Mediation of Construction & Business Disputes

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MEDIATION OF BUSINESS & CONSTRUCTION DISPUTES

Business and construction disputes distract and direct valuable time, energy and resources away from positive and productive purposes. It is an unfortunate reality that litigation is slow and expensive. Valuable business relationships, opportunities and reputations are jeopardized. In a business community and in challenging economic times, protracted and unresolved disputes can be particularly destructive. Mediation has proven to be a very valuable and effective means of addressing, managing and resolving business and construction disputes, allowing the parties to maintain control over the resolution of their disputes. When parties mediate, resolution rates are commonly in the 70% to 80% range. Mediation, when timely engaged and sensitively performed by trained and experienced mediators empowers parties to achieve maximum mutually beneficial resolutions that meet their real needs and interests.

Sophisticated business ventures, developments, construction, technical and scientific enterprises are a dynamic and complex mixture of relationships, resources, vision, art and execution. The added interplay of government regulations, insurance, surety bonds and the irregularity of craftsmanship makes perfect achievement of the enterprise very challenging.

With such complexity and issues – disagreements are inevitable. If not promptly and efficiently managed, issues and disagreements become

disputes and disputes, poorly managed, can become debilitating litigation. Complex business and construction disputes often involve multiple parties – principals, lenders, investors, design professionals, owners, contractors, manufacturers, suppliers, sureties, insurer and construction professionals. The multiplicity of parties, issues and insurers makes the resolution of multi-party disputes extremely complicated, costly and slow. Arbitration and litigation can take months and years to reach final resolution. Quite often, the cost of litigating or arbitrating such disputes exceeds the value of the issues involved and the cost of correction.

Mediating complex commercial and construction disputes typically is quicker and far less expensive than arbitrating or litigating such matters.

During mediation, parties are encouraged to provide and exchange critical information so that all parties can fully, quickly and adequately assess the situation so that sound and sensible business decisions can be made. If this can be achieved before avoidable and unnecessary litigation expenses are expended, parties are better able to use their resources more productively and to reach reasonable and realistic agreements.

TIPS FOR ADVOCATES AND ATTORNEYS IN MEDIATION

The greatest advantage of mediation is the <u>flexibility of the process to adapt to the special facts and needs of the parties</u>. Parties resolve their disputes in a private, confidential and informal manner with direct involvement

of the disputing parties. In representing your client in a mediation, keep these points in mind:

- **Meet early with your mediator.** Discuss whether all potential and necessary parties have been identified and are participating. Assess whether the mediator can assist in accelerating discovery and exchange of critical and pertinent information. Determine if identification, review and tenders have been made for all potentially applicable policies of insurance and/or surety bonds. Are the parties ready to settle? Are the insurers adequately informed?

- **Know your case.** Be prepared to give a brief and succinct statement of the critical facts and claims. A mediation session can be a very valuable opportunity to present a summation of your case to the mediator and the other party. Unless your case is a simple one, prepare a concise and focused pre-mediation submission to the mediator to educate and arm the mediator with the critical facts, document excerpts and issues involved.

- **Maintain appropriate tone.** While maintaining firmness in advocating the strength of your case, be open to practical, reasonable and creative resolutions.

- **Prepare your client.** Educate your client about what might be expected from the mediation process. Be clear about your client's real interests and needs and how they relate or differ from their legal positions and potential outcomes in a contested

litigation or arbitration. Be personable and professional. Avoid actions, ultimatums, statements or emotionally hurtful words that may jeopardize the trust and good will of the parties and advocates necessary and conducive to productive negotiations.

- **Consciously whether your client/representative can be an articulate, effective and active participant in the mediation.** Determine who will be the most effective representative participating on behalf of your client. Consider whether your client/representative should make a direct presentation of some or all of an opening statement to the other party(ies). Identify whether there are special, real world business or personal relationships, personalities, procedural problems or other considerations that may impact the negotiations. Consider the emotional and relationship aspects of the situation. Would a timely and meaningful apology or a demonstration of sincere empathy be important to defuse anger or hurt felt by another party? Is it important that the other party have an opportunity to vent and express concerns directly to a key party representative?

- **Be creative and open to possibilities.** Mediation allows for "win-win" resolutions. You and your client should be prepared to listen and look for all possible options and packages of possible solutions. Understanding the stated and unstated needs, hopes and dreams of your client and those the other party(ies) can help to fashion resolutions

tailored to meet yours and their special needs and interests.

- **Take advantage of the flexibility of the process.** The mediation process can be adapted to suit the needs and circumstances of your case. Determine if review and presentation of key information, testimony, deposition excerpts or even expert opinions will be helpful to develop focus on the critical issues and establish the strength of your case. Parties do not need to agree on the facts to settle. The key is that parties appreciate the risks and benefits of various settlement options and how they meet their particular needs and interests.

- **Identify multiple options that might be the basis for a mutually negotiated resolution.** The more options and components of options that can be identified, the more likely a resolution will be reached that is acceptable to all parties. Many times, solutions are not the ones thought of prior to mediation.

- **Identify and understand the strengths and weaknesses of your case and that of the other party(ies).** Understand and determine whether the perceptions and motivations of the other party(ies) is driving, helping or hindering the negotiations. Discuss this fully with your client and the mediator. Identify and understand whether missing information, misperceptions and other barriers to settlement and the factors (factual, legal, economic, psychological, personality, relational, procedural) are driving the controversy or

blocking progress in the negotiations. Enlist the assistance of the mediator to obtain or arrange production of critical factual information, correct misperceptions and to help parties recognize and remove such barriers. Mediators can help to provide parties with a meaningful reality check.

- **Mediation is a dynamic process.** Make sure that all necessary parties are participating meaningfully in the mediation, decision makers should have full authority and flexibility to agree to solutions and packages proposed.

- **Document settlements immediately.** When an agreement is reached, document it immediately before leaving the mediation. At the minimum, have an enforceable agreement approved and initialed by all parties before concluding the mediation. It is a good idea to prepare a written settlement agreement with all desired important terms (confidentiality, non-disparagement, indemnification) included. It may also be good to share a copy with the other parties before commencement of mediation meetings with principals. Consider incorporating a dispute resolution or fast track arbitration mechanism to resolve disagreements over "formal" settlement documents.

- **Keep the mediator's role and function distinct from that of an adjudicator.** Combining mediation and arbitration functions (med-arb) in a single person is not generally recommended. Parties need to have trust and confidence in the

mediator. Mediation works best when no one fears that something said in mediation to a mediator might be prejudicial if the matter later goes before the same neutral then serving as an arbitrator.

Parties maintain a greater degree of control over the outcome and resolution of their conflict and usually with substantial cost and time savings of cost, time, opportunity costs and aggravation. When parties are willing to mediate in a good faith attempt to search for resolutions to mutual problems, they nearly always succeed.