



Believe in mediation: An effective tool to settle construction disputes - by Andrew Richards

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Many clients and attorneys believe that mediating construction disputes is a waste of money and time for a variety of reasons. Over the years I have been told that the parties are too far apart to settle, the mediator will not have the expertise to conduct a fruitful mediation and it is just a delay tactic by the adverse party. For many of the 30 years of my construction litigation practice, I was one of those attorneys. However, over the last five years or so I have become a believer in the mediation process.

So why have I become a believer? Because over the last few years we have been able to settle complicated cases and save our clients time and money when we find the right mediator and when all parties fully commit to the mediation process. The parties just cannot accept a mediator assigned by the alternative dispute resolution of the courts or a garden variety commercial mediator from a national alternative dispute resolution organization. Nor can the attorneys just show up with clients to the mediation without vetting the issues and the evidence as if they were preparing for depositions or a trial.

The right mediator is critical to the process. The mediator must be well experienced not only in construction litigation, but with respect to the issues at hand. If the dispute revolves around contractual terms, an attorney with construction dispute experience will understand the meaning of the contractual terms and how they are relevant to the construction process. In addition, such an attorney will understand the laws that pertain to the issues. If the disputes center on scope of work issues (e.g., change order work or back charges for improper performance), the parties may be better served retaining a contractor or engineer as the mediator. Such a mediator may not know the law as well, but scope of work disputes are generally not law intensive. In addition, whether an attorney or contractor/engineer is retained as a mediator, the mediator must be strong willed and not afraid to look into the eyes of the parties and tell them they are wrong on issues.

Remember, mediation is non-binding unlike arbitration. An arbiter can be meek and passive because he/she is ruling on the issues just as if the parties were before a judge in court at trial. Because mediation is non-binding, the mediator must come across as knowledgeable and

convincing. The mediator must be able to show the parties that he/she is well versed in the issues and law, and be firm and convincing as to why he/she believes a party's position is untenable. This is extremely important because many times an attorney may tell his/her client that they are wrong on an issue, but hearing it from an impartial person may be very convincing. Mediation is a great way for an attorney to have his/her client see the issues through the eyes of someone who they respect who is reviewing them with an open mind. Many times an attorney has a client that needs to be educated and understand the deficiencies in its case in order to settle the case.

Many attorneys go into mediation with the notion that mediation is a dog and pony show and will be a waste of time. That only happens when the attorneys are not prepared and have not prepared their clients for the mediation process. In addition to knowing his client's strengths, the attorney must be prepared to discuss his client's weaknesses. The attorney must have the pertinent agreements, correspondence and other documentation that would be utilized to prepare the case for trial. Having the relevant documentation at the mediation allows the mediator to convince the other side why they should settle.

It is also important for the attorneys to exchange documents and information, and agree in advance of the mediation on the issues so that the mediation can be effective. By discussing issues and facts in advance of the mediation, the attorneys can streamline the mediation and allow the mediator to concentrate on the issues productively to settle the matter. At a minimum, even if mediation does not result in a settlement right away, the education of all counsel during mediation in the matter may lead to a settlement sooner than later thereby saving the clients legal fees.

Mediation can be an effective tool to settle cases. However, the attorneys must make sure they retain the "right" mediator for the process and fully commit to the mediation process. Otherwise, the parties may miss out on an opportunity to save time and money, and instead litigate unnecessarily for years.

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