



## Are You Prepared for Mediation? (Revisited)<sup>1</sup>

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**ABSTRACT:** Mediation is not new. Mediation was employed in ancient India as well as in the Islamic world. In more recent times mediation has been widely adopted in the U.S. construction industry as a form of Alternative Dispute Resolution (ADR). Mediation is often employed when claims negotiations fail in lieu of arbitration or litigation. This paper discusses mediation as a process and why construction professionals need to learn about mediation. The paper identifies both good and bad points concerning the use of mediation. Additionally, the paper offers a number of practical suggestions on how to prepare for and be successful in mediation.

### INTRODUCTION

This paper was originally drafted in 1999 and presented and published in 2000. At that time, it seemed that a large tranche of construction disputes – that is, claims that were not settled in negotiation – were resolved through arbitration or litigation. Mediation

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did not seem to be all that common. In the past fifteen years though, the number of construction disputes being referred to arbitration or litigation has fallen dramatically. The construction bar refers to this trend as the “vanishing trial.” In regard to this issue, it is noted that –

“In 1938, about 20% of federal civil cases went to trial. By 1962, the percentage was down to 12%. By 2009, the number has sunk to 1.7%. The percentage of jury trials in federal civil cases was down to just under 1%, and the percentage of bench trials was even lower. So between 1938 and 2009, there was a decline in the percentage of civil cases going to trial of over 90% and the pace of the decline was accelerating toward the end of that period...”<sup>4</sup>

Mediation seems to have largely taken the place of arbitration and litigation. Thus, the authors decided to revisit the original paper and update it based on much more experience than they had fifteen years ago.

The purpose of this paper is to discuss mediation as a form of alternative dispute resolution (“ADR”) for the construction industry. This paper identifies why construction professionals need to study and learn about mediation as a process. The paper also discusses the good and the bad points concerning the use of mediation as a form of dispute resolution. Finally, the paper offers a number of practical suggestions and recommendation concerning how to prepare for and be successful at mediation. Keep in mind, when reading this paper, the authors define the term “be successful at mediation” as achieving a resolution to the dispute without having to go to arbitration or litigation. Does this mean that you will get absolutely everything you want? Of course not, mediation is a dispute resolution process and not a “winner take all” forum. “Success”

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<sup>4</sup> Robert P. Burns, What Will We Lose If The Trial Vanishes?, Northwestern University School of Law, Public Law and Legal Theory Research Paper Series No. 11-48, 2011. See also, Marc Galanter and Angela Frozena, ‘A Grin Without A Cat’: Civil Trials in the Federal Courts, 2010 Civil Litigation Conference, Judicial Conference Advisory Committee on Civil Rules, Durham, N.C., May, 2010.



in the minds of the authors is resolving disputes in such a manner that both sides to the dispute can sign a settlement document and move on to other projects.

## MEDIATION— AN OVERVIEW

### What Is Mediation?

Since the U.S. Government enacted the Administrative Dispute Resolution Act in 1990<sup>5</sup> which has been subsequently reenacted and amended twice, the first time in 1996 and the second in 1998, mediation has been a widely used form of ADR. One publication described mediation in the following manner – “Mediation is the private, confidential, and informal submittal of a dispute to a non-binding dispute resolution process.”<sup>6</sup> In the mediation process, the parties (generally, the project owner and the prime contractor) work together to craft a solution to the dispute. The parties are assisted in their dispute resolution effort by an outside neutral, the mediator. The parties may opt for a single mediator or a mediation panel, although in the experience of the authors, single mediators are much more common.

Mediation is a very flexible process, much more flexible than arbitration or litigation. For example, in mediation there are no formal rules of procedure for the mediation session; testimony is not offered under oath; there is no formal transcript taken during the mediation; there is no cross-examination by opposing counsel; the rules of evidence so well practiced in court and frequently employed in arbitration are inapplicable in mediation, etc.

The role of the mediator is quite different from that of an arbitrator or a judge. In essence, a mediator is a negotiation facilitator. As a neutral negotiation facilitator, the

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<sup>5</sup> 5 U.S.C. §571.

<sup>6</sup> Harris, Allan E., Charles M. Sink, and Randall W. Wulff. **ADR: A Practical Guide to Resolve Construction Disputes—Alternative Dispute Resolution in the Construction Field**. Dubuque, IA: Kendall/Hunt Publishing Company, 1994.



mediator's role is to help each party objectively analyze their own position, identify both the strong and the weak points of their position, and assist the parties in structuring an acceptable settlement. Thus, the mediator is an advisor, of sorts, to both parties in analyzing their position and finding ways to settle a dispute.

The power to resolve the dispute rests with the parties to the dispute entirely, not with the mediator. The parties control both the process and the outcome. Thus, one of the keys to success in mediation is self-determination by the parties. The disputants pick their own solution; nothing is imposed upon them by outside forces as in arbitration or litigation.

Due to its inherent flexibility and the fact that the outcome of the process is solely under the control of the parties, mediation is capable of going well beyond traditional settlement negotiations. Mediation can and often does broaden potential resolution options. Mediation can even go beyond the strict issues in dispute to resolve multiple issues, if the parties determine that is the desirable outcome.

## Why Study Mediation?

Since the late 1990's mediation has gained in popularity as a form of ADR in the construction industry. Mediation has actually outstripped both arbitration and litigation in terms of the number of disputes resolved using this forum. More people in construction are aware of mediation and thus it is now almost always suggested or recommended as a possible way to resolve disputes. Additionally, mediation is required in some U.S. nationally recognized contract document forms. For example, Clause 5.4.1.1 of AIA document A511 mandates the use of mediation<sup>7</sup> as does Article 10.2 of DBIA document 535.<sup>8</sup> And the newest form of contract documents in the U.S.,

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<sup>7</sup> American Institute of Architects, AIA Document A511, *Guide to Supplementary Conditions for AIA Document A201*, 1987.

<sup>8</sup> Design-Build Institute of America, DBIA Document 535, *Standard Form of General Conditions Between Owner and Design-Builder*, 1998.



ConsensusDOCS provides for mediation prior to legal action.<sup>9</sup> Thus, some owners and contractors may find themselves contractually bound to the mediation process, whether they personally want to or not.

Additionally, the parties may be operating in a jurisdiction where mediation is mandated by statute. In 1999 the National Conference of Commissioners on Uniform State Laws (n/k/a Uniform Law Commission or “ULC”) together with the American Bar Association’s Section on Dispute Resolution, performed a survey in which they determined that mediation is “. . . embodied in more than 2,000 state and US federal statutes . . .”<sup>10</sup> Mediation then gained even more popularity and legal recognition and the number jumped to 2,500 by 2003. Subsequent to its survey, the ULC released the Uniform Mediation Act (“UMA”) in 2001 (as amended in 2003).<sup>11</sup> The UMA was jointly-drafted and has been approved by the American Bar Association. The intent of the UMA is “to address th[e] core concern about the confidentiality of mediation proceedings” and to act as a “statute of general applicability that will apply to almost all mediations...”<sup>12</sup>

Since 2003, the UMA has been endorsed by the American Arbitration Association, the Judicial Arbitration and Mediation Service, the CPR Institute for Dispute Resolution, and the National Arbitration Forum. Currently, eleven states (Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington) and the District of Columbia have enacted the UMA into law. A bill to enact the UMA

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<sup>9</sup> ConsensusDOCS 200, Article 12.4, Standard Agreement and General Conditions Between Owner and Contractor.

<sup>10</sup> *Draft of Uniform Mediation Act Released*. **Dispute Resolution Times**. American Arbitration Association (July 1999).

<sup>11</sup> National Conference of Commissioners on Uniform State Laws (n/k/a Uniform Law Commission), *Uniform Mediation Act*, 2001 (as amended in 2003).

<sup>12</sup> *Mediation Act Summary*. Uniform Law Commission. Web.

< <http://www.uniformlaws.org/ActSummary.aspx?title=Mediation Act> >



has been introduced in New York and Massachusetts as well. Additionally, several other states have enacted similar bills into law governing the mediation procedure – some containing arguably stronger confidentiality protection. This legal movement has inspired more courts to “encourage” mediation, if not to outright mandate it.

Like it or not, the parties may be statutorily required to mediate a dispute. In the alternative, the parties may be “judicially mandated” to mediate a dispute. That is, in some of the more crowded court jurisdictions, judges are suggesting in the strongest possible terms that the parties would be smarter to mediate their construction dispute than litigate it. While they may not have the legal right to compel mediation, “strong suggestions” from the trial judge prior to litigation generally carries great weight.

Further, mediation needs to be studied as an ADR process because it is different from other forms of ADR. It is a non-binding process, not a binding process like arbitration. It is a facilitated negotiation rather than a hearing like a mini-trial. As noted earlier, it does not have most of the formal, lockstep rules and procedures like litigation. Mediators cannot make decisions as triers of fact in arbitration or litigation can. And, unlike a Dispute Resolution Board, mediators often will not even make recommendations. The parties are allowed to control both the process and the decision. That is, they craft their own solution and do not look to a third party to determine a solution for them.

Finally, anyone considering mediation as an ADR forum should study mediation purely because of its proven success rate. “More than 85% of those who mediate their disputes settle successfully.”<sup>13</sup> With proper preparation, you could be in the 85%.

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<sup>13</sup> Madden, John P. *Recipe for Success in Construction Mediation*. **Dispute Resolution Journal**. American Arbitration Association (May-July 2001).



## The Mediation Process

In the authors' experience, mediation typically develops in the following manner. A claim is filed, generally by the contractor against the project owner. The owner analyzes the claim and attempts to settle the issue(s) by direct negotiation. After numerous attempts, negotiations deadlock or fail all together. As a result, the contractor either files a demand for arbitration or initiates litigation, depending upon the terms and conditions of the contract. At this point, attorneys and expert witnesses start their involvement in the process and there is some initial "bloodletting" on both sides. Legal and expert witness fees start to mount up quickly.

Once the cost has risen to a painful level, one or the other of the parties decides "there must be a better, faster, cheaper way!" At this point, one or the other party, having heard about mediation, offers mediation as a faster and considerably cheaper alternative to legal action, and the other party agrees. Assuming the matter has already been submitted to a formal dispute, the judge or arbitrator is then notified that the parties have agreed to mediate and the parties then request an extension on any existing deadlines related to the legal dispute. It should be noted that the formal legal action is not necessarily dropped but simply held in abeyance pending the outcome of mediation.

Upon agreement to mediate, the parties select a mediator, frequently with the advice of legal counsel. After their appointment by the parties, the mediator's first action is to assist the parties with the physical arrangements of the mediation itself; the date, the location, what information is to be exchanged, and when. The mediator monitors the information exchange to ensure that both parties live up to their agreements. Additionally, the mediator aids the parties in setting the ground rules for the mediation itself – most importantly of all is the assurance of confidentiality.

On the day of the mediation, the mediator opens the session by reiterating the ground rules previously agreed upon. This is sometimes followed by a brief introduction to the attendees in the room and their affiliations in order to promote



clarity and collaboration. The contractor, who is typically the claimant, presents its case first, followed by the owner, as defendant. Depending upon the ground rules established earlier by the parties, several things may happen next. First, the mediator may sum up each party's case after their presentation to help focus the issues. Second, there may be a question and answer period or a discussion session following the presentations, to air certain issues. At some point though, the parties are "sent to neutral corners." That is, the parties are separated into different rooms and the mediator starts the facilitated negotiation, first with one then with the other. Basically, the mediator keeps the parties talking until they find a satisfactory settlement.

As a general rule, mediators do not like attorneys (even though many are attorneys themselves!). While each party will nearly always bring legal representation to mediation, many mediators will feel that the process is distracted by an attorney. At some point during the mediation, the mediator may request to speak to the parties alone. However, there is no obligation for the parties to agree to this.

Experts are often asked to join in mediation to present their preliminary observations on specific issues involved in the dispute, such as schedule delay or claimed costs. This is helpful to articulate the position taken by each party. Depending on the facts of the case, an expert may be the sole presenter during the parties' opening presentation. Throughout the mediation, each expert's opinion will be investigated by the mediator based on his or her outlook on how the trier of fact may view it. Similar to "hot tubbing" in international arbitration proceedings, the mediator may also ask each expert to present its opinions issue-by-issue in order to investigate the relative strength of each parties' position before moving on to the next topic.

### **MEDIATION: THE GOOD AND THE BAD POINTS**

It is generally safe to say that in construction, everything has an upside and a downside! This is as true with mediation as with any other system employed in the construction industry.



## Strong Points

On the positive side, mediation is a relatively inexpensive process, especially when compared to arbitration or litigation and is certainly much quicker. Mediation is non-binding, so no decision can be imposed from the outside. Mediation is private and confidential, and mediation agreements frequently include strict confidentiality agreements on the parties, the attorneys and the expert witnesses. Mediation is quite flexible, generally limited only by the ingenuity of the mediator and the willingness of the parties to be flexible in pursuit of dispute resolution.

Mediation identifies and works with the strong points and the weak points of both sides of the dispute. It gives each party a better sense of the other's case and gives each the opportunity to test the other's resolve in carrying on with the dispute. Mediation also amounts to a terrific amount of free discovery. Finally, mediation tries to identify and focus on common interests rather than specific mistakes each side may have made on the project.

## Weak Points

Due to the fact that mediation requires such low investment of time and cost, either party can easily walk away, resulting in no decision coming out of the process. Another issue frequently mentioned by those experienced with this process is that mediators are trained to "drive a deal." That is, their goal is to settle the case. In the process of seeking ways to settle the case, they may overlook what they consider to be minor items, such as facts, documents, contract language, etc.

Mentioned earlier, as a positive point, was the fact that mediation results in a terrific amount of free discovery. Well, this is a sharp, double-edged sword. In the process of getting free discovery, each party also allows the other to discover a great deal of information. Finally, it is difficult to succeed in mediation if the parties are on the "opposite sides of \$0." That is, if the owner believes there is absolutely no merit to the contractor's claim and is forced into mediation by contract, statute or judicial mandate,



mediation is highly unlikely to succeed.

## HOW TO “SUCCEED” AT MEDIATION

In a sense, mediation is a competitive sport. That is, each side is trying to arrive at a number they will be happy with. As with all competitive sports, certain actions must be taken in order to succeed – that is, achieve resolution of the dispute as close to each party’s goal as possible. This section of the paper is intended to present a number of tips on how to succeed at the mediation table.

### General Thoughts

- **Get Prepared**—Parties that go into mediation with nothing more than generalizations, vague stories, unfounded accusations or “whining,” invariably fail in this process – or cause the process to fall short of its intent.
- **Remain Business-Like**—At the mediation session, remain cool and under control. Remember that mediation is a facilitated business negotiation process. Both parties should be seeking a good business decision. It’s rarely personal. Treat the process like business and you’re more likely to prevail.
- **Keep Process Informal**—In formulating the ground rules for the mediation session, strive for “professional informality”. That is, the more legalistic the session appears, the more nervous the project participants are likely to be. Remember only attorneys are trained to be comfortable on the floor of a courtroom. If the mediation seems like a court hearing then the project personnel involved will be less effective.
- **Prepare and Rehearse**—Spend as much time and energy as necessary to put together a good presentation that is factual and well documented. Then, rehearse the presentation and game plan the session thoroughly.
- **Don’t “Fall in Love with” Your Case**—The more time spent preparing for mediation, the more convinced you become of the righteousness or the



correctness of your own case. This is a natural outcome of thorough preparation. However, keep doing reality checks. Examine every point carefully and with a skeptical eye. It is relatively easy to fool yourself. It is much more difficult to stay rational and objective. To succeed at mediation, you must remain objective.

- **Define “Success”**—In the course of preparing for mediation you need to define what “success” means to you. That is, you must determine, prior to the day of mediation, what the “good settlement” should look like in terms of cost, time, and other considerations – other considerations being the terms and conditions you want included in the mediated settlement such as confidentiality provisions, payment timeframe, release of retainage, return of liquidated damages, etc. The last thing you want to face is to reach a mediated settlement at 1:00 AM (after 15 or 16 hours of mediation) and then have to think through for the first time the various terms that have to be included in the settlement. Be prepared with an ideal settlement option and a worst case scenario or “walk away” settlement option. Be aware of your financial boundaries, while appropriately factoring in the risk of potential future costs if the mediation were to fail. Know where you want the mediation to end up before you even start.

## Preparing for Mediation

- **Mediator Selection**—One of the keys to a successful mediation is selection of the right mediator. You need to carefully choose the mediator. The first choice is between an “evaluative mediator” and a “subject matter expert.” Evaluative mediators are typically attorneys who have practiced in the construction litigation field for some period of time. They know a good deal about construction but are typically not trained or skilled in the fields of architecture, engineering, construction, or construction management. Thus, while they may be good evaluators, the presentation must start with the basics. On the other hand, some mediators are technical experts in certain issues (for example, construction scheduling and delay analysis) and may be preferable if you have



a very narrowly focused dispute. Next, how do you identify mediators? Check with the local American Arbitration Association (“AAA”) or the Judicial Arbitration and Mediation Service (“JAMS”) office to get a list of local construction mediators. Whether you have an outside group such as AAA or JAMS manage the mediation process or not, their lists of mediators is available to you at any time. Speak with attorneys who practice construction litigation in your area. Check with other people in your area who have gone through mediation. Once you have a list, carefully check the background and experience of everyone on the list. Speak with other people in your position (whether you’re a contractor or an owner) to see how they felt about the mediator and his/her personality.

- **Process Understanding**—Work with your attorney to gain a thorough understanding of the process and your role in mediation. Remember that mediators do not make decisions and may not even offer recommendations. This is your role as a participant in the mediation process.
- **Process Participation**—Since mediation affects you directly, participate actively in setting the ground rules. How would you like to see the mediation session run? Participate in the document exchange. Review the project facts. Assist your attorney in writing the mediation brief – or, at a minimum, review and comment on it. True, writing briefs is a legal function the brief must be factually accurate. Since you or your team were on site and have the first hand project experience, not your attorney, you have more command of the facts. Finally, determine your role at the mediation. Mediation is not like a trial where attorneys do all the talking. In mediation, the project participants can, and often do, make the mediation presentation, lead the discussion session, and ask and respond to questions. Finally, be prepared to make the decision. This is a key role that only project participants can fulfill.
- **Critical Documents**—During preparation, identify which of the thousands of project documents are critical to the case. Organize these documents along



with your presentation. Bring multiple copies of these documents to the mediation so they can be used and distributed to others when needed without interruption.

- **Legal Support**—If there are legal issues that need to be settled in the mediation be prepared to address them. Issues such as attorney fees, statute of limitations, enforceability of contract language, liquidated damages, etc., may need to be addressed. Have case law, statutes, and contract documents at the mediation to address such issues. Don't rely solely on presentation skills and logic. One of the mediator's main objectives is to make each party aware of its legal position in the event the dispute was to proceed to formal legal action. Mediators may try to ignore logic to achieve settlement, but they cannot ignore well documented legal issues.
- **Learn Strong Points**—During preparation of your case, learn your "strong points." These are points that are clearly in your favor, are well documented, and cannot be argued or interpreted in any other fashion. Find these strong points, document them, and figure out how to use them to leverage a favorable settlement.
- **Learn Weak Points**—Equally important, but harder to do, is learning the weak points of your case. These are facts that lead to settlement in the other party's favor. You need not like these points but you must be prepared to live with and deal with them realistically. Be prepared to concede these weak points while minimizing damage to you own case to the maximum extent practicable.
- **Learn the Other Side's Strong and Weak Points**— Even more difficult is the task of objectively analyzing the other side's case. You need to examine it from their viewpoint. Find their strong points; learn how to deal with them. Find their weak points; learn how to use them to your benefit. Remember that your objective in the mediation is to convince the mediator that your case is stronger and more likely to prevail and then let the mediator convince the other side of



this. To accomplish this, you must shoot holes in the other side's case. Find, document and point out mistakes, inconsistent statements, overinflated costs, unrealistic damages, double counted costs, unsupported legal theories, etc.

- **Know Real “Damages”**—Mediation focuses heavily on dollars. Parties are often surprised when the first question the mediator asks in the private session is “What will you really settle for?” They do this to determine how far you are prepared to go to settle. It is not at all uncommon for mediators to follow up this first question with “And, what do you think the other side will settle for?” The mediator often acts “shocked” at your numbers and offers up numbers considerably larger/smaller than yours in an effort to start movement on your part. Calculate your real number. Tie your calculation closely to the requirements of the contract documents. Be prepared to give this calculation to the mediator to prevent them from leveraging you against yourself. Remember to know where you want the mediation to end up before you start – and have confidence, but not over-confidence, in your numbers.
- **Estimate “Failure” Cost**—Remember mediation typically starts with some legal action, which has been put in abeyance pending the outcome of mediation. Thus, if mediation fails, if no settlement is reached, the legal action comes back to life. Calculate your own BATNA (“best alternative to no agreement”). That is, as part of mediation preparation estimate your cost to arbitrate or litigate the cost. Why? Because mediators frequently open with, “You may as well throw your legal costs into the calculation!” And, if you do not have an estimate of legal costs, the mediator is often willing to provide a very high number of their own to start movement from your position. You need your own legal counsel to prepare an estimate of this number as they are likely as not, much more experienced at doing this than you.
- **Rehearse**—If the issue in dispute is sufficiently large, it may well be worthwhile to hire a mediator to run a one day “mock mediation.” This is analogous to a dress rehearsal and can be used to prepare you and your team for the real thing,

especially if this is the first time your team is participating in a mediation process.

## At the Mediation

- **Authority to Settle**—Successful mediation demands that both parties bring people to the table with full authority to settle the issues. As one construction mediator, John P. Madden, wrote: “There will be and can be no such agreement unless each party has a representative with the full authority to act present at the mediation. Most typically, this involves financial authorization...”<sup>14</sup> This authority to settle is easier to obtain for private parties but much harder for public entities. Public entities need to make their position clear at the outset. “If we reach settlement today, I’m prepared to go to the City Council tomorrow evening and recommend their full concurrence.”
- **Participate**—Mediation is not arbitration or litigation where attorneys do most of the talking. Be an active participant as well as a decision-maker. Make the presentation; participate in discussions, etc. Remember, it’s your project, your case, your money, your solution, and you have to live with the outcome. Remember also, this is not a “wake me when it’s over” affair!
- **Trust the Mediator**—For mediation to succeed, don’t constantly question the mediator’s approach, don’t assume they are biased against you and don’t assume they can force you into a settlement you don’t want. Develop a rapport with the mediator, respond openly to their questions, and follow their lead as long as you’re comfortable. Seek advice from the mediator when appropriate. Recognize their goal and yours are the same: a settlement of all issues.
- **Team Approach**—Having a single person make the entire presentation is easier

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<sup>14</sup> Madden, John P. *Recipe for Success in Construction Mediation*. **Dispute Resolution Journal**. American Arbitration Association (May-July 2001).



for the mediator to follow and easier for you to prepare. But, having a team present may bring different perspectives, more depth and granularity, and a more balanced approach to the various issues in dispute.

- **Summary Presentation**—Mediation is a forum for settlement discussion not for detailed fact finding. Your presentation should be brief and to the point. Details should be summarized. Pick your key points carefully, document them well and focus on them at all times. Don't allow the mediator to get lost in the myriad details of the project, most of which probably have little or nothing to do with the issues in dispute.
- **No Insults**—Regardless of personal feelings, do not insult the other party or their attorney. Insults harden positions and make it less likely that the other side will be flexible. Impress the other side with facts; don't rile them with insults. As one famous set of authors stated some time ago in this regard, "Be hard on the problem, soft on the people."<sup>15</sup> Remember the goal of mediation is settlement. You need the cooperation of the other side to achieve this goal.
- **Factor in Other Benefits**—When discussing settlement options, add in other benefits beyond direct costs. For example, settlement allows both parties to close out the project; allows release of retained earnings; may allow release of previously withheld liquidated damages; frees up the contractor's bonding limits; avoids the high cost of litigation; etc. There may be other benefits you want to use in the settlement equation.
- **Be Creative**—In discussing settlement options, think outside the box. For example, you may be able to expand the pie by paying the price asked if the other side resolves other claims. You may be able to accept an extended bond or warranty in lieu of dollars. You may agree not to talk about the contractor's performance on this project to other project owners. Things of this nature may

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<sup>15</sup> Fisher, Roger, and William Ury. **Getting to Yes**. Boston, MA: Houghton Mifflin, 1981.





add value to the settlement without adding cost.

- **Trial-Ready Graphics**—Mediation is a forum for persuasion. Summarize your case in a few trial-ready (high quality) graphics. Use the graphics to help focus your case and aid in your oral presentation.
- **Know Your “Walk Away” Number**—Mediation focuses on “how much?” In addition to defining your “success” you must also go into mediation knowing your real bottom line. Once you know this and have estimated your failure cost, you can establish your “walk away” number. Your walk away number is the number beyond which it is probably better to go back to legal action as your costs are likely to be lower. If you reach your walk away number without achieving settlement, and with no good reason to change your number, then it is time to walk away from the mediation.
- **Maintain Control**—Mediation can be lengthy and quite stressful. Aggressive, inflammatory tactics probably will not work in mediation. You need to avoid getting angry or emotional. Focus on remaining under control at all times.
- **Don’t Panic**—When the mediator starts telling you how weak your case is and starts throwing around outrageous numbers don’t panic. The mediator is doing this to start movement toward settlement. Panicked perceptions of your own weaknesses can be very expensive. That is, you’ll end up negotiating against your own position; either throwing more money on the table or taking more money off. Remember your strong points and the other side’s weak points. Self-doubt during the process is normal. Remember too, the mediator is beating up the other side also, instilling in them their own self-doubts.
- **Listen, Then Talk**—Practice “active listening” during the mediation. Try to experience and understand the situation from the other party’s viewpoint. Don’t view your own silence as weakness. Be open to the possibility that your case is weak in certain areas – without the need to reveal that weakness in the moment. Feel out the situation. Pay close attention to their opening and closing



statements, as these often are the best summaries of their position. Don't spend your listening time thinking of rebuttal statements. If you do that, you've stopped listening and may miss valuable information that will impact your decision-making.

- **No Non-Negotiable Demands**—Mediation is a structured, facilitated negotiation. Non-negotiable demands, at least at the outset of the process, are inconsistent with the spirit of mediation and counterproductive. The “take it or leave it” approach does not facilitate dialogue and is unlikely to produce settlement.
- **No Walk Outs**—One of the keys to successful mediation is to keep talking. Walk outs, unless you've reached your walk away number, are counterproductive in this regard. Walk outs stop communication. Additionally, they leave the other party with the false impression that, “My case must be even stronger than even I believed. The other side tucked tail and ran.” That erroneous message makes it harder to reach resolution later on. Finally, walking out of mediation will likely lead the other side to reinstitute the initial legal action.
- **Make Settlement Easy**—In trying to structure a settlement, identify the other side's concerns and try to address them in ways that don't cost you money. For example, emotional issues may be settled by a formal apology from one side to the other concerning the way in which the project was run. Owners may promise no adverse commentary to other owners; no adverse performance ratings; or possibly a promise of future work.
- **Be Prepared to Make Business Decisions**—Win/win settlements are obviously desirable but may not be possible, given the circumstances. Potential settlements may not be entirely within the bounds of the contract but they may still make good business sense. All potential settlements must be approached from this perspective. Each side may have to make painful decisions to achieve



resolution. They may have to admit wrongdoing or compromise positions in order to reach settlement. But, if settlement is good business for both sides, then each side must be willing to pay the price.

### After the Mediation

- **Sign the Settlement at the Mediation**—Once settlement has been verbally agreed to, have the mediator write out the settlement, including all of the terms and conditions and have all parties sign the document before anyone leaves the mediation room. Construction mediator Rosemary Jackson once wrote: “The final, essential preparation is the drafting of a blank settlement agreement. Nothing is worse than drafting a settlement agreement by committee when everyone is tired and, perhaps, a little touchy at the end of a long and difficult day.”<sup>16</sup> In a pinch, this document can be handwritten; however, it would have to be followed up with a more formal settlement document at a later point in time. Nevertheless, it is important to get a signed agreement in order to avoid buyer’s remorse the next morning as well as to avoid the typical post-mediation problems. (“If only I had said...” or “If I’d been there, I never would have given away the farm like you did!”).
- **“Sell” the Settlement Within Your Own Organization**—Almost without fail, people on both sides (especially those who did not participate in the mediation) will criticize the outcome. Each side needs to go back into their own organization and explain why the settlement is a good deal. If things went wrong on the project, explain this so others can learn a lesson and avoid similar problems in the future. You need to help everyone in your organization understand the reasons for the settlement. And, on the public owner’s side, the people at the mediation need to present the settlement to the appropriate decision makers, and convince

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<sup>16</sup> Jackson, Rosemary. *Engineering Mediations for Success*. JAMS Dispute Resolution Alert Newsletter. JAMS (Fall 2013).



them to approve the settlement.

## CONCLUSION

Mediation is the continuation of previous negotiation efforts, in a more structured setting and with the assistance of an outside neutral. Mediation, contrary to popular belief, is not easy. It should not be attempted without thorough preparation

Success in mediation requires careful preparation and a hard, realistic appraisal of both your case and the other side's case. It requires a solid, focused presentation by a well-prepared team of people. It also requires active listening and a willingness to make hard business decisions to achieve resolution short of arbitration or litigation.

The outcome of mediation is totally under the control of the parties, unlike the outcome of arbitration or litigation. Properly done, mediation is a very effective dispute resolution mechanism. Improperly done, mediation can be a very frustrating experience and results in a terrific amount of free discovery for the other side. If you follow the guidelines set forth in this paper you can learn how to succeed at mediation.