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Are you prepared for mediation?[3]

Abstract
This article discusses mediation as an alternative dispute resolution (ADR) process. It identifies why we ought to study the mediation process and discusses some of the good and bad points concerning the use of mediation as a form of dispute resolution. Finally, the article offers a number of suggestions as to how to prepare for and win at a mediation session.
Keywords: mediation, alternative dispute resolution.

IS U GEREED VIR BEMIDDELING?
Die artikel bespreek bemiddeling as 'n alternatiewe proses vir dispuutoplossing. Die redes waarom die bemiddelingsproses bestudeer moet word, word aangedui en enkele goeie en swak aspekte word bespreek met betrekking tot die gebruik van bemiddeling as 'n vorm van dispuutoplossing. Laastens, bied die artikel 'n aantal voorstelle oor hoe om vir bemiddeling voor te berei om sodoende as oorwinnaar uit 'n bemiddelingsessie te tree.
Sleutelwoorde: mediasie, alternatiewe dispuutoplossing.

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Mediation: the process

What is mediation?

Mediation has been discussed in a number of publications in recent years. One publication described mediation as follows (Harris, 1994: 5): "Mediation is the private, confidential, and informal submittal of a dispute to a non-binding dispute resolution process. In the mediation process, the parties (generally, the project owner and the prime contractor) collaborate to craft a solution to the dispute. An outside neutral, the mediator, assists the parties in their efforts to resolve the dispute resolution. The parties may opt for either a single mediator or a mediation panel."

Mediation is a very flexible process, considerably more so 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 of the mediation; there is no cross-examination by opposing counsel; the rules of evidence so well practised in court do not apply in mediation, etc.

The role of the mediator differs from that of an arbitrator or a judge. In essence, a mediator is a negotiation facilitator. As a neutral negotiation facilitator, the mediator's role is to help each party objectively analyse his position, and assist the parties in structuring an acceptable settlement. Thus, the mediator is an advisor to both parties in analysing their position and finding ways to settle a dispute.

The power to resolve the dispute actually rests with the parties to the dispute, 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 out-come of the process is solely controlled by the parties, mediation is capable of going well beyond traditional settlement negotiations. Mediation can broaden potential resolution options and can even go beyond the strict issues in dispute to resolve multiple issues, should the parties decide that this is the desirable outcome.

Why study mediation?

In recent years, mediation has gained popularity as a form of ADR in the construction industry. More people in construction are aware of mediation which is now more often suggested as a possible way to resolve disputes. In addition, mediation is a prerequisite in some nationally known (US) contract document forms. For example, Clause 5.4.1.1 of AIA document A511 mandates the use of mediation (AIA 1987), as does Article 10.2 of DBIA document 535 (DBIA 1998). Thus, some owners and contractors may find themselves contractually bound to the mediation process, whether they want to or not.

In addition, the parties may be operating in a jurisdiction where mediation is mandated by statute. The National Conference of Commissioners on Uniform State Laws, together with the American Bar Association's Section on Dispute Resolution, ran a survey in which they determined that mediation is "... embodied in more than 2.000 state and US federal statutes ... (American Arbitration Association)." Like it or not, the parties may be statutorily required to mediate a dispute. On the other hand, 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 rather than to litigate it. While they may not have the legal right to compel mediation, 'strong suggestions' from the trial judge prior to litigation generally carry great weight.

Further, mediation must be studied as an ADR process because it differs from other forms of ADR. Unlike arbitration, it is a non-binding process. 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 they can in arbitration or litigation. And, unlike a dispute review board, mediators will often not even make recommendations.

Finally, anyone considering mediation as an ADR form must study mediation because the parties are allowed to control both the process and the decision. That is, they find their own solution and do not seek a third party to craft a solution for them.

The mediation process

In the author's experience, mediation typically develops in the following manner. Generally the contractor files a claim against the project owner. The owner analyses the claim and attempts to settle the issue(s) by direct negotiation. After numerous attempts, negotiations deadlock or fail altogether. At this point, the contractor either files a demand for arbitration or initiates litigation, depending on the terms and conditions of the contract. At this stage, attorneys and expert witnesses get involved and there is some initial 'bloodletting' on both sides. Legal and expert witness fees are increasing rapidly.

Once the cost has risen to a painful level, one or the other of the parties may decide, '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. It should be noted that the formal legal action is not dropped but simply held in abeyance pending the outcome of mediation.

Once mediation is agreed to, the parties select a mediator. 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 adhere to their agreements. The mediator also assists the parties in setting the basic rules for the mediation itself.

On the day of the mediation, the mediator opens the session by reiterating the basic rules previously agreed upon. The contractor, as claimant, presents his case first, followed by the owner, as defendant. The sequence of events depends on the basic rules established earlier by the parties. Firstly, the mediator may sum up each party's case to highlight the issues. Secondly, a question-and-answer or a discussion session may follow 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 party, then with the other party. The mediator basically keeps the parties talking until they find a satisfactory settlement.

Good and bad points

It is generally safe to say that in construction, nothing is either all good or all bad! This is true for both mediation and 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 it is certainly a considerably faster process. Mediation is non-binding, thus no external decision can be imposed. Mediation is private and confidential, and mediation agreements frequently include strict confidentiality agreements on the parties, the attorneys, and the expert witnesses. Mediation is flexible, and it is generally limited only by the ingenuity of the mediator and the parties.

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 party's case and gives each party the opportunity to test the other party's resolve in proceeding with the dispute. Mediation also effects free discovery. Finally, mediation tries to identify and focus on the common interests rather than on the specific mistakes each side may have made on the project.

Weak points

As mediation requires such low investment of time and cost, either party can easily walk away, resulting in no decision arising from the process. Another issue frequently mentioned by those who have experienced 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 issues, such as facts, documents, contract language, etc.

It was mentioned earlier that mediation effects free discovery. This is indeed a sharp, two-edged sword. In the process of getting free discovery, each party also allows the other to discover a vast amount of information. Finally, it is difficult to succeed in mediation if the parties are on the 'opposite sides of $0'. If the owner believes that there is absolutely no merit to the contractor's claim and that he is forced into mediation by contract, statute or judicial mandate, mediation is highly unlikely to succeed.

How to 'win' at mediation

In a sense, mediation is a competitive sport. Each party is trying to arrive at a number with which they will be satisfied. As with all competitive sports, certain actions must be taken in order to emerge victorious. This section of the article is intended to present a number of tips on how to achieve victory at the mediation table.

General points

- *Be prepared*. Go into the session knowing your facts! Be able to document every point made in the mediation session. Parties that go into mediation with nothing more than generalisations, vague stories, unfounded accusations or 'whining,' invariably lose in this process.
- *Remain business-like*. At the mediation session, remain cool and in control. Remember that mediation is a facilitated business negotiation process. Both parties should seek a good business decision. It is rarely personal. Treat the process like business and you're more likely to succeed.
- *Keep the process informal*. In formulating the basic rules for the mediation session, strive for informality. 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 prepare a factual and well documented presentation. Rehearse your presentation and 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 of your 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 remain rational and objective. To win at mediation, you must remain objective.
- *Define 'win'*. In the course of preparing for mediation you need to define what 'win' means to you. You must determine, prior to the day of mediation, what the 'good settlement' should be in terms of cost, time, and other considerations. Know where you want the mediation to end before you even start.

Preparing for mediation

- *Mediator selection*. One of the keys to a successful mediation is to select 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 practised in the construction litigation field for some time. They are well-informed 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 fields (for example, construction scheduling) and may be preferred in the case of a very narrowly focused dispute. Next, how do you identify mediators? Obtain a list from the local American Arbitration Association office, speak with attorneys who practise in the field of construction litigation in your area, or check with other people in your area who have experienced mediation. Once you have a list, carefully check the background and experience of the persons listed. Speak with other people in your position (whether you're a contractor or an owner) to find out their opinion on the mediator and his/her personality.
- *Process understanding*. Work with your attorney, for in this way you will gain a thorough understanding of the process and of your role in mediation. Remember that mediators do not make decisions and may not even offer recommendations. This is your role as participant in the mediation process.
- *Process participation*. As mediation affects you directly, participate actively in setting the basic rules. How would you like the mediation session to run? Participate in the document exchange. Assist your attorney in writing the mediation brief. True, writing briefs is a legal function but the brief must be factually accurate, and since you, not your attorney, were on site, you have more command of the facts. Finally, deter-mine 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.
- *Be prepared*. Learn your case thoroughly. Carefully calculate costs and losses. Prepare arguments and documents

thoroughly. If you do all this, you will not be caught off guard if the other party makes false statements at the mediation.

- *Critical documents*. During preparation, identify which of the thousands of project documents are critical to the case. Organise these documents along with your presentation. Bring multiple copies of these documents to the mediation so that they can be used and distributed to others when needed.
- *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, etc, may need to be addressed. Have case law, statutes, and contract documents at the mediation to address such issues. Do not rely solely on presentation skills and logic. Mediators may try to ignore logic to achieve settlement, but they cannot ignore documented legal issues.
- *Learn your strong points*. In preparing your case, learn your 'strong points'. These are clearly in your favour, 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 influence a favourable settlement.
- *Learn your weak points*. Learning the weak points of your case is equally important, but more difficult to do. These are facts that lead to a settlement in the other party's favour. You need not like these points but you must be prepared to live and deal with them realistically. Be prepared to concede these weak points while minimising damage to your own case as much as practicable.
- *Learn the other side's strong and weak points*. An objective analysis of the other party's case is even more difficult. 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 advantage. 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 party's case. Find, document, and point out mistakes, inconsistent statements, over-inflated costs, unrealistic damages, double counted costs, new legal theories, etc.
- *Know real damages*. Mediation focuses heavily on dollars and 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. The mediator often acts 'shocked' at your figure and suggests a figure considerably larger/smaller than yours in an effort to get you started. Calculate your real figure. Tie your calculation closely to the requirements of the contract documents. Be prepared to give this calculation to the mediator to prevent them from influencing you against yourself.

- *Estimate 'failure' cost*. Remember mediation typically starts with some legal action, which has been placed in abeyance pending the outcome of mediation. Thus, should mediation fail, and should no settlement be reached, legal action is re-instituted. Therefore, preparing for mediation involves estimating your cost in order to arbitrate or litigate the cost. Why? Because mediators frequently open with, 'you may as well throw in your legal costs!' And, if you do not have an estimate of legal costs, the mediator is often willing to suggest a very high figure of their own to get you started.
- *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.

At the mediation

- *Authority to settle*. Successful mediation demands that both parties bring people to the table who have the full authority to settle issues. This is easy for private parties but considerably more difficult for public owners. Public owners need to clarify their position at the outset. 'If we reach settlement today, I'm prepared to go to the City Council tomorrow evening and recommend their full consent'.
- *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 accept the outcome.
- *Trust the mediator*. For mediation to succeed, do not constantly question the mediator's approach, do not assume that he is biased against you, and that he can force you into a settlement you are not willing to accept. Develop a rapport with the mediator, respond openly to his questions, and follow his lead as long as you are comfortable. Seek advice from the mediator when appropriate. Recognise that you both have similar goals: a reasonable settlement of all issues.

- *Team approach*. It is easier for the mediator to follow and for you to prepare when a single person makes the entire presentation. When a team makes the presentation, this may bring a different perspective, more depth, and a more balanced approach to various issues.
- *Summary presentation*. Mediation is a forum for discussing a settlement, not for detailed fact-finding. Your presentation should be brief and to the point. Details should be summarised. Pick your key points carefully, document them well, and focus on them at all times. Do not confuse the mediator by the myriad details of the project, most of which 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; do not 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 (Fisher 1981)". Remember the goal of mediation is settlement. You need the co-operation of the other side to achieve this goal.
- *Factor in other benefits*. When discussing settlement options, add in other benefits besides 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 dam-ages, frees up the contractor's bonding limits, avoids the high cost of litigation, etc. You may wish to use other benefits in the settlement equation.
- *Be creative*. In discussing settlement options, think beyond 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 add value to the settlement at no extra cost.
- *Trial-ready graphics*. Mediation is a forum for persuasion. Summarise your case in a few trial-ready (high quality) graphics. Use the graphics to focus your case and to be of assistance in your oral presentation.
- *Know your 'walk away' figure*. Mediation focuses on 'how much': on dollars. You must go into mediation knowing your real top or bottom line. Once you know this and have estimated your failure cost, you can establish your walk away figure. Your walk away figure is the amount beyond which it is probably better to re-institute legal action as your costs are

likely to be lower. If you reach your walk away figure without achieving a settlement, and with no good reason to change your figure, then walk away from the mediation.

- *Maintain control*. Mediation can be lengthy and stressful. Aggressive, inflammatory tactics will probably not work in mediation. You need to avoid getting angry or emotional. Focus on being in control at all times.
- *Do not panic*. When the mediator starts telling you how weak your case is and starts throwing around outrageous figures, do not panic. The mediator is moving towards a settlement. Panicked perceptions of your own weaknesses can be very expensive. That is, you will 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, instilling in them their own self-doubts.
- *Listen, then talk*. Practise 'active listening' during the mediation. Try to experience and understand the situation from the other party's viewpoint. Pay close attention to their opening and closing statements, as these are often the best summaries of their position. Do not spend your listening time thinking of rebuttal statements. If you do this, you have stopped listening and may miss valuable information.
- *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 effect a settlement.
- *No walkouts*. One of the keys to successful mediation is to keep talking. Walkouts, unless you have reached your walk away figure, are counterproductive in this regard. Walkouts stop communication. In addition, 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 more difficult to reach a resolution later. Finally, walking out of mediation will likely lead the other side to re-institute 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 do not 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 mediation

- *Sign the settlement at the mediation.* Once settlement has been verbally agreed to, have the mediator write out the settlement, including all the terms and conditions, and have all parties sign the document before anyone leaves the mediation room. This document may be hand-written and may have to be followed up with a more formal settlement document. It is important to get a signed agreement in order to avoid buyer's remorse the next morning, and 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 organisation.* Almost without fail, people on both sides (especially those who did not participate in the mediation) will criticise the outcome. Each side must return to its own organisation and explain why the settlement is a good deal. If things went wrong on the project, explain this so that others can learn a lesson and avoid similar problems in the future. You need to help everyone in your organisation 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 relevant decision-makers, and convince them to approve the settlement.

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

Success in mediation requires careful preparation and a hard, realistic appraisal of your case and the other side's case. It requires a good, 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. A properly executed mediation is a very effective mechanism for resolving disputes. On the other hand, mediation can be a very frustrating experience and result in a vast amount of free discovery for the other side. If you follow the guidelines set forth in this article, you can learn how to win at mediation.

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