

WHY MEDIATIONS FAIL – HOW THEY CAN SUCCEED

By George Calkins

By now, it is accepted that many, if not most, disputes in the real estate/construction industry of today can and should be resolved through use of a dynamic new tool, which is now coming into its own—mediation. Mediation basically involves the skillful intervention of a third party professional to help resolve lawsuits and other disputes that arise between two or more parties. Through a series of well-timed and properly conducted joint and individual meetings with the parties, a mediator often may produce a settlement where none seemed possible before. Statistics compiled by the American Arbitration Association indicate that at least 95 percent of all mediations of disputes administered by its members result in settlement.

While the intervention of a mediator may sometimes seem like magic, in most instances it is a result of hard work, preparation, anticipation, and expert management by counsel for the parties and the mediator. In addition, the parties need to avoid certain pitfalls and dangers. Extensive experience with the mediation process suggests the following basic reasons why mediations fail:

- The parties failed to cooperate and engage in the necessary mediation preparation activity. The mediator needs to conduct sufficient preparation to understand the parties, as well as the circumstances behind the dispute. The mediator should facilitate an exchange of documents and technical data among the parties relevant to the dispute. The parties and their experts should meet and confer among themselves and with the mediator to outline the issues and facts upon which the dispute is founded. The dialogue process of the mediation begins with this

premediation exchange of information and ideas and it is important for the mediator to be a vocal participant in this activity.

- The mediator has not been properly prepared by the parties and lacks sufficient information to facilitate a settlement. The mediator should receive written submissions from the parties before the mediation (whether they are confidential or not) that provide needed information regarding the background of the dispute and the underlying interest of the parties.
- The mediator fails to “manage” the parties and mediation process well, and the mediator fails to engage in the necessary communication with all parties to obtain the necessary information regarding the underlying interests and concerns of the parties.
- The parties and mediator fail to take the appropriate steps to assure that properly prepared and authorized representatives of the parties conduct the necessary preparation activities and communication among themselves (in person and by other means of communication) before the mediation in order to identify available settlement options and to take advantage of all opportunities and options to settle the dispute. This necessary process of identifying and developing settlement options must take place before and during each mediation.
- The parties and the mediator fail to develop the “momentum” and confidence necessary to settle the dispute.

- The mediator fails to effectively utilize "shuttle diplomacy" to impart the timely flow of needed information during the mediation process in order to match the underlying interests of the parties with the relevant factual background of the dispute. This is where the skill of the mediator comes in to play.
- The mediator fails to impart a flow of new information, recent case law, and additional facts or documents that help encourage the parties to think about options during the mediation process. Good mediators give the parties "homework assignments" during the mediation meetings in order to encourage creative thought by the parties that hopefully lead to a resolution of the dispute.
- The parties and mediator fail to follow up and persistently pursue settlement opportunities following initial impasses. In many instances, a non-monetary solution will help push the case toward resolution. This often involves effective utilization of future business opportunities and confidentiality provisions.
- The mediator fails to utilize proper facilitating and/or evaluative techniques effectively to achieve a settlement. A good mediator must know when to facilitate the parties' natural movement toward settlement, as well as to state a well-timed evaluation of the case to help the parties settle their differences. A mediator must carefully develop the potential for utilization of case evaluation, where requested by the parties and appropriate to the evolving circumstances of the mediation. A misplaced evaluation will lose the attention of at least one of the parties and will be counter-productive for motivating a settlement.

As one can see, careful preparation, selection of an appropriate mediator and efforts to anticipate the evolution of the negotiation process are at a premium if one is to have a successful mediation. Working closely with counsel in using the preparations and procedures just discussed will greatly improve the chances of achieving a favorable settlement during any mediation.

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