CONSTRUCTION MEDIATION ADVOCACY

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Much has been written about mediation advocacy. Both lawyers and mediators have espoused their views as to the most effective way to posture for a successful outcome during this negotiating process. As most of my mediations over the past 15 years have been construction-related, I humbly add my own views for the benefit of construction law practitioners.

PREPARATION

Counsel Preparation

Every time I have a chance to write or speak on a topic of mediation advocacy, I begin by preaching the preparation gospel. Simply put, in order to give yourself and your client the best opportunity for a successful mediated outcome, you must prepare yourself, your client, and the mediator.

While certainly not true of all practitioners, there is a trend toward lawyers showing up ill-prepared for mediation. This includes limited knowledge of the facts, the players involved in the controversy, the status of current pleadings (including, surprisingly, lack of designation of expert witnesses), etc. From the mediator's perspective, when a lawyer is obviously ill-prepared for a mediation, we presume these lawyers simply want us to reach into our pocket and spread our magic mediator's dust on a problem. While some of us do possess magic dust, it is in short supply, and we rarely use it for the benefit of ill-prepared attorneys. Seriously, you are doing your client (and yourself) a great disservice by not performing due diligence prior to the mediation.

In any generic dispute, preparation means knowing the facts and the law and how they interrelate with each other relative to your case and your opponent's case (an often overlooked feature of case evaluation). In a construction case in particular, this means thoroughly knowing the parties (who is the owner? the contractor? the applicable subcontractors? the designer?); how the facts in the dispute relate to all of these parties; what factual evidence, by way of documentation, written or otherwise, relates to the dispute; what are the contractual terms between the parties; what is the law in this area (both for you and against you); what are the live pleadings and what are the elements required to prove what has been pled, etc. There are countless other items to be explored. Of course, many of these areas of preparation are identical to trial preparation issues, and that is the very point. Knowledge is power. The more knowledgeable you are in all areas of the case, the better you are able to negotiate both the strengths and weaknesses of the case and, not insubstantially, your opponent's position as well.

Other Benefits

There are other extremely important benefits to complete preparedness. Somewhat surprisingly, some of these benefits have nothing to do with the actual strength of the case itself and have more to do with the psychology of negotiation. While I do not pretend to have any background in the art or science of psychology, I do know preparedness in a construction mediation has a significant effect on both your client, and your opposition.

If your client is convinced you are on top of the case both factually and legally, and you are organized both physically and mentally (having the files in order, and remembering where the documents are when needed) you will have built up an incredible amount of trust and loyalty in that client. It has been my experience that even the most "difficult" clients give great deference to advice and direction from the "prepared" counsel. However, I have found the reverse also to be true. A client is apt not to take as much direction or advice from counsel who the client believes is not on top of the game. In the final analysis, the disorganized attorney attempting to "fake it" through the mediation will not have as much sway with the client in the end game of negotiation that so often determines the success or failure of the mediation.

Additionally, when a client believes his counsel unprepared, I have often seen a parting of the ways between attorney and client in future endeavors, and sometimes in the very case at hand. Perhaps the client is thinking, "if my attorney is not prepared for mediation, he will not be prepared for trial."

Preparedness is also critically important in regard to your standing with the opposition. If you are prepared, organized, and on top of the situation you will automatically have strengthened your case, regardless of its relative worth in the eyes of the opposition. If you have the "stronger" case, being prepared will instill even greater fear in the opposition and in all likelihood will mean a better settlement for your client. Likewise, even if you have the "weaker" side of the case, preparedness and organization will project confidence to the other side and instill in them the thought that, even though they have the stronger argument, you will put up an honest fight. This in and of itself will create value for your side of the case in negotiations.

The converse is absolutely true. If you appear unprepared you will not project confidence and your case, whether strong or weak, will suffer during the negotiation process. Any mediator with a discerning eye will tell you the same thing. There is no substitute for preparedness at trial and there is no substitute for preparedness at mediation.

Client Preparation

Preparing yourself for mediation is not enough. Your client must be prepared and the mediator must be prepared, in that order. While most sophisticated clients in the construction industry have had experience with mediation at this point, many still have not and therefore do not understand the process. Take the time to explain generally what will happen during the process to alleviate the fear of the unknown.

More importantly relative to clients is the need to prepare them for the range in which the case is likely to settle, assuming it is a case to be settled on monetary terms. If you have not prepared the client for "compromise" (i.e. less than 100% of the wish list), then you will be reduced to two choices: (1) the distinct probability that the case will not settle on this mediation day and/or (2) after possibly months of telling the client how good the case is, you will have to tell the client the difficulties in the case and how the client really ought to consider taking something less than his bottom line. Of course, part of our function as the mediator is to discuss risk and doubt with all parties. However, your client will lose faith and confidence in you if they hear, for the first time on the mediation date, that the case really is not as strong as previously thought. You will do yourself and your client a favor by having frank discussions of value and of possible settlement parameters well in advance of the mediation process. The most successful advocates find it useful to have a continuous dialogue with the client on valuation issues.

I continue to be amazed at how often there has been no discussion of the full cost of a construction trial prior to mediation. We all know how expensive both attorneys' fees and expert fees can be in these cases. The client should know as well. This sobering discussion is a crucial tool in the mediator's arsenal, but I can tell by the look in most client's eyes, they are thinking, "why didn't I know this before?" It is my belief that if full discussions were had relative to cost of construction litigation coming into the mediation, both parties would have a definite and common interest in settlement. That is, neither side will probably want to actually spend the full cost of a litigated construction matter; consequently, they both have a common interest in resolution and this can be a major tool in helping to settle the case.

Mediator Preparation

Finally, although less important than preparedness of either counsel or client, it is advisable to prepare the mediator for the mediation day. There is a distinct trend towards not submitting position statements, memos, or even making telephone calls to the mediator regarding the facts of the case, prior to mediation. While a good construction mediator will generally have enough experience to piece together issues fairly quickly on the mediation day, informing the mediator in advance of at least the basic facts of the situation will give the mediator a chance to think about the case, potentially create options, and develop a plan of attack to get the dispute in its best position to be settled. This is particularly important for multi-party cases, where time is always a critical factor.

Additionally, failing to send the mediator any pre-mediation information may signal your disinterest in the case.

ATTENDANCE

Who to Bring?

To maximize your success in a construction mediation it is imperative that counsel bring the right client representative. Many respected mediators will say to bring the person with the most factual information about the dispute. To the contrary, particularly in construction mediations, I have sometimes found this can be quite a hindrance to the resolution of the dispute. While factual information is important and in some cases critical, it is possible the person with the most knowledge will be a detriment to the process.

Many times, the most knowledgeable people are the ones on the firing line, having lived with the dispute during the course of the job. Given the nature of people generally associated with the construction industry and human nature in general, it is many times evident these folks have an ax to grind. At a minimum, there may be other agendas at work which may have a detrimental effect on the settlement process. In most instances, the person on the firing line is going to be perceived (or at least he will perceive himself) to be responsible for the situation. Consequently, survival instinct takes over and that person will jealously guard their reputation and their actions. In other words, they will not be able to look dispassionately at the situation in order to make a proper decision vis a vis settlement. Counsel should take it upon themselves to determine the level of this individual sensitivity and to decide, with input from upper management, whether the individual should attend. In some instances, having the knowledgeable individual attend for the first half of the mediation is a compromise.

While many counsel and company management insist on having the person with the most knowledge at the mediation, if that person is adamantly lobbying against the settlement (remember, that person will have some level of persuasiveness since they indeed have the most knowledge of the facts, right?) it is often difficult for upper management to go a different direction. All we ask as mediators is for counsel to give this issue some thought relative to putting themselves and their clients in the best position to settle a case at the mediation.

How Many to Bring?

Significant thought should also be given to the number of people to attend the mediation. I do not believe that there is a single mediator alive who will say that it is easier to get a case settled when a party brings a significant amount of people to the negotiating table. There is simply “strength in numbers” and no one will want to appear

as the weak link. Everyone will take the company line and that consensus can be difficult to overcome. The inevitable consensus will be "our company is right and the other side is wrong." This is simply a function of human nature. It is many times difficult for counsel, upper management decision-makers and a mediator to overcome this type of momentum. Often times the mediator is forced to mediate positions inside of a single party, because of the number of people attending. Think long and hard about the number of people to bring and their importance to the mediation process.

Human nature and personality plays a large part in the dynamics of the "proper" person to bring to the mediation table, particularly in the construction arena. For lack of better words, there are facilitators and there are agitators. We all know there are a fair amount of agitators in the construction business. God love them. Sometimes there is no choice in the matter; however, counsel should give serious thought as to personalities and, if possible, select persons not necessarily who will "cave" and settle at any costs but those who will dispassionately look at the totality of the situation and make an informed and unemotional business decision.

It goes without saying the persons brought to the mediation as the parties representatives should have authority to settle the case. If your client representative must call back to the home office for approval or advice, you have probably brought the wrong person.

Adjusters

Relative to the attendance of insurance adjusters, there is no question a much greater chance of getting the case resolved at mediation exists if all participants, including insurance adjusters, are present in person. There is a trend, due to many reasons not the least of which is travel costs, to have adjusters appear telephonically at the mediation. It should come as a surprise to no one that it is much easier to say "no" over the telephone rather doing so in the heat of battle. While certainly not appropriate in every case, under certain circumstances it may be appropriate for counsel to obtain a court order requiring in-person participation from adjusters.

OPENING STATEMENTS

Some mediators theorize the opening statement is one of the most important if not the most important part of the mediation process. While I do not necessarily subscribe to that theory entirely, I do believe opening statements are important as they set the tone for the entire mediation day. To borrow a phrase, "you may not win the mediation with your opening statement, but you might very well lose it." Again, preparation is the key. A succinct, well thought-out and prepared opening statement will at the very least let your opponents know you are organized and prepared and this negotiation will not be a "lay down". Never underestimate the effect of your opponent's perception of your organization and resolve. If they see they are in for a tough fight, that alone will have an

effect on how they negotiate and perhaps how they settle in the end. Do not mistake this as advice to always take a "hard line". It is quite the contrary. Persuasion is rarely found in harsh, attacking tones. Rather, the mere fact of you showing preparedness and intelligence in your opening statement will help the mediator in "reality testing" and "creating doubt".

As with pre-mediation memoranda to the mediator, there is a tendency to slough off opening statements. Ask yourself how your client feels (much less your opposition) when he hears, "this is a standard, typical construction case," without further meat on the bones. This is particularly true if significant fees have been paid to date, and especially fees for "mediation preparation."

I do not advocate extremely lengthy opening statements. As we all know, construction cases can be and usually are factually intensive. A recessitation of every single fact involved in the dispute is not persuasive and is a waste of time. However, a carefully selected collage of factual recessitations will have the effect of showing your preparedness while not losing the interest of the opposition.

Do not under any circumstances go into attack mode against the opposing side. Even if you feel that it is the appropriate thing to do and it is warranted given the factual situation, resist the temptation. Ask yourself what negotiating mood you would be in if you were just called a liar, a cheater and a thief? Mediators will tell you significant time is lost trying to bring an offended party back to even his original mind-set coming into the mediation, after suffering a personal attack in an opening statement. Is your goal to try to settle the case, or to try to make your client happy by spearing his opponent? As a rule, folks in the construction business, whether job site foreman or company owners, do not respond well to threats or attacks.

Expert Presentation

There is also a trend, particular in larger cases, to not only bring experts but to have them make the opening presentation. Expert presentations can be useful and persuasive, in the larger and more complex cases. However, not all expert presentations "advance the ball". Most of these presentations are entirely too long. If both (or all) parties intend to have expert presentations, I highly suggest either a two day or a day and a half mediation process, with the presentations being done on the first day. It makes no sense to have a one day mediation, when the full opening statements and presentations last until early afternoon; there is simply not enough time to let the process effectively work.

There is an additional danger in having an expert give the opening presentation. If the expert doesn't "nail it", or worse, if there is any type of error in computation or factual presentation, the other side will automatically feel strengthened and encouraged. After all, if your expert (your "ace in the hole") can't get it right, what else is there to worry about? There is something to be said for keeping the experts opinions (or at least the presentation of those opinions) somewhat "mysterious", at least through the mediation process. Sometimes the fear of expert testimony is greater than the actual testimony itself.

Client Presentation

Finally, regarding opening statements, consider carefully whether your client should speak. Some of the best, most cogent and persuasive opening statements I have heard have come directly from clients themselves. I am not speaking only of the well-educated upper management type either. As we all know, some of the best testimony at trial come from the "guys in the field".

However, I have also seen a client's presentation derail the process, sometimes irrevocably. As long as your client will not attack the other side (for the reasons mentioned earlier), and will not make "line in the sand" postures, everything should be okay. However, if depositions have yet to be taken, and your client makes a poor (albeit genuine) statement, this will create more confidence in your opposition than it will help your side in the resolution of the case. With a bit of coaching on these issues, I believe client statements are, generally, helpful to the process of settlement as they impart true feelings from the participants and they allow those participants to "have a say." Counsel who refuse to let their clients speak in the opening session or in private caucuses are not giving the client the "day in court" he probably needs in order to make the mediation successful.

FOCUS

The following paragraphs could very easily be included in a construction trial preparation article. Because I believe preparation for trial and preparation for mediation are based on a common goal, that is, getting the best "deal" for the client (victory or settlement), I include it in this piece on mediation advocacy.

Because of their inherent complexity, construction disputes very rarely if ever involve a single issue. More typically there are many factual issues, many trails to wind down, and multiple areas of inquiry that make up the "whole" of the dispute.

However, clients and counsel alike are sometimes blind to the "big picture", focusing instead on minutia which, although important, may not be case determinative.

As counsel it is easy to fall into this trap because, being advocates, we want our side to win. We have spent time with our client to cultivate the winning trial strategy using facts favorable to our side.

Construction mediators in particular harp on the big picture. "See the forest instead of the trees," is a favorite saying. We focus on this because first, the natural instinct is to focus on individual facts to the exclusion of the collection of facts as a whole and, second, the complex nature of construction generally means there are two sides to every story (or at the very least, the ability to create an alternative view). The inter-woven nature of the construction process leads to many different "stories" with the same set of facts.

While it is the mediator's job to focus parties on the whole of the case (e.g. "how it will sell"), counsel should also not lose focus of the ultimate portrait to be painted. Another tired and true colloquium may be on point: don't put all your eggs in one basket.

Below are two simple examples to illustrate the point.

Example 1: Assume a subcontractor is causing significant delay on a project by causes of its own making. Yet, the subcontractor will argue to the death that a slightly delayed shop drawing approval (which has nothing to do with any of the actual causes of delay) in his "get out of jail free" card.

Although it is possible that the subcontractor could win with this argument, I believe the chances are remote.

Example 2: A general contractor is dissatisfied with the speed with which a subcontractor is progressing the work. Although the sub is behind schedule, the delay does not appear fatal to the job. The general sends out a "complete all of your work within 48 hours" notice as is allowed by the contract. There is no way possible for this or any other sub to complete the work in that time frame. The general contractor terminates the sub, gets a replacement contractor (without bidding or due diligence to get the lowest price) and the replacement takes six weeks to finish. The general sues to recover 100% of the overage, plus general conditions, etc. based on the contractual language.

Again, while it is possible for a judge, jury or arbitrator to take a strict approach and allow the general to claim victory, I believe most fact finders try, where possible, to assert the "do right" rule (in the context of the law and clear contractual language, of course).

I have seen many counsel in construction cases become myopic and so enamored with the minutia of the facts that the big picture is lost. Clients are notorious for this, which is completely understandable. Accomplished construction counsel should guard against falling in love with just a few facts. This may serve to create elevated client expectations during the negotiation stage of mediation.

In support for my position, I offer the jury poll. How often has a polled jury commented on certain issues which counsel thought were insignificant, yet the same jury did not think counsel's ace in the hole factual scenario was nearly as important?

Admittedly, there are times when all you have on your side is one fact. If that is the case, you have no choice but to ride that horse all the way. However, the bigger the picture, the more consistent the trial theme. With an assortment of factual issues, the better chance of success, in my opinion.

How does this relate to mediation? The easier it is to sell your trial theme to the other side, the more risk and doubt will be created, which will arm the mediator and increase the probability of favorable settlement.

CONCLUSION

I have tried to focus this presentation on providing the construction advocate "fundamentals" which I sometimes see are lacking in many construction mediations. I have not attempted to provide discourse on how to negotiate, as my feeling is that most people have their own style which, with some filtering and massaging by the mediator, can be effective. Although I can not guarantee success, it is my belief that if counsel concentrate on the fundamental areas suggested herein, their cases will be postured much more favorably for an appropriate and successful mediated resolution.