Chapter 03

Mediation – The First Step in ADR

This chapter addresses the subject of mediation, which is one of the most important forms of Alternative Dispute Resolution (ADR) techniques.

This chapter covers the following:

3.01 Definition of Mediation

As defined by the National Arbitration Forum (NAF), mediation is a voluntary method of dispute resolution that allows parties to craft their own solution to a dispute. An unbiased third party (the mediator) assists the parties in this process by conducting private interviews and negotiations with each party to discuss settlement opportunities and facilitate an agreeable solution. Mediators never impose decisions on disputing parties; rather, they encourage disputing parties to find common ground and resolve their dispute on their own terms.

3.02 Major Differences Between Arbitration and Mediation

As discussed in the next chapter, arbitration is a formal process that follows a set of prescribed procedures. These procedures are set forth by the administrative entities such as the NAF or American Arbitration Association (AAA). The results of arbitration are binding on both parties.

In contrast, mediation is an informal procedure highly dependent upon the individual skills of the mediator. The results are non-binding on the parties involved.

3.03 Role of Mediation in the ADR Process

Although some people refer to mediation and arbitration as an "either/or" choice, the reality is that most organizations see these two processes as complementary. For example, the American Institute of Architects (AIA) recommends contract clauses that state:

4.6.1 "Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5."

4.6.2 "Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect."

Similarly, the Association of General Contractors (AGC) states in part:

"Pursuant to Paragraph 12.4, if neither direct discussions nor mediation successfully resolve the dispute, the Owner and the Contractor agree the following shall be used to resolve the dispute. Binding Arbitration shall be pursuant to the current Construction Industry Arbitration Rules of the American Arbitration Association, unless the parties mutually agree otherwise…."

Clearly, there is general agreement that if the parties to a dispute cannot work it out in direct negotiations among themselves, they should bring in a mediator as a first step and only resort to arbitration if the mediation process fails.

Thus, the sequence of steps recommended in this multi-tiered approach to dispute resolution without litigation is private discussions between the parties, mediation, and finally arbitration.

3.04 Selecting the Right Mediator

Perhaps more than in any other form of ADR, finding the right person to serve as mediator is crucial to the success of the process. The mediator, after all, is a neutral party who has no power to render a decision or unilaterally resolve a dispute. The mediator's main purpose is to facilitate a settlement. That, in turn, requires someone who is knowledge of the issues, unbiased, charismatic, and trusted by both sides.

Both sides in the dispute must agree upon the selection of the mediator. Obviously, any person nominated as a mediator should be investigated to ensure that he/she does not have any improper connections with the opposing party or the opposing party's counsel.

There is no formula for selecting the right mediator, but parties to the dispute should look for potential mediators with the following qualities:

Substantial experience with construction claims gained by litigating, judging, arbitrating, and/or mediating a large number of such claims.

A solid reputation for handling construction claims in a fair, competent, personable, and ethical manner.

If possible, familiarity with the parties and their attorneys sufficient to create an underlying feeling of trust between the mediator and the parties.

The ability to "close a deal" (i.e., the ability not only to help the parties search common ground, but also to convince them to commit to the terms of a final resolution).

3.05 Steps in the Mediation Process

The art of mediation has come a long ways since the days when two parties agreed on a third, sat down and laid out their cases, and then hoped the mediator would come up with some answer that satisfied them both. Times have changed, the complexity of cases has

increased, and the potential awards/damages have increased, not to mention greater time pressures to resolve the issues and get on with the business at hand. Given these changes, another is the use of legal counsel to present both sides.

A successful mediation requires close attention to the following steps:

Preparation: Mediation is only as valuable as the preparation that precedes it. Before any mediation, a lawyer should assemble the pertinent facts of the case by meeting with the client; if necessary, interviewing percipient witnesses; and possibly conducting limited discovery, such as an exchange of project records. Typically, there are thousands of project documents that will require review in order to accurately assess what problems occurred on the project and assign responsibility thereto. This task is often undertaken with the assistance of consultants in the relevant fields of design and construction. Finally, the lawyer must conduct the necessary legal research, based upon the assembled facts, contract documents, and expert opinions so that he/she goes into the mediation understanding the merits of any legal arguments and defenses.

Perhaps the foremost rule for holding a successful mediation is that the attorney must be prepared to "assist" the mediator in finding grounds for a settlement. While mediators are typically selected based upon their expertise in the business or area of law in which the dispute has arisen, this does not mean they will have the tools needed to broker a settlement. Attorneys can play a key role in this process no matter how much expertise or persuasiveness the mediator possesses.

Pre-hearing conference: Today, it is becoming increasingly common for the mediator to host a pre-mediation conference by phone or by person, in which the following are discussed:

The contents of a confidential pre-hearing statement. What do the parties, as well as the mediator, believe would be helpful?
The status of discovery and what further discovery, if any, is necessary for the mediation to be effective. Can it be accomplished informally?
Do the parties fully understand the claims and defenses of the opposing party? If not, they can be defined either orally or by a subsequent memorandum for the benefit of the opposing party as well as for the mediator.
Who should be present at the mediation?
For how long should the mediation be scheduled?
What are the obstacles to settlement?

The mediator may, at his/her discretion, hold further separate conversations with counsel for each party to obtain a better "feel" for the controversy, elicit information that the attorney was unwilling or unable to express in writing. and identify possible approaches to a settlement. These discussions may also take place via email.

Right Parties Present: Most construction disputes will routinely involve owners, design professionals (such as architects and engineers), and general contractors. These players will

almost certainly have to attend a mediation if it is to be successful. However, many other players may have some legal responsibility. This includes construction managers, subcontractors, material suppliers, surety companies, and liability insurers. The attorneys in a dispute must identify any such parties and involve them in the mediation process. This means actually having the party's principal, vested with full settlement authority, physically present at the mediation. Allowing these decision makers to only be available by telephone is not recommended in order to produce a successful mediation. If any party with potential liability is excluded from the process, the remaining parties will probably feel a fair deal is beyond their reach, and the mediation will fail. Furthermore, a proposed settlement will likely fail if it hinges on a party subsequently having to chase down another company not present at the mediation to seek a monetary contribution.

The Formal Mediation: Formerly, starting the mediation with a joint session of all parties and attorneys, with each party presenting a brief opening statement was standard procedure. Today, opening statements are typically used only when the mediator concludes they will have a defined value, including consideration of the input from each counsel separately as to the potential value to be achieved. Potential value may include an opportunity to vent or to genuinely explore the differences – an opportunity to be sure each party understands the position of the other party.

On the other hand, sometimes a joint conference is viewed as undesirable because of the time involved versus the limited benefit, the potential risk of increasing animosity and the like.

Mediation briefs are usually a required part of the mediation process, and are provided by the parties' lawyers to the mediator well in advance of the mediation. These briefs may form the basis for starting the discussion at the formal hearing; however, the choice of how the session begins and how it is conducted belongs to the mediator.

Some guidelines to improve a party's chances of achieving a favorable settlement are:

Present only information that is believable and that can be readily substantiated.

Present the "right" information at the "right" time. Sometimes particularly powerful information might not be included in a brief but introduced at the time during the hearing when it will have the greatest influence in helping the mediator to understand the situation and reach the desired conclusion.

Address damaging information head-on it if is certain the other side possesses such knowledge. Avoiding such information will make a party appear uninformed, evasive, or even disingenuous when the other side presents it.

Use private sessions with the mediator to provide confidential concessions of fault or partial liability where such concessions may aid in brokering a settlement.

Avoid misrepresentation, not only for the potential damage to the case, but also because of the legal liability involved.

Ensure that both the attorney and his/her client are on the "same page" both in terms of the information to be given to the mediator and on the terms and conditions of any possible settlement.

During the course of a mediation hearing, it is not unlikely for the mediator to call a recess for a few hours or for days. This can serve several purposes:

The recess is to allow the parties to consult further internally before making further offers.
The recess is for a certain additional discovery to occur.
The recess is to allow heated emotions to subside.

However, today's mediation may be an ongoing and continuous process over some period of time.

Settlement: The goal of mediation, of course, is to reach a settlement. This can take several different forms since mediation provides opportunities for more creative settlements. Settlements need not simply involve payments of money. Mediation can involve a resolution of a future course of business between two business entities, contributions to charity, creation of charities, supply contracts, etc. While in most situations the payments/receipt of money is going to be the form of resolution, alternative forms of resolutions may be the key to achieving a successful close to the mediation.

Mediations often last for an entire day or a series of days. They can be grueling exercises and can seem more like haggling contests than a productive process. However, in all successful mediations there comes a point where the parties reach a compromise of the dispute. The compromise is often only based on a general understanding of the most crucial terms of the agreement, and often times only comes after hours or days of negotiation. At such a point, it can be very tempting for the parties and their attorneys to agree, with only a handshake as evidence, that the matter has been resolved. Finalizing the details and signing a formal, written agreement might be left for after the mediation is over.

This is a mistake to be avoided at all costs. In many jurisdictions, statutory authority and/or case law provide that an oral settlement agreement reached during mediation may be unenforceable. In other words, a written settlement signed by the parties will almost always be enforceable via a simple motion to enforce the settlement. On the other hand, a settlement that is not signed by the parties runs the risk of never being enforced if a party reneges on a "handshake" deal after the fact.

3.06 Advantages/Disadvantages of Mediation

The major advantages are that mediation:

Is generally less expensive than both litigation and arbitration. While top level mediators in construction issues can command upwards of $12,000 per day, the entire process is less expensive than either of those two alternatives.

Similarly, is also less time consuming.

Allows for "tailored" solutions that sometimes better fit the needs of both parties.

Can be followed by either arbitration or litigation if satisfactory results are not produced.

The major disadvantages include:

Is non-binding, although this can be minimized if the parties agree to and sign a written agreement at the end of the process.

Is highly dependent upon the skills of the mediator. If that person is a poor choice, considerable time and effort could be wasted.

3.07 Conclusion

With only minimal risks on the downside, mediation can be an invaluable method of resolving construction defect disputes. Properly handled, it can result in saving hundreds of thousands of dollars in litigation expenses. Perhaps equally important, mediation can satisfy parties to the action by enabling them to stop spending time, energy, and resources on a problematic project and instead focus on future business development or other ongoing construction projects. By thoroughly preparing for mediation, selecting the suitable mediator, and approaching the mediator in the proper manner, attorneys can maximize their client's chances of realizing the full potential benefits of mediation.

3.08 Resources

Some of the key sources for additional information on mediation are:

National Arbitration Forum
P.O. Box 50191, Minneapolis, MN 55406-0191.
telephone at 952-516-6450 or 800-474-2377
email at info@adrforum.com
website at http://www.adrforum.com/.

American Arbitration Association
Headquarters at 335 Madison Avenue, Floor 10, New York, NY 10017-4614
telephone at 212-716-5800 or 800-778-7879
email at mailto:websitemail@adr.org

Mediation section at Neil Carmichael
Vice President, 200 South College Street, Suite 1800, Charlotte, NC 28202
telephone at 704-347-6652
email at mailto:CarmichaelN@adr.org.

Mediation Information and Resource Center
(http://www.mediate.com/)

American Bar Association
http://www.abanet.org/aztopics.html (Search: mediation)

See "Constructing a Successful Mediation: A Blueprint for Lawyers and Mediators" by Mary A. Salamone and "The Changing Role of Mediators and the Mediation Process" by Robert E. Benson

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1. One method for resolving disputes by allowing parties to craft their own solutions is known as a:
   a) Arbitration
   b) Private meeting
   c) Negotiated solution
   d) Third party deal
   e) Mediation

2. A mediator is a:
   a) Judge
   b) Friend of the owner
   c) Technical expert
   d) Independent third party
   e) Media person

3. The difference between a mediation and an arbitration is that a mediation generally is:
   a) Less formal
   b) Non-binding
   c) Uses private interviews
   d) Seeks common grounds for agreement
   e) All of the above

4. The proper sequence of the three steps involved in a multi-tiered approach to dispute resolution as described in this chapter are:
   a) Private discussion, arbitration, mediation
   b) Arbitration, mediation, private discussion
   c) Mediation, private discussion, arbitration
   d) Private discussion, mediation, arbitration
   e) Mediation, private discussion, arbitration

5. The important qualities of a mediator include all but one of the following:
   a) Reputation as fair, competent and ethical
   b) Ability to "close the deal" by finding common ground
   c) Close connections with at least one attorney involved
   d) Substantial experience in construction claims
   e) Ability to establish trust with both sides

6. What is the normal sequence of action steps in the mediation process?
   a) Pre-hearing conference, preparation, formal mediation, settlement, right persons present
   b) Preparation, right persons present, pre-hearing conference, formal mediation, settlement
   c) Right persons present, preparation, pre-hearing conference, formal mediation, settlement
   d) Preparation, pre-hearing conference, right persons present, formal mediation, settlement
   e) Pre-hearing conference, right persons present, preparation, formal mediation, settlement

7. During the preparation phase of the mediation process, perhaps the most important role of an attorney representing one of the parties is to:
   a) Find common ground to "assist" the mediator in reaching a settlement facts
   b) Conduct the necessary legal research
   c) Assemble the pertinent facts, including interviewing witnesses
   d) Conducting limited discovery, if necessary
   e) Arrange for technical witnesses where appropriate

8. Which of the following is not part of the pre-hearing conference:
   a) The status of discovery and any additional discovery requirements
   b) Understanding the claims and defenses of the opposing parties
   c) The contents of any confidential pre-hearing statement
   d) The outline of a settlement deal
   e) Who should be present at the mediation

9. Which of the following is it important to have attend a mediation:
   a) Any person with some legal responsibility in the issue such as suppliers and subcontractors
   b) Representatives of surety companies and liability companies for both sides
   c) Any party affected by a monetary decision as part of the settlement
   d) Design professionals (architects and engineers)
   e) All of the above

10. Which if the following guidelines does not apply when information is being presented during the formal mediation sessions with both sides attending:
    a) Present information at a time when it will have the greatest impact on the decision
    b) Use only information that is believable and can be substantiated
    c) Present information on the party's financial ability to reach a settlement
    d) Address damaging information if the other party knows it
    e) Avoid misrepresentation of the information

11. Which of the following is generally not considered an advantage of using mediation:
    a) Allows for "tailored" solutions to meet needs and circumstances
    b) Is less costly than arbitration or litigation
    c) Takes less time
    d) **Settlement can be sealed with a handshake between the** parties
    e) Can be followed by arbitration or litigation if not successful