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# Why Do Construction Mediations Fail? Avoid These Top Ten Mistakes!

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The time and effort opposing parties typically invest in the mediation process to resolve a dispute would seem to be a recipe for success. Yet this process sometimes fails. Why? Although every mediation is different, there are several recurring mistakes that can doom a mediation and frustrate the goals of all the involved parties and the mediator. This article discusses the "Top Ten" recurring mistakes, and how they can be avoided.

## Underestimating the Value of Mediation

Why does mediation sometimes work when ordinary negotiations have failed? Negotiations often fail because the parties were not really negotiating in the first place. They were just disagreeing. Lack of progress in such discussions could be caused by any number of factors: personal animus between the parties, the parties' lawyers' reluctance to honestly advise their clients of case weaknesses, or advocacy bias. Advocacy bias—the tendency of disputants to regard their position as "the truth"—can effect both the lawyer and the client.

Mediation participants sometimes need to have a scrappy disposition to succeed in the working world. Similarly, their lawyers are often effective precisely because of their hard-charging demeanor. However, that approach may impede successful mediation. Advocates frequently overestimate the strengths of their positions and underestimate their weaknesses. Parties in litigation understandably seek to maximize the evidence that helps them and minimize or refute the evidence that runs counter to their stated positions. So how do participants to a dispute find the "off" switch before stepping into a negotiation? Frequently, they do not. The work of the mediator is an effort, in no small measure, to overcome precisely these biases so that the parties can take at least a slightly more objective perspective on their case. Overcoming this advocacy bias is one of the most important roles of an effective mediator.

## Lack of Conflict Resolution Management

If resolving a controversy at an early stage to avoid the cost and energy associated with litigation is a laudable goal, why not institutionalize it by adding a mediation clause to your standard form contracts, purchase orders and subcontracts? Enforceable mediation provisions are fairly brief and simple to write. Examples of vetted provisions are easily found online. The American Arbitration Association, for example, has suggested clauses on its website, as do other similar organizations. The mediation provision can be styled as a condition precedent to further litigation.

Of course, litigants can always agree in the midst of a dispute to mediate. But why not make mediation the default procedure? Once the parties are embroiled in a dispute, they may no longer be willing to meet with a mediator. If that step is required before litigation commences, a good mediator has the chance to focus the parties on a resolution to the conflict. There is much upside and very little downside to requiring mediation before a dispute barrels forward. If the parties both later agree that there is a true impasse and the controversy cannot be resolved, then they can always mutually agree to forgo mediation.

## The Reluctance to Propose Mediation

If there is no mediation protocol built into the standard form contracts, the parties will need to agree on mediation on an *ad hoc* basis. However, parties sometimes fear that proposing mediation will make them "look weak." This fear is almost always more perceived than real. Sophisticated litigants usually understand and respect the advantages of resolving disputes on commercially reasonable terms.

## Poor Mediator Selection

Find a mediator with sufficient familiarity with the subject matter of the dispute and whose approach fits the personalities and temperament of those involved in the discussion. A mediator with subject matter familiarity can better direct and focus the discussion and negotiation. Even in the early stages, a knowledgeable mediator can ask intelligent and probing questions to further the parties' understanding and appreciation of the risks involved with continuing the controversy. Toward the end of negotiations, when the parties are close to resolution, a knowledgeable mediator will better be able to forcefully nudge the parties to the finish line by expressly detailing those risks.

If your construction dispute involves an industrial accident or wrongful death claim, an evaluative, arm twisting, "bulldog" mediator may do poorly trying to resolve such an emotionally charged case. On the other hand, that approach may be necessary in a case involving an ordinary payment dispute, in which the participants are used to aggressively fighting for their positions. Every case is different, and more than one approach may work. However, this aspect of the mediation should definitely be considered.

## Lack of a Mediation Plan

Although you would not expect parties going to the trouble of engaging in formal mediation to be guilty of lack of preparation, it is a common problem. The cause for this lack of preparedness may be the attitude of the party, its counsel, or both. Sometimes the participants view the mediation as affording the counter-party the face-saving opportunity to capitulate, thereby requiring little to no preparation on their end. Or, they may regard the mediation process as "free discovery" in which they will primarily listen to their adversary, but do not plan on doing the hard work of fully engaging in rigorous settlement discussions. Sometimes the parties view the mediation as a mini-trial where their goal is to win over the mediator to their side. The parties may view mediation as just one step in the settlement process so that an impasse at the pending mediation is just a stepping stone for resolving the controversy at some point in the future.

Whatever the reason, the result is wasted opportunities. If even one party walks into the mediation session unprepared to discuss the controversy, it will be very difficult for that party to get comfortable with a proposed resolution, even a reasonable resolution. Proceeding without adequate preparation risks losing the opportunity to resolve a controversy then and there. Resolving the conflict down the road may be an expensive proposition.

Parties sometimes simply plan to wait and respond to their counter-party's proposal. This is not a plan at all. Parties adopt this notion out of a desire not to "bid against themselves." However, studies repeatedly show the advantages of taking control of the negotiation by making the first credible move.

## Surprise Facts

It is important that there be no surprises at the mediation. Facts conveyed for the first time at mediation tend to "freeze" the process while the party receiving the new information attempts to process it. For example, suppose the defendant in a construction mediation were to contend—for the first time—at the mediation that the plaintiff's change order claim was actually waived in an email sent by the defendant's supervisor. What effect would that new factual allegation have on the process? Would that cause the plaintiff to immediately lower its demand?

No. It would cause the receiving party to stop negotiating and instead focus on determining the factual and legal basis for the new contention. Even in the best case, such an immediate investigation may take many hours, assuming if it can be done in real-time at all. And during this time, the parties are not moving forward with the negotiation. In most cases, the mediation will need to be suspended while the parties regroup. In that case, another mediation may need to be convened. At that future point—after additional time and effort are spent—the parties will find themselves where they would have been had this ostensibly crucial information been conveyed sooner.

Obviously, a pre-mediation exchange of key information between the parties is essential for a successful mediation. This exchange is far less than the parties would exchange in traditional litigation discovery. Yet, the limited exchange of truly important information is essential for the parties to get comfortable with exactly what issues they are compromising.

## Poor Use of Mediation Statements

Sometimes the parties think they know each other's positions but, in fact, do not have a clear understanding. Part of the mediation process involves the parties' appreciating that the controversy is not as clear or as one-sided as they may have initially thought. This evolution in thought is close to impossible without an adequate exchange of at least the most important information. If the parties do not understand the basis for their adversary's beliefs, they are less likely to consider their views, regard them as reasonable, or be persuaded by them. A valuable method of exchanging this crucial information is via a well-crafted mediation statement.

Mediations have the advantage of educating the parties (not just their lawyers) about the strengths and weaknesses of the competing claims and contentions. The mediation statement is a chance to convey comments directly to your counter-party's decision-maker. That opportunity is lost if your mediation statement is either needlessly antagonistic and hostile or cryptic and unpersuasive. Playing your cards close to the vest may work in poker, but not in mediation.

Just as the parties must exchange information between themselves, they must share the key information (both legal and factual) with the mediator. Providing this information allows the mediator to fully appreciate the factual background of the controversy before stepping into the mediation. The mediator can "hit the ground running" rather than spending valuable time understanding, clarifying, and assessing the disputants' positions. Of course, a mediation statement delivered on the morning of mediation does not further that effort.

## Poor Opening Statements

Mediation is not the place to make aggressive or confrontational accusations. If you are a defendant in a construction dispute and the plaintiff's lawyer accused your company of fraud, how would you feel? Empathetic to the plight of the plaintiff? Of course not. You may become defensive and, therefore, further entrenched in your position. You may react personally and become angry. You may well ignore or dismiss every legitimate point that counsel otherwise had to say. No good comes of trying to "win" the opening presentation with over-the-top rhetoric. Such an approach is usually very unlikely to scare your adversary into seeing things your way.

## Absence of the Necessary Decision Maker

The physical presence of the actual settlement decision-maker is extremely helpful to the success of the mediation. If present, that individual will have access to all of the information deemed necessary by the parties to evaluate the underlying controversy. If there

are opening statements, the decision-maker, if physically present, can hear his/her own counsel's recitation of facts and law, as well as the opposing counsel's recitation. He or she can hear how the arguments for and against "ring out" in a preview of what may come at trial. Indeed, this might be the first time the decision-maker is hearing a presentation of the case unfiltered by his/her own counsel. From this, assessments can be made as to the credibility and persuasiveness of the competing positions. This information cannot be as effectively conveyed second hand over the telephone.

Frequently, the individual with full settlement authority does not come to the mediation but participates telephonically and sends a representative—usually a subordinate employee—in his or her place. That is not as good as a decision-maker attending him or herself. In addition to the inability to fully participate in the discussion of the matter at hand, the individual with full settlement authority on the other end of the phone may not be available on an as-needed basis. We have all seen parties wait for more than an hour just to get the authority to respond to the latest round of discussions. That is crucial time wasted at the mediation. This problem is compounded if the mediation extends past normal business hours. If the mediation is moving along slowly but productively and extends into the evening, access to the decision-maker should be ensured so that the momentum of the negotiations is not lost.

## Not Having a Draft Settlement Agreement at the Ready

There is often a momentum to negotiations that is lost when people leave the mediation. It is not uncommon for participants to try to "sweeten" the deal they struck after-the-fact in a settlement negotiated after the mediation broke up. Sometimes one of the participants will have buyer's/seller's remorse. Sometimes a representative will be criticized for settling for too much or too little. It is much better to memorialize the settlement in the moment, when minds are focused on the dispute and the advantages of resolving it. It may save countless hours if the resolution is papered then and there.

## Conclusion

The author hopes that by recognizing some of the pitfalls commonly experienced in construction mediations that the participants' efforts will be more successful.

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