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A Blueprint for a Successful Construction Mediation

By Nancy Holtz 5/16/2014

Project: Settlement. Construction mediation is no different than any other type of mediation. However, it can present additional challenges since there are frequently a multitude of collateral issues which can impede settlement. Let's take a look at the critical path to getting the case settled.

The Program. For almost every construction case, the best pathway out of the dispute is through settlement rather than through adjudication by judge, jury or arbitrator. Point out to your client that in choosing mediation over litigation your client is retaking control of his business – and life. Because as litigation unfolds, your client will quickly and unhappily experience a complete lack of control over what happens. But with mediation, your client will have control over the timing, process and outcome of the dispute. Your client's business will have no interruption occasioned by assisting in discovery, attending depositions, and, worst of all, attending and testifying at trial. There will be no bad blood between business entities with whom your client wishes to continue to work. Bear in mind, people in the construction industry are used to having a fair amount of control over their part of a construction project. So, the idea of regaining control of their fate regarding the legal dispute is very appealing.

Design-Build. The beauty of mediation is that the parties can create whatever dispute resolution process they feel will be most effective. Formats to consider include mediation, mediation-arbitration, or arbitration-mediation.

Seek Bids for the Job - The Mediator. A construction mediator should possess the characteristics of any good mediator: skill, fairness, and common sense. But, because of the challenges of construction mediation, more is needed. No one wants a mediator who thinks The Eichleay Formula is a Robert Ludlum book; but, to resolve a tough construction dispute, you will want a mediator who has certain traits beyond some level of fluency in construction law. An effective construction mediator must have highly developed interpersonal skills, tenacity, and boundless energy for the marathon sessions which can occur.

A mediator should be flexible and be able to move between approaches – facilitative and evaluative – depending on the circumstances of the mediation and needs of the parties. Specifically, you will want a mediator who can speak to questions of evidence and other legal issues which may arise if the case goes to trial.

Erect the Scaffolding. A candid pre-mediation telephone conversation is crucial to the success of the mediation. Although dubbed a "pre" mediation call, it is in fact the beginning of the mediation because you will begin to describe the case from your perspective during this conversation. This is also the time where you should talk about the trial date, what settlement discussions have already occurred, and any particular challenges you anticipate. For example, are there issues regarding insurance coverage; in multi-defendant cases, is there a question of apportionment among the defendants; what to do about a non-participating defendant; and, whether a defense-only mediation session might be helpful. There may also be personality issues to address. Finally, you should discuss opening statements which, on occasion, can be unduly lengthy, provocative and even counterproductive.

The Project Documents. A good mediation summary should distill the significant information into a format which is persuasive and manageable. An unfiltered data dump of plans, photos, and technical information does not provide the mediator with the most effective tools to question and challenge the other side's position.

Assembling the Team. The oft cited advice of bringing the people with authority to settle is a good starting point. Beyond that, consider bringing people who are knowledgeable on anticipated areas of controversy. You may want to bring someone at a senior management level who is above the fray of having worked on the project himself. Such a person can bring great knowledge without the protective feelings of ownership regarding the project. You, as advocate, need to move beyond the role of warrior and become a diplomat. As the attorney at a mediation, you should be part of the solution-not part of the problem.

No Hard Positions on Hard Hats. The construction industry is populated by people who take great pride in their work. So, if your opening statement includes claims which might be taken as insulting, such as shoddy workmanship, try to soften your words a bit. A successful mediation needs buy in from all participants. Harsh statements attacking the integrity or competence of a party are sure ways to harden positions.

Loss of Productivity. Be careful if you choose to bring an expert. An expert should attend a mediation to help educate and elucidate - not carry the day for your side. The goal of mediation is to move the parties beyond their positions and focus on their interests. So, do not waste valuable time having the expert expound on why your client's position is 100% unassailable.

Also, sometimes even powerful evidence presented at mediation can be a waste of time. Such evidence is not particularly valuable if it is so technical that it will never be understood by a fact finder or, worse still, will never pass evidentiary muster. Never forget that this is a legal dispute headed for court if it cannot be resolved. To make the session productive, focus on those items which will be admissible and persuasive to the ultimate fact finder. That is what will elicit movement on the other side.

Delay Damages (Don't). Do not spend the whole session trying to jam a week's worth of evidence into a single day in order to prove the liability part of your case. Regardless of the strength of your case, your interest now is to get it settled. So, like it or not, you simply must move to the numbers and - working with the mediator - find the number that everyone can live with.

Be Ready for Change Orders. Come to the mediation with a settlement range in mind, but, be prepared to be flexible. Those last moves beyond your hoped for end point may be tough but will be worth it when the case settles.

Terminations for Convenience. It can be tempting to take the easy route and walk out on a mediation when it is not going well. But remember, rarely is your client better served by a trial. The brief moment of righteousness upon walking out will soon be eclipsed by the specter of a lengthy expensive trial looming in your client's future.

Concurrent Delays. As the parties near resolution, there are some obstacles which tend to crop up all at once. You may have some terms which you consider minor but which the other side might balk at. Do not wait until the very end of negotiations to raise these terms. When you present additional terms after the other side thinks they have struck a deal, it can derail the process. In fact, you may be providing the other side with new leverage. So, raise these issues earlier rather than later in the negotiations.

Another cause for delay at the end is the task of reducing the settlement to writing. Even when everyone is exhausted and content with a handshake, do not leave until the basic terms of the settlement are memorialized in a binding agreement. Your mediator should provide the parties with a Memorandum of Understanding to use once a settlement is reached. But, you should come to the mediation with any particular language which you want to be included in the Memorandum of Understanding already prepared. You will want to address any liens and logistics of releases of those liens. Consider the collateral effect of this settlement. Do you want language relating to any warranties or on any ongoing insurance litigation. These are all items which can be anticipated and you should have language ready to include in the Memorandum of Understanding if at all possible. It is much wiser to have an enforceable Memorandum of Understanding when the mediation breaks than hope the necessary terms will all be included in a later drafted settlement agreement and release.

Punch List. If the case does not settle at mediation, the project is still not over. Construction mediations can take more than one session – in person or by phone. Keep working with your mediator. With the right plan you can complete Project: Settlement within an acceptable budget and your client will thank you for it.

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