MEDIATING CONSTRUCTION DISPUTES:

WHAT COUNSEL SHOULD KNOW ABOUT MEDIATION ADVOCACY

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Published:

Mediation Handbook
2016 Edition
Juris Publishing

MEDIATING CONSTRUCTION DISPUTES: WHAT COUNSEL SHOULD KNOW ABOUT MEDIATION ADVOCACY

Nearly all construction cases, whether in the litigation or arbitration forum, will be mediated. Courts have found mediation to be an effective tool in managing their dockets. Additionally, many contractual arbitration clauses require mediation prior to the use of the arbitration process. Because construction cases often involve numerous complex issues, counsel needs to adequately focus on those issues in order to provide the best possible environment for success in mediation. While there is no one "bible" stating the rules for advocacy in a construction mediation, and different opinions no doubt exist on the subject, this article contains suggestions for counsel acting as mediation advocates based upon our experience as construction mediators. By sharing experiences, participants in the mediation of a construction dispute can judge the techniques that can be employed to enhance the process for both counsel and their clients.

Pre-Mediation Issues

A. When to Mediate? Significant thought should be given to the issue of when to mediate a construction case, particularly in light of the amount of discovery that will be needed. A case usually will not settle before it is "ripe," but this does not necessarily mean after all (or any) discovery takes place. Clearly all of the facts will not be known or developed prior to the completion of significant discovery, but this should not preclude serious consideration of the advantages of early mediation. If the project is still under construction and work is continuing, there is an enhanced likelihood of finding a business resolution. The parties will be able to control many more issues during construction, and be able to "horse-trade" related to these issues. If a dispute lingers after construction is complete, the bargained-for resolution is usually limited to a monetary outcome.

Additionally, feelings may not have hardened beyond repair early in the dispute. Thus, there is a greater possibility of restoring a continuing business relationship. While it is not uncommon for disputing parties to be entrenched in their positions, if they still need each other (e.g. for completion of certain scope of work), they often are willing to create a business resolution to the dispute.

Most lawyers, through training and historical perspective, have been taught to think forensically. They come to the matter after the fact and look at it with an eye toward how they believe a judge, jury, or arbitrator would decide particular issues. Lawyers could better service clients who are involved in construction disputes by fully exploring the potential for a business resolution, rather than simply facilitating the onset of litigation. In our view, this exploration should be mandatory in all disputes in which construction is ongoing.

Even if construction is substantially complete, counsel should still seriously discuss with the client the benefits of mediating early, even before any discovery has been done. From the client's point of view, an early resolution in mediation will save the parties money. Construction cases are notoriously complex, and therefore expensive. The less money put into the kitty to pay for extensive discovery and legal fees means more resources available for settlement. Just knowing that mediation can save money may persuade the parties to mediate and even increase the prospects of resolution.

Another reason to consider mediation at an early stage is the opportunity it affords to learn about the case. How often do counsel for the parties have the opportunity to spend an entire day with their clients, talking to them about the case, and listening to the arguments and some of the evidence from the opponent? We would never suggest undertaking mediation simply as a discovery tool, since doing so would violate both the letter and the spirit of the "good faith" rule. Yet it cannot be denied that the information and strategies learned at a single day of mediation can help focus discovery efforts and litigation strategy if the parties cannot agree to a mediated resolution.

In the final analysis, there is no downside to mediating early. There is no rule preventing the parties from mediating again later if an early mediation does not succeed. Indeed, if suit is filed in the case, a judge might order mediation again prior to trial.

Preparation for Mediation. Counsel must be prepared for mediation. It is alarming how often counsel attend the mediation session without a good working knowledge of the facts, the law, or the claims, counterclaims or defenses alleged by the opposition. If the case were going to trial, the lawyers would not dare go unprepared. The mediation day is conceivably the most important day in the life of a case and is quite often the client's "day in court." Lawyers who are unprepared at mediation perhaps have lost the best opportunity to resolve the case.

In litigation, all things being relatively equal, the more prepared party usually fares better. While mediation is a win-win process in that both parties must be satisfied with the result (or at least accepting of it) for a dispute to settle, it is nevertheless possible to reach a settlement one party believes is more advantageous to its side. That is more likely to occur to the party whose attorney is better prepared. In light of this, doesn't it make sense to be as prepared as possible?

Managing Client Expectations. Nothing will deflate the momentum and promise of a construction mediation quite like a client who learns, for the first time at the mediation, that his multi-million dollar case is really worth a mere fraction of that number. Unrealistic expectations are often the death-knell to a mediated resolution. Although it is not impossible to resolve cases where one or both parties have an unrealistic expectation of the outcome, the chances of successful resolution are substantially diminished. It is the lawyer's job to properly manage the expectations of the client in advance of the mediation. If the lawyer doesn't manage the client's expectations, the mediator will burst that balloon at the mediation, since most mediators provide a "reality check" on those expectations. The attorney's failure to honestly discuss with the client the true value of the case

may put a dent in the client's trust, which will hinder not only the resolution of the current dispute, but perhaps have a deleterious effect on future representation of that client. A client will look with a jaundiced eye at a lawyer who promised a "lay down" case worth millions if the maximum offer at mediation pales in comparison.

Even if a construction case appears to be strong, counsel should advise the client well in advance of mediation of the vagaries of litigated outcomes, and the very real possibility that the opposition does not see the case in the same light (and almost certainly has another side to the story). This will only make counsel appear more proficient when the mediator addresses exactly those issues in private caucuses at mediation.

Client Preparation. Prior to the mediation, all counsel should explain to their clients how the mediation process works and how the negotiations at mediation are carried out. **The explanation of the process should be thorough, including what happened (or is likely to happen), in the joint session, the intermediate and the last caucuses and the signing of a settlement agreement.**

During mediation, clients usually act on their emotions, and not on a logical assessment of the facts. It is not uncommon to hear phrases from clients such as, "I want this," or "I feel I should be paid this." One of the attorney's responsibilities as a mediation advocate is to explain that offers and demands will be made at the mediation and they will change throughout the day. Because the attorney has given the client a realistic understanding of the strengths and weaknesses of the case and what would be a reasonable settlement based upon the attorney's evaluation of the facts, the law, the client's needs and other factors, the client should be told to be prepared to hear things during the mediation that may change his or her previous evaluation of the case or the point at which a settlement is desirable. If this preparatory work is not done, the mediation could fail. This issue is rarely addressed with parties before mediation as shown by the questions clients ask at mediation.

Opening Statements

In litigation, counsel has no opportunity to address or hear from the opposing party except through discovery requests, requests for admission, depositions, and the trial. Ethics precludes any direct communications between counsel for one side and the adversary. In mediation, however, there is an opportunity to hear from and communicate with the opposing party. In all but the atypical case, opening statements are given during the joint session of the mediation with all attorneys and parties present. Thus, the way these statements are delivered can influence everything that follows: it can make your case seem stronger or weaker in the eyes of the opposing party. As a result, properly delivered opening statements are critical.

Who Should Counsel Address? Many attorneys primarily address the mediator when they make their opening statement or respond to questions, as though they are trying to convince the mediator of the correctness of their client's position on the facts and the law. The problem is that the mediator is not the decision-maker. The mediator controls the process and how it is run, but the parties control the outcome. This differs from arbitration where the arbitrator is the ultimate decision-maker. For this reason, counsel should not address the mediator or the opposing party's attorney. Counsel should use the opportunity to speak directly to the opposing party. When there are multiple representatives of a party, counsel should speak to all of them, because at this stage of the mediation the real decision-maker may not be apparent, especially in the construction context. Often times parties bring senior management to mediation; this does not mean, however, that the most senior ranking member of a party is its decision-maker. Also, public sector entities usually have varied and complex decision-making structures. The danger in assuming a particular person is the

decision-maker and addressing only that person is that counsel could be wrong, a decision that could have harmful consequences.

Counsel should be judicious in choosing the words and the manner in which to address the opposing party. This is particularly true if counsel wants the opposing party to listen to the presentation. Personal attacks on others in the opening statement may win points with the client, but it is likely to alienate the opposing party and derail the possibility of a mediated outcome. In any event, even if counsel is professional, respectful and polite, the opposing party will have difficulty really hearing what counsel says because of the mistrust that has grown between the parties. Therefore, it is best to use everyday words (no legal jargon) and a conversational tone of voice. It is useful to engage in eye contact with the party, but not so much as to create discomfort. A presentation should not be made to the opposing party in a fashion that is so intense as to make the opposing party uncomfortable during the presentation.

What Should Counsel Say? Construction mediations are usually scheduled for one day. These cases are usually very issue and document-intensive. In that one mediation day, there is not adequate time to fully address each and every issue. Yet, counsel for the parties often attempt to rebuild the entire project during the day of mediation. This is not practical.

Counsel should look at the overall picture, not the minutiae. For instance, will a $500,000 repair of a house valued at $300,000 make sense some day to a judge, jury, or arbitrator deciding the case? Will a two-year repair of a three-month project seem reasonable to a decision-maker? Making a demand that is either extremely unreasonable or one that is based on a far-fetched litigated result could discourage the other side and make them believe that settlement is completely unobtainable.

Counsel should not be afraid to acknowledge weakness in his or her client's position. It is a rule of negotiating that a good negotiator admits legitimacy in the other side's point of view. This also assists the other party in hearing the content of what counsel is saying.

Should the Client Speak? The majority of attorneys do not allow the client to make any remarks about the case in the opening session of the mediation. This is unfortunate. Attorneys should evaluate this philosophy on a case-by-case basis. The mediation is often the only "day in court" for the parties, and for some, being heard is the most important factor. Allowing a client to speak in the joint session if the client can speak effectively and stay on the subject without straying or revealing confidential information, can have a huge impact on the likelihood of settlement. The opposing party and attorney will also see how well this party will sound to a jury in the courtroom, which may make them more disposed to settle. This also allows the client to have a "day in court" and feel a sense of participation in the process.

In cases in which a party has been allowed to speak in the opening session, parties often comment to the mediator during private caucuses that they never before understood what the opposing parties were thinking. That understanding greatly contributes to the willingness of the opposing party to participate in the process and achieve a resolution.

Visual Aids. In construction cases, the dates of events usually are critical. One of the most effective tools an attorney can use in mediation is a visual time line illustrating the important events. Other visual aids also can be used, depending on the facts, including a chart of the categories and amounts of damages alleged, blown-up photographs of alleged construction defects, a video of the construction site, and aerial photographs of the state of the project.

Some counsel, particularly in complex cases, have a claims expert present a video or power-point presentation in the joint session. Counsel should be mindful of the time restrictions involved. Does a two-hour media presentation really make sense in a one-day mediation?

Money Demands or Offers. It is usually inadvisable to discuss money in the joint session, either by way of demands or offers. When money is mentioned, it is typically the only factor the opposing side remembers. An experienced construction mediator will not ask about money or a history of settlement offers, as attorneys often have different perceptions of previous negotiations. The mediator knows to ask such questions privately. If nothing is said in the joint session about prior negotiations, the mediator will start the discussion of numbers in the first private caucus.

In the event counsel makes a demand or offer in the joint session, the demand should not be more and the offer should not be less than the amount conveyed in previous settlement negotiations. If that occurs, it is not unusual for several hours to be wasted while the mediator tries to get the parties back into the settlement range which the parties had previously discussed. In any event, the initial amount demanded should never be a complete surprise to the opposing party. Counsel should explain to the mediator the elements and an amount of damages that make up the demand and have evidentiary support. Then the mediator can convey this supporting information to the adversary in the private caucus with that party.

Private Caucuses

The Client's Role. During the first private caucus with each, each side has his or her "day in court" when the mediator allows the party representative to talk about the events that led to the dispute. The need to vent is often important in construction disputes, which tend to register high on the emotion scale. A skilled mediator usually directs the preliminary questions to the party

representative, as opposed to counsel. Counsel should understand that one of the techniques of good mediation advocacy is to allow the party representative to converse with the mediator and answer questions. The importance of allowing the client to speak during private caucuses cannot be overemphasized. If the client does not feel that he or she has had an opportunity to be heard, the client is likely to have difficulty being flexible when necessary throughout the day.

Often attorneys find it difficult to remember that it is the client's case and ultimately the client's decision to settle. A client may have an interest in settling a case while the attorney recommends against that action. This is not likely to become known unless the client can speak freely in these confidential private caucuses. A good mediation advocate will explain his or her view of the facts, the law, and the likely outcome if the case were to go to hearing, but allows the ultimate decision about settlement to be made by the client.

The private caucus is confidential and the mediator will only reveal to the other side what is permitted to be revealed. Counsel should always tell the mediator which facts and issues are confidential and therefore should not be discussed with the opposing side.

Who Should be Present? It is well known that persons with the decision-making authority should be present at the mediation. In construction cases, however, it is also imperative to have persons in attendance who are familiar with and can explain the relevant facts and relevant technical areas. This may require more than one client representative at the mediation. For instance, if the issue is an alleged construction defect, a client representative with knowledge about the project, such as a project manager, also should attend. Too often the only client representative is a company executive with overall managerial responsibility who has no specific knowledge about the construction site. If the issue is an accounting issue, there should be an accountant or bookkeeper at the mediation along with the person in authority who will be making the ultimate decisions. Hours

of mediation time can be saved if the right party representatives are available when they are needed. Except for the decision-maker, it is not generally necessary for all persons whose participation may be needed to be present for the entire day. They should, however, be present until questions have been answered about that person's area of expertise.

Insurance Coverage Issues. Insurance issues are becoming more prevalent in construction cases since many builders now have commercial general liability policies. When there is a claim filed against the builder, the insurer often provides the builder with counsel to defend against the suit, while the insurer "reserves" its right to challenge its liability under the policy for a later day.

The builder's attorney represents the builder and is hired to defend the builder against the owner's claims. The attorney is paid by the insurance company and thus cannot provide advice to the builder on matters of insurance coverage. The builder usually appears at the mediation with this attorney and a representative of the insurance company. Although many insurance coverage issues may be raised during mediation, the builder usually does not bring a personal attorney to give advice about coverage issues. This sometimes results because the attorney appointed by the insurer has not suggested this to the builder and stressed that it would be helpful to have "coverage" counsel.

An attorney who appears at mediation with an insurance company representative needs to be as certain as possible before the mediation that the representative has the authority to make settlement offers. Too often valuable hours are lost waiting for the attorney to find a higher level insurance company representative at the home office to authorize an offer. When people are in different time zones, this can result in even more wasted time. Although many attorneys attempt to address this issue prior to mediation, it is sometimes out of their control. However, this issue should be a priority in pre-mediation planning so that the length of mediation is not unnecessarily extended.

Strength and Weakness Analysis. During private caucuses, the most important job of the construction mediator is to focus the attention of the party representative and counsel on the strengths and weaknesses in the case. This is the second stage of managing the party's expectations, only this time it is done by the mediator. If risk and doubt about the success of a party's position is not present, the case most likely will not settle.

During these private caucuses, the attorney's role is to act as a counselor to the client. Most litigators know how to be an advocate, but too few know how to be a counselor. While it is important for attorneys to champion their client's side, particularly in front of the opposition, the private caucus is where the attorney should begin advising and counseling the client in an objective manner. The private caucus is the appropriate place for the attorney to switch hats from advocate to counselor.

Lawyers spend too much time advocating the client's case in attempting to "win over" the mediator. While they and their clients may gain some satisfaction from that, since the mediator is not the ultimate decision maker, what is really gained? Additionally, if the client only hears the lawyer advocating his side of the case, the client is more likely to focus only on the upside (as advocated by the lawyer) as opposed to potentially vulnerable areas. Consequently, the opportunity for rational, informed decision-making is compromised because of the one-sided nature of the presentation.

Seasoned construction attorneys act as counselors at least as much as they act as advocates in mediation. In our experience, they and their clients fare quite well in the process, "well" being defined as having a higher resolution rate, and higher client confidence in counsel.

Don't Pull Any Punches. Attorneys who represent parties in mediation often soften the bad points of the client's position. This is human nature but it is never a good idea to soft-peddle

bothersome issues. If counsel believes the client or another witness will not make a good impression, counsel should not hide this fact. True, no one wants to hear that he will not make a good witness. That will hurt less, however, than having that person appear and compromise the client's position. The client is paying for good legal advice and should receive it, whether the news is good or bad.

Likewise, counsel may "shrug off" troublesome documentary evidence by belittling its effect or using some other justification. Professional arbitrators and mediators know the value of documentary evidence. The outcome of a case may very well hinge on the words of a contract, letter, or other document. Conversely, it may hinge on the lack of documentation. The private caucus is the place where the window shades are drawn, revealing the downside, as well as the upside, of the client's case. Only then can the client make an informed decision about the wisdom of settlement and what the settlement parameters should be.

Some lawyers prefer to have the mediator "do their dirty work"- that is, have the mediator critique the client's case, while the attorney acts only as an advocate. This is not necessarily wrong. However, in our experience, while a party will listen to what the mediator has to say about the party's view of the case, it is better when the party hears a similar analysis from respected counsel. This makes it easier to "buy into" a mutually agreed settlement.

Show and Tell? In private caucus, the attorney often discloses confidential information or documents to the mediator, instructing that they should remain confidential. The attorney decides what information the mediator can or cannot disclose and the mediator understands that the attorney's trial strategy influences this decision. Attorneys should understand, however, that mediators deal in risk and doubt and that they will have difficulty getting movement from the opposing side if they are unable to share detrimental information with that side.

Instead of taking an "everything is confidential" approach, the attorney should analyze whether information that would be discoverable in litigation must be kept confidential in mediation, and whether it might be worthwhile to allow the mediator to use that information to generate movement. For instance, in a construction case it is the norm that a party will have to produce all project documents. However, an attorney sometimes will not allow the mediator to show opposing counsel a project document even though it could assist the mediator in getting the adversary to improve an offer in the next caucus. We are not suggesting that attorneys compromise their trial strategy, but only that they evaluate whether the information or document is really going to remain confidential under pre-trial discovery rules. This should be weighed against the advantages that a party may obtain by allowing the mediator to convey information that may reveal a weakness in the opposing party's case.

Using the Mediator – Do I or Don't I? Although there are different philosophies regarding this issue, a mediator as a neutral should not express opinions about who is right or wrong in the case or assist one party at the expense of the other. However, this does not mean that the mediator cannot assist a party in evaluating the effect of messages that the attorney instructs the mediator to convey. Often, the mediator knows that a demand or offer that is conveyed will be counterproductive to the goal of getting the case resolved. A mediator can focus a party's attention to that problem by using role reversal and asking what their reaction would be if they were to receive such an offer. If the party acknowledges that he would react in a negative way, the mediator may be able to help the party see the need to revise its offer. Mediators are skilled in negotiating and conveying information in a manner that works toward resolution and not away from it. They are helping the parties recognize their interests and possible options for settlement. An attorney who has confidence in the mediator should consider relying on the assistance of the mediator in analyzing negotiation issues.

Multi-Party Cases. Construction mediations often involve many parties. In addition to the owner and general contractor, there are invariably numerous subcontractors in the contractor chain. In addition, insurers often play a role in these cases.

An integral part of mediation advocacy is planning ahead, anticipating issues and addressing them early to maximize settlement opportunities on the mediation day. In a multi-party case, there are many issues to consider in advance of the mediation. For example, in a dispute in which the owner sues the contractor and subcontractors, seeking damages for faulty workmanship, counsel for the owner should think about how he or she should conduct the negotiations. For instance, should counsel give one demand to all the defendants as a group (and leave it to them to negotiate among themselves as to how that demand will be met), or give a separate demand to each? Should the attorney settle with one defendant if a global settlement of the dispute is not achieved with all the defendants? The end of the mediation day is not the time to begin asking questions about the legal effect of a partial settlement.

The attorneys for the contractor and subcontractors should confer at least once before the mediation day to determine if they should negotiate with the owner as a group and make a joint offer of settlement. They also should discuss how each would contribute to the payment of a settlement sum. If they can agree on the contribution percentage each will make, that will go a long way toward reaching a settlement. Equal percentages may be the logical place to start in these discussions, but if that is not acceptable to one or more of the defendants, the attorneys should at least have an idea from these discussions about each defendant's view on the contribution issue before the mediation starts.

If the attorneys foresee that it will be difficult for the defendants to agree on the percentage each will contribute to the settlement, they should advise the mediator before the mediation. This

will give the mediator time to plan how to approach the parties. In large or complex cases where the defendants are at odds on the contribution issue, the mediator may suggest having a day of mediation only with the defendants where this issue can be addressed. Thereafter, a second mediation day can be scheduled with all the parties to resolve the case as a whole.

Anticipating and being prepared are essential to make the best use of the mediator and enhance the possibility of settlement in a multi-party case.

Final Caucuses

Client/Lawyer Interaction

The final caucuses are, naturally, shaped by the work previously done in the mediation. Obviously, the more movement towards an acceptable settlement area that has previously taken place, the easier it is for a deal to be made. This is how "textbook" mediations take place.

However, even if parties are significantly apart in terms of settlement parameters, amazing things can happen in the final rounds of mediation. It is the belief of many attorneys that "the real mediation doesn't start until 4:30 p.m." Mediators know to expect the unexpected in the last part of the process.

Because the final round of caucuses is a critical time, counsel should also be ready for whatever comes. It is a likely scenario that the client has spent all day being told he is wrong (by the opposing side), his case is suspect (by the opposing side and perhaps the mediator), and the amount of attorney's fees that he estimated spending has been exponentially miscalculated (by his attorney). He is undoubtedly tired and his character very likely has been impugned by the opposition.

Although mediators have witnessed this scene countless times, counsel always seem to be

taken aback by the client's inevitable outburst. Instead of buying into the literal meaning of the angry client's announcements (e.g. "You tell them to take their demand and … etc."), counsel should realize this last bit of venting is an important part of the process for the client. Too often we have seen counsel accepting the statements made in the client's diatribe as terms carved in stone.

The better practice is for counsel to allow the outburst to subside and then to calmly and rationally counsel the client about the critical, global issues, such as the following: There are no guarantees of winning the case; there will be ongoing costs (always expensive in construction cases) of not settling the case; there will be the undefined costs of loss of time and other business opportunities; and there is a value to closure.

There is, generally, no one the client trusts more, relative to the case, than his attorney. It is in the final caucus where this trust will be magnified. The client does not need to be told what he wants to hear; rather, at this critical time, he needs good, sound legal advice and counseling. With this type of "help", the mediator can help close the deal.

Settlement – Not Just About the Money

Different types of settlement arrangements can be devised to settle a construction dispute in mediation because the consideration given need not be monetary in nature, as it must be in a trial. For example, a settlement can involve a contractor performing a repair (although there is the risk of another lawsuit), putting a contractor on the short list for another job, or dismissing certain claims or counterclaims with no money changing hands. Good mediation advocacy includes helping the client to identify, preferably as early as possible, even during the "preparatory" pre-mediation stage, what the client's real interests and needs are. Often the contractor is more concerned with non-monetary

items, such as additional time to complete the job, or future work, while the owner wants the project completed as quickly and as economically as possible. Counsel should spend the time necessary to understand the real interests of their client and explore ways to satisfy those interests. Not all cases have to be settled with money.

The Settlement Agreement. If a case is settled by oral agreement at the end of the mediation, the mediator invariably will ask the parties to memorialize the agreement in writing. To avoid surprise, counsel should advise their clients before the mediation begins that if the case is settled, a written settlement agreement will be signed by the parties, and this agreement will constitute a legally binding contract. Depending on the circumstances, this agreement may constitute the final written agreement between the parties. Alternatively, the written agreement signed at mediation may contain the basic outline and terms of the deal, with a more formalized document to be prepared later, by counsel. Although mediation practices vary across the country, generally mediators prefer to allow counsel to craft the settlement document, perhaps using a basic form supplied by the mediator.

Whether the project involved in the dispute is large and complex, and whether or not it involves many parties, counsel must give a significant amount of thought to the specific terms of the settlement agreement. For example, will particular project specific terms be needed, in addition to the standard release language? The answer could depend on the following issues:

1. Is there a recorded lien which needs to be released?

2. Are there mechanics liens by subcontractors/suppliers that need to be released?

3. What should be the mechanics of paying subcontractors/suppliers and getting appropriate releases? Should joint checks be employed?

4. How will warranties be handled? Will the contractor and subcontractors remain bound by their warranties in the construction documents (e.g., will the warranties be extended?) or will the settlement release all from their unexpired express warranties?

5. Will there be insurance litigation unrelated to this dispute that may be affected by this settlement?

6. How will contingent liability for future unknown personal injuries at the site be addressed?

7. Will "completed operations" insurance coverage be affected by a release of "any and all claims, known or unknown"?

8. How will indemnity issues be addressed?

9. If the same parties in mediation are involved in other projects, how will the agreement be worded so the other projects are not affected?

10. If settlement ends in termination of a contract in which a party is still working at the site, how will this party's withdrawal from the site be accomplished and when?

11. If the settlement entails additional work on site, what should be the scope of work; when should it be done; what standards should apply; and who will determine whether the work has been done satisfactorily?

12. If only some parties have agreed to settle, how should the agreement be worded?

This list is not exhaustive, but it does point out the many and varied issues involved in construction case settlements. Thus, prior to the mediation, counsel should anticipate all possible issues and their ramifications, raise these issues with the mediator during the mediation, and finally, address them in the settlement agreement. We have frequently been involved in lengthy mediations in which the parties have reached an agreed-upon financial settlement, only to spend many additional hours working through the logistics of settlement issues. Mediators know that it is very difficult to "go back to the well" once disputes arise during the process of drafting the final settlement document. If these matters are not dealt with up front and during the mediation, a settlement that has apparently been achieved can easily unravel.

Conclusion

In conclusion, the important role of counsel in mediation cannot be overstated. While mediation is a fluid process and the outcome is never certain, an attorney who properly prepares for mediation, who acts as counselor at least as much as he acts as advocate, and who anticipates and resolves the intricacies of a construction settlement will have added great value to the services provided the client. In our opinion, counsel employing these suggestions will enhance their success rate in mediation, however that term is defined.

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