To Mediate or Not To Mediate: That Is the Question

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The authors, both with significant mediation experience, discuss the issues that parties want to know: the pros and cons of mediation, the suitability of a case for mediation, risk analysis, when to mediate, proposing mediation to the adversary, and the benefits of mediation even when the case does not settle.

To mediate or not is a question parties to major construction disputes should ask themselves whenever a dispute arises. Unfortunately, it seems that, with the rise of limited liability companies, project asset-based financing, the shift to engineer, construct and procure (EPC) and design/build contracts, as well as the desire to finish projects and put them on-line as fast as possible, there is a rush toward costly, time-consuming litigation and arbitration.
Fortunately, experienced construction participants and lawyers are discussing the role that mediation should play. To use mediation effectively, the case must be appropriate for mediation, and the timing of the mediation needs to be deliberately chosen. Especially in connection with a serious effort to resolve complex, fact-based construction disputes, an early mediation may be more or may be less fruitful than a mediation that occurs later in the claims analysis process. While mediation has been incorporated as one of the first steps in the claims procedures in some standard form construction contracts, parties can strike the provision from the contract. They can also agree to mediate even when the contract is silent as to procedural conditions prerequisite to commencing litigation.

For sound reasons, many federal district and state trial courts mandate mediation of all cases filed in their jurisdiction, whether or not the matter is construction-related, or whether it is simple or complex.

Mediation should always be the first step that construction parties consider after they have failed to resolve a conflict on their own. Highly qualified mediators, such as those on the roster of the American Arbitration Association, can supply the much needed expertise to help construction parties avoid the uncertainty of litigated proceedings and bring the dispute to a close in less time and at less cost and in a way that is agreed upon by both sides.

Advantages of Mediation

As an advocate, you owe it to your client to always consider mediating a construction dispute. The mediation process offers a multitude of benefits to the participants, among them:

- A settlement produced by the process will be a final contract not subject to the vagaries of appeals, and be immediately enforceable.
- Even an unsuccessful mediation process can help the parties narrow the disputed issues.
- Because it is less adversarial and requires a certain amount of cooperation, the process helps the parties preserve business relationships.
- The process leads to a cheaper, faster resolution than adversarial dispute resolution options.
- The parties retain control of the outcome so there can be no unexpected, unacceptable results.
- Confidentiality can be maintained to the extent applicable law allows or by contractual agreement.
- The process allows the parties to preview an alternate reality, providing a reality check that empowers them to adjust their risk allocation assumptions.

- The process allows the true decision makers, the ones who have the authority to settle, to allocate risk personally and more accurately than the initial participants to the disputed matter.
- Unlike arbitration and litigation, mediation settlement options include various kinds of non-monetary solutions.
- The court would refer the parties to mediation in any event under a court-mandated program.

Let’s look at each in turn.

Finality

A mediated settlement can completely resolve a construction dispute. When a dispute is completely settled in mediation, if counsel for both sides do a proper job, there should be no appeals or conditions subsequent to alter the new deal the parties have struck. The mediation agreement would be immediately enforceable. In the event that there are any differences of interpretation or problems with compliance, the settlement agreement could contain an alternative dispute resolution clause so that any disputes under the agreement could be resolved expeditiously. If the parties agree, it is even possible to refer the matter back to the original mediator.

Having a mediated settlement agreement allows your client to put the dispute behind it, and move on to new terrain that it will be traversing in the future.

Narrowing Issues

Even if mediation is not completely successful in resolving the entire dispute, it can be productive for your client. The mediation process can help to identify facts and issues on which there is no dis-
pute; it can also narrow the issues in dispute by having the parties settle ancillary or severable issues. Mediation can then focus on the remaining significant issues in dispute and, no doubt, it will teach the parties that the facts are subject to a variety of interpretations. This can help pave the way for a partial or eventual settlement of the matter. For example, the parties can agree to separately negotiate disputed change orders that may be too numerous to be handled efficiently in litigation or arbitration. Mediation can also narrow the gap between the parties’ demands, so that economics of litigation or arbitration tip even more decisively towards a negotiated settlement.

Mediation can save lots of time and money. By agreeing to resolve some disagreements, leaving only the intractable portion of the dispute for a third party to resolve in arbitration or litigation, the ensuing adversarial proceeding will be less complex and protracted, hence less expensive. If the parties continue to negotiate after the mediation has ended, their efforts could bear fruit in the form of a settlement of the remaining open issues.

**Preserving Relationships**

The mediation process is inherently less adversarial than litigation or arbitration. In order to succeed, a respectful attitude must be maintained by all participants. An experienced mediator will make sure that this occurs by setting the ground rules for the mediation and talking privately in caucus with the parties.

When parties act respectfully toward each other, they are more inclined to listen to each other’s point of view. That does not mean that they necessarily accept it. But hearing it is a first step toward working out a mutually acceptable solution.

A consequence of this good behavior often is the repair of the parties’ damaged relationship. Many mediation settlements have included future business arrangements. Especially when parties repeatedly do business together, this aspect of the mediation process could be worth more than a monetary settlement. Certainly that could not happen if the parties or their counsel were insulting each other and denigrating what the other had to say.

Because the parties and counsel are required to behave in a businesslike way and be open to hearing each side’s legal arguments, as well as their interests and needs, there is a higher level of emotional satisfaction from participating in mediation than in more adversarial processes where the results are determined by a third party. The parties usually will be happier with a result that they have helped to craft, than with a resolution imposed upon them by a stranger. The voluntary decision to take less than one had initially hoped for is a far less bitter pill to swallow than being forced by judge or panel to accept a fraction of the damages originally anticipated. Remember, for the parties, litigation is always a tension-filled and stressful experience. In litigation, each side is competing for the hearts and minds of strangers—whether a judge or jurors. Even though arbitration is less formal, taking place in an office setting with no judge in robes, no bailiffs with guns, and no jury, and even though you select the arbitrators, you cannot be sure of the likelihood of a successful outcome, so there is still quite a bit of risk, which is stressful in itself. Mediation alone puts the outcome in the hands of the parties.

**Costs**

The cost of a mediation pales in comparison to trial or arbitration costs. One reason for this is that discovery in mediation is usually quite limited. This discovery activity is most often targeted at uncovering a limited set of unknown factors that are preventing the parties from achieving a meeting of the minds. For example, how much did that repair actually cost? Or do those cracks indicate structural failure or simply cosmetic surface imperfections? Was the design defective, or was the installation flawed? Frequently, the parties will exchange expert reports to enhance the other side’s understanding of the strengths and weaknesses of their position.

Since more discovery is conducted in arbitration, and much more in litigation, particularly when multiple parties are involved in a large, complex dispute, the cost of these processes can only go up. It is not uncommon for hundreds of depositions to be taken in litigation, which not only requires attorney time and expense, but also involves the efforts of key management personnel and, sometimes, expert witnesses to help prepare them to be deposed. The resulting time that key managers are away from productive work is another cost that parties need to consider when weighing the benefits of mediation. A focused discovery process managed by the mediator will keep the parties’ efforts on crafting of potential solutions, and away from stalling and delay tactics.

Another reason mediation is less costly is that there is no motion practice in mediation. Preparing and filing motions generate extremely high legal fees. Their absence from mediation makes this process the most economical by far.

**Party Control**

Mediation allows construction parties to determine their own fate. The parties cannot be forced
to settle or to agree to anything that they cannot live with. To many, this is the single most valuable element of the process. Your client will not be at the mercy of a judge or jurors who do not understand the consequences of certain outcomes. No arbitrator or panel will ever be as familiar with the nuances of your client’s business as your client is. Mediation allows your client to decide how to respond to settlement proposals, whether they involve sensitive key issues or those of secondary importance. Your client can decide when it can afford to be flexible and when it cannot.

**Confidentiality**

Confidentiality is a valuable asset for most businesses. Few want their dirty laundry aired in public. In order to facilitate frank settlement discussions between the parties, several states have enacted the Uniform Mediation Act, which creates a mediation privilege for most mediation communications and prevents their use in subsequent legal proceedings. At least one state has enacted a statute making mediation communications confidential. In other states there is a patchwork of mediation statutes. But an otherwise discoverable document does not become privileged under the UMA by reason of its use in mediation.

While the terms of a mediation settlement may often be protected from public view under the terms of a confidentiality agreement, this may not be the case for public entities, which have stringent reporting obligations. Disclosure of settlement terms will be necessary if one party goes to court to obtain enforcement of the settlement agreement.

By entering into a separate confidentiality agreement before the mediation, and incorporating an ADR clause into the mediation settlement agreement, the risk of disclosure can be reduced but not completely eliminated.

**Reality Check**

The mediation process allows the true decision makers for each side to view the dispute through the eyes of the other side. Mediation may be the first time your client has been able to see an alternate reality of the case, one that is more nuanced or complex than previously imagined.

The mediator can be extremely helpful in this regard as he or she encourages each side during private caucuses to see the real strengths and weaknesses of its case. The process of reality testing often is what motivates the parties to move forward with offers and counteroffers during the mediation.

**Decision Makers Allocate Risk**

Mediation requires the attendance and participation of authorized representatives from each side who possess full settlement authority. This means the dispute is no longer in the hands of lower level personnel who might have an agenda that is preventing resolution. When the dispute is elevated up the chain of command to the true decision makers, risk allocation decisions can be made with more detachment and with a greater understanding of the true cost to the business caused by the dispute. After hearing the other side’s view of the case in the joint session and coming to understand the strengths and weaknesses of their own case, the decision makers may shift their risk analysis towards resolution and away from obstinacy.

**Non-Monetary Consideration**

Finally, mediation, unlike litigation or arbitration, offers the parties the opportunity to craft their own customized solutions to the dispute, which need not involve the exchange of money. A settlement that involves future contractual arrangements or other business relationships may be a preferred path to resolving the current dispute. Apologies have also been extremely important consideration in certain kinds of disputes.

**Court-Ordered Mediation**

If the jurisdiction where you will litigate a construction dispute has a court-mandated mediation program, you could end up mediating before a court-appointed mediator who has no special knowledge of construction or construction law. It makes sense to agree to mediate privately prior to litigating so that you and the adversary could select a qualified mediator to maximize the potential for settlement.
Why Some Mediations Fail

There are times when mediation doesn’t work or is frustrated for one reason or another. But there is no way of knowing whether these circumstances will be present in your mediation, so they should not deter you from engaging in the process. Here are a few examples with suggestions you can use to protect yourself in some of these situations:

• The adversary never had any intention of trying to mediate a resolution. Its purpose in agreeing to mediate was to obtain discovery of the other side’s position and facts that otherwise might be difficult to obtain through deposition or answers to interrogatories. This possibility can be controlled to some degree by entering into an agreement before the mediation that limits the amount of discovery in mediation.

• The adversary seeks to prolong the mediation as long as possible to obtain an advantage and demands that the litigation or arbitration be suspended while mediation is pursued. You can prevent this situation by agreeing to a time limit for the mediation.

• One party holds back critical or important facts during the mediation out of an ill-conceived belief that through surprise it will do better at trial or arbitration. This strategy has been called “hiding the baby.” There is little you can do to prevent it except discuss with the mediator your suspicions that the other side is holding back.

• The parties either fail to understand that the mediator is not a decision maker or they expect the mediator to convince the other side to come around to their perception of the merits. There is little you can do about this. It is the mediator’s job to make clear that he or she is a facilitator—not a judge—and that mediation is an opportunity for the parties themselves to take control of the settlement process.

• One or both parties cannot control their emotions and the mediation becomes so antagonistic that an impasse is reached or one party walks out. This can drive the parties further apart with little hope of returning to the settlement process. There is little you can do if the other side is out of control emotionally except rely on the mediator to try to calm things down.

When mediation has failed and the bills come in, parties tend to criticize the process. But one should not indict the process because of conduct by an intransigent party. Most parties enter mediation with the sincere hope of putting an end to the dispute. That is why mediation has such a high success rate and has been cited in a survey of corporate counsel as the preferred dispute resolution process.

When Is a Dispute Not Suitable for Mediation?

There are a few situations in which mediation may not be the right process. Here are some examples.

Mediation is inappropriate for a dispute when one of the parties is determined to establish a precedent that will be binding on all future similar transactions. Most construction cases do not fall into this category.

Also a poor candidate for mediation is a dispute where a party believes that immutable principles should govern the dispute. For example, a governmental body may prefer to defend a regulatory program or public policy issue against a legal attack, rather than resolve an individual challenge; a contractor trying to prevent a proposed government contract award by challenging legislation that gives preferences to local businesses would likely find that its dispute would not easily be resolved by mediation.

Mediation also cannot work if an indispensable party is absent from the table, for example, the architect or engineer or a major subcontractor to the general contractor. A contractor may identify design defects in owner-provided plans, but unless the designer is also engaged in settlement negotiations, the remaining parties may be unable to finally resolve the matter.

A frivolous claim is another type of dispute that is not likely to be mediated successfully. Mediation demands that the disputing parties be as informed about the nature and extent of the dispute as can reasonably be managed. It also requires cool heads to dispassionately evaluate the risks of pursuing alternative dispute resolution vehicles. A reckless disputant is unlikely to be interested in engaging in compromise to put the matter to rest.

When Is a Dispute Suitable for Mediation?

Mediation has the greatest chance of success when adequately empowered parties are prepared to engage in meaningful and informed discussions with the mediator. If one of these elements is missing, the likelihood of reaching a settlement is diminished. Despite the skills of a trained experienced mediator, the right people with the right information in the right frame of mind are necessary to settle a case in mediation. Thus, a case
may not be ready to be mediated until the parties have taken steps to investigate their respective positions and their available options.

Also, both sides need to be willing to negotiate in good faith for the process to work. This maxim really has little to do with “not bidding against” oneself, and more to do with a willingness to look at a situation from another perspective and be flexible about considering possible solutions, even those that are less than what the party initially envisioned.

Most often, mediation turns sour because one side isn’t sufficiently informed to recognize a good settlement opportunity. This may be due to ignorance of the facts or the law. But it could also be due to ignorance of the risks involved in allowing a judge, jury, or arbitrator to decide the disputed issues.

Some discovery can remedy this problem. With the assistance of counsel, the parties should gather the pertinent facts, both good and bad. A full assessment of liability and of damages may require the assistance of an accountant, a scheduler, or a structural engineer to analyze the data and put it into perspective.

It is vital that each side have a realistic view of the dispute. Otherwise it will be difficult to settle. During the mediation, the mediator will assist with this by providing a reality check.

There is no reason for ignorance of the law. Prior to the mediation, counsel should provide the client with an assessment of relevant case law so a clear-headed evaluation of risk at trial can be made.

Where the case turns on a legal issue, if the jurisdiction does not prohibit the practice, the parties may ask a private mediator for an evaluation of how the case might turn out at trial. In a few jurisdictions, such as Florida and Virginia, evaluative mediation is not permitted and is considered an ethical violation. Some court-annexed mediation programs (such as the one in the Eastern District of Pennsylvania) may also bar mediators from using evaluative techniques. However, this would not affect a private mediation between two commercial parties.

It is imperative that each party send a representative to the mediation who has full authority to settle the matter. An offer met with “I’ll take it back to my boss and consider it” will not provide settlement opportunities. Not only must the parties commit the time and resources necessary to mediate effectively, they must be prepared to bring the mediation to an end with a settlement.

But success in mediation does not come without preparation by counsel and the parties, and preparation costs money. Mediation is a process of learning about the dispute and the interests and needs of the other side in order to develop proposals and counterproposals that might be acceptable.

The Role of a Litigation Risk Analysis in Mediation

Whenever your client is involved in a construction dispute, we recommend that you perform a litigation risk analysis. This will help your client decide to mediate and be more receptive to settling.

Figure out the length of time it would likely take to obtain a decision at trial or an award in arbitration and the associated costs. Time drives up the cost of all dispute resolution processes and costs can quickly careen out of control even in simple disputes, but more dramatically when the dispute is large and complex.

Estimate the cost of each phase of litigation: for example, the cost of seeking summary judgment, the cost of the discovery phase, and the cost of the trial, the cost of all fact and expert witnesses, and all consulting costs. However, clients should know that unless they lock the legal team into those budgets, counsel fees will always be more than the original estimate. Depending on the merits of a case, a law firm might be willing to negotiate a substantially reduced fee with an aggregate cap, plus a contingency percentage based on the outcome and timing of the eventual result.

Another step in deciding to mediate is to assess the strengths and weakness of your client’s positions on the issues and to the extent possible, those of the opponent. Often, at this point, the client finds this hard to do because it has an investment in its positions and is unable to see the dispute from any other vantage point. While you may warn your client against being overly
optimistic, that is sometimes difficult to do because the client believes that you should be a soldier for its position.

Most construction disputes are fact intensive. It may be necessary to have an independent schedule analysis or a review by a forensic auditor before your client can decide to mediate.

There are times when legal or contract issues are determinative of the result, for example, a statute-of-limitations defense, or noncompliance with notice provisions in the contract, or an unproven theory of damages. You should have a good idea of whether your client would prevail on these issues at trial and on appeal. (Of course, any appeal would add to the cost of the case and greatly influence the decision to mediate or not.) You should walk your client through a “best and worst” case analysis. This means explaining to the client the best result it can expect and the downside if it loses. You can help your client evaluate whether it is worth the risk to seek a judgment by a third party, or whether it would be better to mediate and reach a mutually acceptable resolution.

When to Begin Mediation?
Assuming that your client has enough information about the dispute to decide to mediate, it is generally better to begin the process before litigation is commenced, rather than after. This maximizes the efficiency of the process.

Also, it is usually better to mediate soon after the dispute arises, rather than wait until after the project is substantially completed.

An effective moment to call in a mediator is when the parties have stopped communicating. A skilled mediator can open channels of communication so that the dialogue continues, and even help the parties repair a damaged relationship.

Proposing Mediation to the Other Party
Traditionally, lawyers have been reluctant to propose mediation or suggest settlement to their construction clients for fear of being seen as weak or lacking confidence in the merits of the client’s case. With the widespread acceptance of mediation, this misperception is less commonplace. More and more lawyers know that suggesting mediation is not a sign of weakness because there are many sound business reasons to mediate.

But counsel will not have to make the suggestion if mediation is mandated in the construction agreement. This way the parties know in advance that, if a dispute arises that they cannot resolve on their own, a process for resolution is in place.

Usually, the contract provides for some steps prior to the institution of mediation. One is that the designated project executives for each side initially attempt to resolve the matter and then, if they are not successful, selected officers or high-ranking officials of each side try and reach a mutually acceptable agreement. When that fails and the contract next calls for mediation, a demand for mediation by either party may ensue.

When the contract does not call for mediation, someone has to propose mediation for the dispute to be mediated. This could be one of the parties. If an arbitration is filed with the American Arbitration Association, the AAA case manager will usually ask counsel if the parties have considered mediation. If litigation is filed, the court could refer the case to court-mandated mediation.

The better approach, however, is for counsel to bring up the subject of ADR with the client after the dispute arises. Some jurisdictions require this while others only encourage counsel to discuss ADR options with client.

Here is where counsel needs to have the client’s interests foremost at heart because in most instances, mediation will be in the client’s best interests. If your client expresses interest in mediation, it will be necessary to propose the idea to the other side. Again, there should be no implication of weakness resulting from this proposal, since your client retains the right to pursue its legal remedies in court if mediation fails. If the other side similarly expresses interest in mediation, the parties could enter into a post-dispute mediation agreement.

If necessary, a period for limited discovery could be included in the mediation agreement. Also in that agreement should be rules that the parties agree to apply to the mediation, such as the AAA Construction Industry Mediation Rules, which contain a procedure for appointment of the mediator, among other rules.

Conclusion
We have successfully used mediation in more than 50 large, complex construction disputes involving multiple millions of dollars. We can say unequivocally that, in our experience, the results obtained were much better than decisions issued from third parties in either judicial or arbitration settings.

When we say that one day, or three or four, with a skilled mediator, can be the best investment your client can make towards resolving a construction dispute, we do so with firsthand knowledge of the mediation process.

What do you have to lose? Even if mediation does not achieve an overall settlement, there are many benefits to be gleaned from the process.