litigation, depending upon the terms and conditions of the contract. At this time, attorneys and expert witnesses get involved and there is some initial "bloodletting" on both sides. Legal and expert witness fees start to mount up quickly.

Once the cost has risen to a painful level, one or the other of the parties decides "there must be a better, faster, cheaper way!" At this point, one or the other party, having heard about mediation, offers mediation as a faster and considerably cheaper alternative to legal action, and the other party agrees. It should be noted that the formal legal action is not dropped but simply held in abeyance pending the outcome of mediation.

Once mediation is agreed to, the parties select a mediator. The mediator's first action is to assist the parties with the physical arrangements of the mediation itself; the date, the location, what information is to be exchanged, and when. The mediator monitors the information exchange to ensure that both parties live up to their agreements. Additionally, the mediator aids the parties in setting the ground rules for the mediation itself.

On the day of the mediation, the mediator opens the session by reiterating the ground rules previously agreed upon. The contractor, as claimant, presents their case first, followed by the owner, as defendant. Depending upon the ground rules established earlier by the parties, several things may happen next. First, the mediator may sum up each party's case after their presentation to help focus the issues. Second, there may be a question and answer period or a discussion session following the presentations, to air certain issues. At some point though, the parties are "sent to neutral corners." That is, the parties are separated into different rooms and the mediator starts the facilitated negotiation, first with one then with the other. Basically, the mediator keeps the parties talking until they find a satisfactory settlement.

GOOD AND BAD POINTS

It is generally safe to say that in construction, nothing is either all good or all bad! This is as true with mediation as with any other system employed in the construction industry.

Strong Points

On the positive side, mediation is a relatively inexpensive process, especially when compared to arbitration or litigation, and is certainly much quicker. Mediation is non-binding, so no decision can be imposed from the outside. Mediation is private and confidential, and mediation agreements frequently include strict confidentiality agreements on the parties, the attorneys, and the expert witnesses. Mediation is quite flexible, generally limited only by the ingenuity of the mediator and the parties.

Mediation identifies and works with the strong points and the weak points of both sides of the dispute. It gives each party a better sense of the other's case and gives each the opportunity to test the other's resolve in carrying on with the dispute. Mediation also amounts to a terrific amount of free discovery. Finally, mediation tries to identify and focus on common interests rather than specific mistakes each side may have made on the project.

Weak Points

Due to the fact that mediation requires such low investment of time and cost, either party can easily walk away, resulting in no decision coming out of the process. Another issue frequently mentioned by those experienced with this process is that mediators are trained to "drive a deal." That is, their goal is to settle the case. In the process of seeking ways to settle the case, they may overlook what they consider to be minor items, such as facts, documents, contract language, etc.

Mentioned earlier, as a positive point, was the fact that mediation results in a terrific amount of free discovery. Well, this is a sharp, two-edged sword. In the process of getting free discovery, each party also allows the other to discover a great deal of information. Finally, it is difficult to succeed in mediation if the parties are on the "opposite sides of \$0." That is, if the owner believes there is absolutely no merit to the contractor's claim and is forced into mediation by contract, statute or judicial mandate, mediation is highly unlikely to succeed.

HOW TO "WIN" AT MEDIATION

In a sense, mediation is a competitive sport. That is, each side is trying to arrive at a number they will be happy with. As with all competitive sports, certain actions must be taken in order to emerge victorious. This section of the article is intended to present a number of tips on how to achieve victory at the mediation table.

General Points

- **Be Prepared**—Go into the session knowing your facts! Be able to document every point made in the mediation session. Parties that go into mediation with nothing more than generalizations, vague stories, unfounded accusations or “whining,” invariably lose in this process.
- **Remain Business-Like**—At the mediation session, remain cool and under control. Remember that mediation is a facilitated business negotiation process. Both parties should be seeking a good business decision. It’s rarely personal. Treat the process like business and you’re more likely to prevail.
- **Keep Process Informal**—In formulating the ground rules for the mediation session, strive for informality. That is, the more legalistic the session appears, the more nervous the project participants are likely to be. Remember only attorneys are trained to be comfortable on the floor of a courtroom. If the mediation seems like a court hearing then the project personnel involved will be less effective.
- **Prepare and Rehearse**—Spend as much time and energy as necessary to put together a good presentation that is factual and well documented. Then, rehearse your presentation and game plan the session thoroughly.
- **Don’t “Fall in Love With” Your Case**—The more time spent preparing for mediation, the more convinced you become of the righteousness of your case. This is a natural outcome of thorough preparation. However, keep doing reality checks. Examine every point carefully and with a skeptical eye. It is relatively easy to fool yourself. It is much more difficult to stay rational and objective. To win at mediation, you must remain objective.
- **Define “Win”**—In the course of preparing for mediation you need to define what “win” means to you. That is, you must determine, prior to the day of mediation, what the “good settlement” should look like in terms of cost, time, and other considerations. Know where you want the mediation to end up before you even start.

Preparing for Mediation

- **Mediator Selection**—One of the keys to a successful mediation is selection of the right mediator. You need to carefully choose the mediator. The first choice is between an “evaluative mediator” and a “subject matter expert.” Evaluative mediators are typically attorneys who have practiced in the construction litigation field for some period of time. They know a good deal about construction but are typically not trained or skilled in the fields of architecture, engineering, construction, or construction management. Thus, while they may be good evaluators, the presentation must start with the basics. On the other hand, some mediators are technical experts in certain issues (for example, construction scheduling) and may be preferable if you have a very narrowly focused dispute. Next, how do you identify mediators? Check with the local American Arbitration Association office to get a list, speak with attorneys who practice in the field of construction litigation in your area, or check with other people in your area who have gone through mediation. Once you have a list, carefully check the background and experience of everyone on the list. Speak with other people in your position (whether you’re a contractor or an owner) to see how they felt about the mediator and his/her personality.
- **Process Understanding**—Work with your attorney to gain a thorough understanding of the process and your role in mediation. Remember that mediators do not make decisions and may not even offer recommendations. This is your role as a participant in the mediation process.
- **Process Participation**—Since mediation affects you directly, participate actively in setting the ground rules. How would you like to see the mediation session run? Participate in the document exchange. Assist your attorney in writing the mediation brief. True, writing briefs is a legal function but the brief must be factually accurate, and since you were on site, not your attorney, you have more command of the facts. Finally, determine your role at the mediation. Mediation is not like a trial where attorneys do all the talking. In mediation, the project participants can, and often do, make the mediation presentation, lead the discussion session, and ask and respond to questions. Finally, be prepared to make the decision. This is a key role that only project participants can fulfill.
- **Be Prepared**—Learn your case thoroughly. Calculate costs and losses carefully. Prepare arguments and documents thoroughly. If you do all of this, you will not be caught off guard if the other side makes untrue statements at the mediation.
- **Critical Documents**—During preparation, identify which of the thousands of project documents are critical to the case. Organize these documents along with your presentation. Bring multiple copies of these documents to the mediation so they can be used and distributed to others when needed.
- **Legal Support**—If there are legal issues that need to be settled in the mediation, be prepared to address them. Issues such as attorney fees, statute of limitations, enforceability of contract language, etc., may need to be addressed. Have case law, statutes, and contract documents at the mediation to address such issues. Don’t rely solely on presentation skills and logic. Mediators may try to ignore logic to achieve settlement, but they cannot ignore documented legal issues.
- **Learn Strong Points**—During preparation of your case, learn your “strong points.” These are points that are clearly in your favor, are well documented, and cannot be argued or interpreted in any other fashion. Find these strong points, document them, and figure out how to use them to leverage a favorable settlement.
- **Learn Weak Points**—Equally important, but harder to do, is learning the weak points of your case. These are facts that lead to settlement in the other party’s favor.

You need not like these points but you must be prepared to live with and deal with them realistically. Be prepared to concede these weak points while minimizing damage to your own case to the maximum extent practicable.

- **Learn the Other Side's Strong and Weak Points**—Even more difficult is the task of objectively analyzing the other side's case. You need to examine it from their viewpoint. Find their strong points; learn how to deal with them. Find their weak points; learn how to use them to your benefit. Remember that your objective in the mediation is to convince the mediator that your case is stronger and more likely to prevail and then let the mediator convince the other side of this. To accomplish this, you must shoot holes in the other side's case. Find, document, and point out mistakes, inconsistent statements, overinflated costs, unrealistic damages, double counted costs, new legal theories, etc.
- **Know Real Damages**—Mediation focuses heavily on dollars. Parties are often surprised when the first question the mediator asks in the private session is "what will you really settle for?" They do this to determine how far you are prepared to go to settle. The mediator often acts "shocked" at your number and offers up a number considerably larger/smaller than yours in an effort to start movement on your part. Calculate your real number. Tie your calculation closely to the requirements of the contract documents. Be prepared to give this calculation to the mediator to prevent them from leveraging you against yourself.
- **Estimate "Failure" Cost**—Remember mediation typically starts with some legal action, which has been put in abeyance pending the outcome of mediation. Thus, if mediation fails, if no settlement is reached, the legal action comes back to life. Therefore, as part of mediation preparation estimate your cost to arbitrate or litigate the cost. Why? Because mediators frequently open with, "you may as well throw in your legal costs!" And, if you do not have an estimate of legal costs, the mediator is often willing to provide a very high number of their own to start movement from your position.
- **Rehearse**—If the issue in dispute is sufficiently large, it may well be worthwhile to hire a mediator to run a one day "mock mediation." This is analogous to a dress rehearsal and can be used to prepare you and your team for the real thing.

At the Mediation

- **Authority to Settle**—Successful mediation demands that both parties bring people to the table with full authority to settle issues. This is easy for private parties to do but much harder for public owners. Public owners need to make their position clear at the outset. "If we reach settlement today, I'm prepared to go to the City Council tomorrow evening and recommend their full concurrence."
- **Participate**—Mediation is not arbitration or litigation where attorneys do most of the talking. Be an active participant as well as a decision-maker. Make the presentation; participate in discussions, etc. Remember, it's your project, your case, your money, your solution, and you have to live with the outcome.
- **Trust the Mediator**—For mediation to succeed, don't constantly question the mediator's approach, don't assume they are biased against you, and don't assume they can force you into a settlement you don't want. Develop a rapport with the mediator, respond openly to their questions, and follow their lead as long as you're comfortable. Seek advice from the mediator when appropriate. Recognize their goal and yours are the same: a reasonable settlement of all issues.
- **Team Approach**—Having a single person make the entire presentation is easier for the mediator to follow and easier for you to prepare. But, having a team present may bring a different perspective, more depth, and a more balanced approach to various issues.
- **Summary Presentation**—Mediation is a forum for settlement discussion not for detailed fact finding. Your presentation should be brief and to the point. Details should be summarized. Pick your key points carefully, document them well, and focus on them at all times. Don't get the mediator lost in the myriad details of the project, most of which have little or nothing to do with the issues in dispute.
- **No Insults**—Regardless of personal feelings, do not insult the other party or their attorney. Insults harden positions and make it less likely that the other side will be flexible. Impress the other side with facts; don't rile them with insults. As one famous set of authors stated some time ago in this regard, "Be hard on the problem, soft on the people [4]." Remember the goal of mediation is settlement. You need the cooperation of the other side to achieve this goal.
- **Factor in Other Benefits**—When discussing settlement options, add in other benefits beyond direct costs. For example, settlement allows both parties to close out the project, allows release of retained earnings, may allow release of previously withheld liquidated damages, frees up the contractor's bonding limits, avoids the high cost of litigation, etc. There may be other benefits you want to use in the settlement equation.
- **Be Creative**—In discussing settlement options, think outside the box. For example, you may be able to expand the pie by paying the price asked if the other side resolves other claims. You may be able to accept an extended bond or warranty in lieu of dollars. You may agree not to talk about the contractor's performance on this project to other project owners. Things of this nature may add value to the settlement without adding cost.
- **Trial-Ready Graphics**—Mediation is a forum for persuasion. Summarize your case in a few trial-ready (high quality) graphics. Use the graphics to help focus your case and aid in your oral presentation.
- **Know Your "Walk Away" Number**—Mediation focuses on "how much": on dollars. You must go into mediation knowing your real top or bottom line. Once you

know this and have estimated your failure cost, you can establish your walk away number. Your walk away number is the number beyond which it is probably better to go back to legal action as your costs are likely to be lower. If you reach your walk away number without achieving settlement, and with no good reason to change your number, then walk away from the mediation.

- **Maintain Control**—Mediation can be lengthy and quite stressful. Aggressive, inflammatory tactics probably will not work in mediation. You need to avoid getting angry or emotional. Focus on remaining under control at all times.
- **Don't Panic**—When the mediator starts telling you how weak your case is and starts throwing around outrageous numbers, don't panic. The mediator is doing this to start movement toward settlement. Panicked perceptions of your own weaknesses can be very expensive. That is, you'll end up negotiating against your own position; either throwing more money on the table or taking more money off. Remember your strong points and the other side's weak points. Self-doubt during the process is normal. Remember too, the mediator is beating up the other side, instilling in them their own self-doubts.
- **Listen, Then Talk**—Practice "active listening" during the mediation. Try to experience and understand the situation from the other party's viewpoint. Pay close attention to their opening and closing statements, as these often are the best summaries of their position. Don't spend your listening time thinking of rebuttal statements. If you do that, you've stopped listening and may miss valuable information.
- **No Non-Negotiable Demands**—Mediation is a structured, facilitated negotiation. Non-negotiable demands, at least at the outset of the process, are inconsistent with the spirit of mediation and counterproductive. The "take it or leave it" approach does not facilitate dialogue and is unlikely to produce settlement.
- **No Walk Outs**—One of the keys to successful mediation is to keep talking. Walk outs, unless you've reached your walk away number, are counterproductive in this regard. Walk outs stop communication. Additionally, they leave the other party with the false impression that, "My case must be even stronger than even I believed. The other side tucked tail and ran." That erroneous message makes it harder to reach resolution later on. Finally, walking out of mediation will likely lead the other side to reinstitute the initial legal action.
- **Make Settlement Easy**—In trying to structure a settlement, identify the other side's concerns and try to address them in ways that don't cost you money. For example, emotional issues may be settled by a formal apology from one side to the other concerning the way in which the project was run. Owners may promise no adverse commentary to other owners, no adverse performance ratings, or possibly a promise of future work.
- **Be Prepared to Make Business Decisions**—Win/win

settlements are obviously desirable but may not be possible, given the circumstances. Potential settlements may not be entirely within the bounds of the contract but they may still make good business sense. All potential settlements must be approached from this perspective. Each side may have to make painful decisions to achieve resolution. They may have to admit wrongdoing or compromise positions in order to reach settlement. But, if settlement is good business for both sides, then each side must be willing to pay the price.

After Mediation

- **Sign the Settlement at the Mediation**—Once settlement has been verbally agreed to, have the mediator write out the settlement, including all of the terms and conditions, and have all parties sign the document before anyone leaves the mediation room. This document may be hand-written and may have to be followed up with a more formal settlement document at a later point in time. But, it is important to get a signed agreement in order to avoid buyer's remorse the next morning as well as to avoid the typical post-mediation problems. ("If only I had said..." or "If I'd been there, I never would have given away the farm like you did!").
- **"Sell" the Settlement Within Your Own Organization**—Almost without fail, people on both sides (especially those who did not participate in the mediation) will criticize the outcome. Each side needs to go back into their own organization and explain why the settlement is a good deal. If things went wrong on the project, explain this so others can learn a lesson and avoid similar problems in the future. You need to help everyone in your organization understand the reasons for the settlement. And, on the public owner's side, the people at the mediation need to present the settlement to the appropriate decision-makers, and convince them to approve the settlement.

Mediation is the continuation of previous negotiation efforts, in a more structured setting, and with the assistance of an outside neutral. Mediation, contrary to popular belief, is not easy. It should not be attempted without thorough preparation.

Success in mediation requires careful preparation and a hard, realistic appraisal of your case and the other side's case. It requires a good, focused presentation by a well-prepared team of people. It also requires active listening and a willingness to make hard business decisions to achieve resolution short of arbitration or litigation.

The outcome of mediation is totally under the control of the parties, unlike the outcome of arbitration or litigation. Properly done, mediation is a very effective dispute resolution mechanism. Improperly done, mediation can be a very frustrating experience and results in a terrific amount of free discovery for the other side. If you follow the guidelines set forth in this article, you can learn how to win at mediation.

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