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Mediation in the Construction Field

Construction Mediation

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Virtually every construction project starts with a spirit of cooperation between the owner, contractor and design team with a promise to work together to bring the project to successful completion. However, promises and agreements at a project kick-off meeting to resolve disputes amicably may be made with the best intentions but rarely occur. Disputes arise on essentially every construction project and mediation is commonly employed to help resolve them. However, some mediation techniques can actually drive the parties farther apart and be counter-productive. As a result, it is important to consider various dispute resolution options and the pros and cons of various mediation techniques, including the use of technical experts, in order to decide which techniques are most likely to provide for dispute resolution.

First, it is important to remember that while mediation can only resolve a dispute if the parties reach an agreement, the parties can also reach an agreement without resort to mediation. An effective dispute resolution technique, particularly for sophisticated parties, is for senior-level management to have an open and honest discussion regarding the dispute. The success of this approach can be enhanced if the parties recognize in advance that disputes during a project are likely, and set forth contractual provisions designed to resolve them quickly and effectively. Often times, project level personnel have vested interests in viewing a dispute in a particular manner. Requiring a dispute to be reviewed by senior-management may provide a new perspective and help to get it resolved. It is also possible that views of the on-the-ground project personnel about a particular dispute may actually be driven by a personality conflict rather than the actual merits of the dispute. Allowing senior management to step in may help remedy disputes that are really personality disputes masquerading as construction disputes and allow the parties to deal with the actual merits.

While the parties can clearly engage in this process without the aid of a mediator, a trained mediator can sometimes be very helpful. Submitting a dispute to mediation provides each party with the opportunity to express its view, requires each party to conduct a serious analysis of the merits of its claim and requires each party to hear the position of the other side. Participation in this process can significantly increase the odds of resolving a dispute. Further, although mediation is most commonly viewed as a post-project procedure there is no prohibition against attempting mediation during a project. Submitting a dispute to mediation while the project is on-going can have a cathartic effect and help get a project back on track.

However, since the views or opinions of a mediator are not binding on any party, mediation can only be successful if the mediator can convince the parties that resolving the dispute is in each of their best interests. It is often said that in successful mediations, neither party is completely satisfied with the outcome but each can accept the result. While each mediator has a unique style, most mediators generally employ one of two styles: facilitative or evaluative.

Under the facilitative approach, a mediator does not provide opinions or evaluation of a position. Instead, during joint sessions with the parties, the mediator asks questions designed to flush out the parties' respective positions with the goal that this process will help the parties reach a consensus on the issues. Under the evaluative approach, joint sessions with the parties are limited and the mediator conducts multiple separate sessions with each party during which he states his views on the strengths and weaknesses of a position, including in many cases his views on the likely result if the case were tried by a judge or jury. The views and opinions of a mediator have no binding effect but are simply tools to resolve the dispute. However, since a mediator using this approach opines on specific legal issues and the merits of each party's claims, he or she should have legal expertise as well as significant knowledge. Further, since the goal of mediation is settlement, it is important to remember that in expressing his views the mediator has an incentive to convince each party that its position has significant weaknesses.

Good mediators will alter their approach given the flow of a particular mediation. A mediator that generally utilizes a facilitative approach might feel at some point that expressing his opinion about a particular issue might aid settlement. However, in choosing a mediator it is wise to consider his general approach and how that might play out in light of the issues and parties. It is also important to keep in mind that the mediator's goal is to resolve the dispute. Even when a mediator provides an opinion regarding the merits of a case, it may not accurately reflect the likely outcome, but rather where the mediator believes the case may settle.

Regardless of the overall approach or style of the mediator, most mediations begin with some form of a joint session with all of the parties. At this session, each party will typically describe his case. In some circumstances the act of being able to present one's case or story to the other side goes a long toward getting the parties engaged in the settlement process. Just having the other party hear your views and your frustrations can have a beneficial effect.

At some mediations, the joint session includes a presentation by the experts. In fact, it has become commonplace, particularly in construction defect litigation regarding production or tract housing, for mediations to include expert presentations. However, whether this approach will likely prove beneficial in any particular case requires careful consideration. The trend toward the use of expert presentations or mediations appears to be based on a theory that if the respective experts meet and discuss their views on technical issues they may reach agreement on the issues and this agreement will form the basis for resolution of the case.

This theory is suspect. First, it ignores the fundamental reason or purpose of an expert. An expert is retained to give his subjective opinion on a topic which requires some technical expertise or knowledge and is beyond common knowledge. As a result, different experts can legitimately view almost any issues differently. Further, an expert has been retained and paid to advance the position of a particular side. Therefore, his goal at an expert presentation is to advance that side and to convince the other side that he is right. The expert for the other side obviously has the exact opposite goal. If they were to reach agreement on a particular issue each would need to concede the merit of at least some part of the other side's position and, they can really only do that if they are given permission by the party that retained them to do so.

As a result, rather than attempting to build consensus, most experts and attorneys view the purpose of an expert presentation as an opportunity to convince the other side that the claim against their client is baseless. In many cases, this approach can lead to a battle between the experts which is completely antithetical to the mediation goal of settlement. This problem can be greatly exacerbated if the expert presentations include questioning of an expert by lawyers and/or experts for other parties. On numerous occasions, I have observed expert presentations devolve into questioning sessions that amount to free depositions by your opponent or your opponent's expert of your expert. Most mediators seem to view this as part of the process and do little to control it. As a result, counsel for the expert must essentially defend as in a deposition and extremely limit

the questions that an expert will answer. Again, rather than building a spirit of cooperation this process breeds animosity.

Further, if you agree to participate in a mediation that includes expert presentations, it is paramount that your expert is prepared and through his presentation demonstrates that he is knowledgeable and will make a convincing witness if the matter is likely to be taken to trial. As a result, one key consideration on determining whether to include an expert presentation at mediation is whether you believe that the benefit of having your expert make a presentation justifies the cost of having the expert prepare to make it. While the benefits of even a quality expert presentation are suspect the effect of a poor expert presentation are unquestionably detrimental. A poor expert presentation will cause your opponent to believe that your case and/or your expert are weak and substantially decrease the odds of reaching a settlement at a mediation or later. In fact, you will almost need to make an additional expert presentation or retain a new expert to overcome the detrimental effect of a poor expert presentation.

In lieu of an expert presentation, an effective technique is to have the opinion of the expert presented through the party's attorney or through a report prepared by party's expert and attorney. This approach allows the expert's opinions to be disclosed and discussed. This allows the opposition to know the views of your expert and the case against them but does not subject your expert to questioning and does not require the cost of preparation for an expert presentation.

This approach also limits the role that technical evaluation play in the mediation. As set forth above, experts will likely be able to have legitimate disagreements regarding any technical issue of significance. Therefore, it is unlikely that the experts will reach agreement on opposing technical issues even if they are extensively vetted. For example, technical disputes in a construction case commonly concern the impacts of, and responsibility for, delays on a project. While the number of delays beyond the approved project schedule by which a particular task was actually completed may be easily determined, the reason for the delay and the impact of the delay are likely subject to divergent expert opinions. Given the multiple ways in which schedules can be manipulated and analyzed it is unlikely that a meeting of experts would result in agreement as to the impact of a particular delay. Further, an expert presentation by an opposing party's expert on the schedule impact of a particular delay is unlikely to convince a party that the counter-opinion by his own expert is wrong, particularly since the answer to the question is likely subjective and the party has paid his expert a significant sum for his opinion.

The same is true with most technical issues. While it is important to learn of the differing views of the respective experts on the issues that is not determinative of whether mediation will be successful. Ultimately, a case will settle if each party believes, based on its assessment of its position and the costs of risk of trial, that settlement is the best option. A good mediator can help the parties reach that conclusion. However, that conclusion does not need to be based on an expert presentation. In fact, in many cases such a presentation will be detrimental to the settlement process.

About the Author

Mark Johnson is a partner in the Environmental and Land Use Group with significant trial and arbitration experience involving a variety of construction, environmental and real estate issues. His litigation experience includes CERCLA, CEQA, RCRA, California Coastal Act and Proposition 65; toxic torts; air quality regulations; hazardous substance contamination; and misrepresentation of environmental conditions in real property transactions. To see more information on Mark Johnson visit http://www.alston.com/professionals/mark-johnson/