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Best Practices for Mediating a Construction Dispute

By Deborah Ballati

When I began my construction law practice nearly 40 years ago, mediation was largely unknown and certainly untested. Clients and many attorneys were almost totally unaware of this form of dispute resolution. Fortunately, however, a few forward-thinking lawyers in the late 1970s and early 1980s understood the value to the industry and their clients of early, consensual and informed resolution of disputes, and began discussing mediation with their clients and other lawyers.

Now, more than 40 years later, there is a widespread belief that those groundbreakers were right. During my career, whether my construction case involved residential buildings on university campuses, military base clean-ups and redevelopment, hydroelectric or nuclear power plants, toll roads or sewage or water plants, the case and the client always benefited from a focus on early dispute resolution. The cost of trying construction cases can be great, and the issues are often ones that will benefit from the input of a neutral with some level of expertise in the technical and contractual issues unique to construction. Judges and juries may not be as well suited to deciding the cases as informed participants and a knowledgeable neutral.

In the beginning, the mediation process followed a fairly structured and uniform approach: statements exchanged prior to the day of mediation; group presentations, often involving key witnesses and experts, to start the mediation day; attendance by decision-makers who had not been heavily involved in the process leading up to the dispute; separate caucuses with the mediator; exchanges of demands and offers; and, hopefully, resolution. The mediator required a term sheet signed by all the parties before they left the mediation, followed by a more formalized settlement agreement executed by all the parties as soon as possible.

Within a few years, it was the clients, not the lawyers, who were the first to mention the possibility of mediating their disputes. Legislatures and the courts began requiring the parties to participate in some form of

ADR before filing lawsuits; clients began including required ADR in their contracts as a predicate to litigation.

In addition to these changes, the mediation process itself has changed as well. There is now far less emphasis on large group presentations to start the mediation, although the best mediators reserve the right to conduct such presentations throughout the day if they think doing so will aid the process. There is less participation

by previously-uninvolved decision-makers, and more involvement by those involved in the process that led to the dispute. This phenomenon may account for the decreased emphasis on large group presentations because those in the room have "heard it all before." Finally, the use of mediator's proposals to break a deadlock has become almost routine.

In short, the process is more nuanced now, and mediators have more tools available than before. How the mediator uses those tools can be crucial to the success or failure of the mediation.

First, understanding that one size doesn't fit all is critical, especially in construction cases where the range of parties and issues can be broad and complex. The instincts of the mediator and the ability to understand what is needed by the parties (and often the lawyers) cannot be underestimated.

Use of mediator's proposals is a powerful tool. But it is important for the mediator, the lawyers and the parties to understand fully what such proposals mean, how they work, and what, if any, role the mediator will have if the proposal is not accepted and the dispute continues.

Second, pre-mediation calls with each side, sometimes followed by a joint pre-mediation call prove invaluable to flesh out the key issues that must be addressed if the case is to settle. For greatest success, those calls should happen at the "right time," and that the "right time" will be different in each case. Sometimes the "right time" is before the mediator has any written materials from the parties, to get background and nuances from the lawyers. In those cases, it is useful to have further pre-mediation calls after the mediator has read the parties' submissions. Having the calls sufficiently in advance of the mediation so the parties can address anything that comes up before the day of the mediation helps to avoid surprises or gaps that make resolution at the mediation impossible.

Third, for construction cases in particular, it is important that the key cost and schedule issues have been explored by both sides and that the mediator understands the contractual provisions that are central to the dispute. While it is not always necessary for the parties to complete costly full blown schedule analyses before the mediation, the parties should have done at least some level of analyses so they can present a credible case on the claimed schedule impacts. Moreover, having sufficient backup for the claimed costs, consistent with the contract requirements, is important.

Fourth, mediators should be sensitive to, and sufficiently knowledgeable about, insurance relevant to the case to assist the parties in making sure that all applicable (or potentially applicable) insurance is available on the day of the mediation. Additionally, I believe the involvement of insurance representatives at the mediation is essential.

Finally, even when the mediator has done his or her homework to help the parties resolve the case, it is important to let the parties have enough time at the mediation to get comfortable with the process, tell their story and be ready to hear what the mediator has to say before jumping too soon to the bottom line. Having patience and being a good listener are two of the most important skills for a mediator, especially in construction cases where the parties may know—or at least believe they know—far more about the technical issues than the mediator.

Deborah S. Ballati, *Esq. is a panelist with JAMS based in northern California. She can be reached at dballati@jamsadr.com.*