

Mediation Approach—Construction Cases

A flowchart of the Mediation Process is attached, which is pretty much a standard cycle of a mediation, but it helps all the parties understand the steps involved. I would like to emphasize that preparation is essential for an effective mediation. When the parties are well prepared and understand—objectively—the issues (which means gaining an understanding of the position of the other party), the odds of a successful mediation are enhanced. In fact, with that type of preparation, the parties are often able to work out things without the need of Mediation, which is even better.

In preparation, it helps everything is the three segments of a claim are dealt with: entitlement, cost, and casual relation. Jumping too quickly into costs seldom helps parties get closer. Understanding entitlement does help the parties frame their positions, however.

I hope each party will have evaluated his BATNA (which is an acronym for Best Alternative to a Negotiated Agreement). My approach as a Mediator is to truly facilitate and not strong-arm, but at the same time I am not a “let’s split the baby in half just to settle this thing and give me a victory as a Mediator”. I would really like to have the issues well defined, the parties truly understand their strengths and weaknesses based on the facts of the case, and try to develop a fair and equitable resolution based thereon. If you are just walking in to split the baby, why do you need me there?

I also hope the parties think creatively before they get to the Mediation about ways the issues can be resolved. I also hope the parties will be patient with my persistence. If I see that the issues can and should be resolved, I will stick with you after the formal mediation by telephone call trying to figure a way. I do not charge for telephone calls, except for the telephone expense—no fee. In this way, I can encourage the parties to keep talking to me without worrying about the meter being on.

I often find it useful for field people—percipient witnesses, as they say—to be present. Not to be argumentative but often they can explain the “real world” or point to a detail on the drawing that is very helpful in clarifying issues. That is your call of course.

I like for the parties to talk together as much as possible and I don’t like outbursts of temper (passion is one thing, temper is another) nor profanity. I will immediately call time-out until we can have a forum in which communication instead of intimidation, is used to resolve issues.

Of course, the usual: a mediation agreement which says what we did here and said here stays here unless there is a settlement, an orderly but informal procedure, decision-makers being present an absolute must or no Mediation, position papers presented in advance of the Mediation and an agreement as to order of presentation.

There are mediators who are very passive and simply flit back and forth as numbers are traded, and I guess that is okay. I personally try to really understand the issues and help the

parties understand them as well and I may be inclined to challenge the parties' positions to help them understand reality, but I don't take over and I don't give my opinion.

You might be interested in the reasons that Mediations are successful:

Parties are well **prepared**, and in advance, seek to identify the weaknesses of their position, and the strengths of the other party. Prepare a BATNA.

Analyze the restraints to negotiation. Is one of the restraints a balance sheet problem (that is if one takes too little or gives too much, the impact on the balance sheet may adversely affect future opportunities with the surety or the bank)? Is there a budget problem by the owner—the well is dry. How can you deal with such problems internally before you get to the mediation?

Parties attend with the idea of **working things out**, rather than just an “I’m right and I will show those guys a thing or two!” attitude.

In advance, thinking of **creative alternatives** to resolution of issues.

A well planned presentation, aimed at **content** and not personalities.

During the presentation of the other party, LISTEN and as Covey says, seek to understand. I will often ask each party to explain his understanding of the other party's position.

Decision-makers attend the mediation, and come with an open mind. It is trite to say, as all mediators will mention in their opening remarks, but it is important to believe this: Someday, someone you don't know is going to decide these issues (a judge, arbitrators, and a jury) so why not the principals? At the mediation?

As almost every jury exit poll shows, **credibility** is often the deciding factor. This holds true in mediation as well. Just because it is an informal process doesn't mean that arguments and presentations aren't analyzed by the principals (decision-makers) for reasonableness and credibility.

Obviously **graphics** which can simply depict issues (cause and effect) are often helpful. But it is not the sophistication of the graphical presentation that is important—it is the content and how it lends itself to explanation that all can understand. I often find that detailed CPM analyses are not as helpful as a few fragments depicting the schedule impact. Or a CAD drawing which enables everyone to understand the original plan and then how that was changed, if at all.

The foregoing is just an illustrative list based on my experience and is not intended to dictate in any manner how the parties do their preparation and presentation. I totally accept that this is the PARTIES' mediation and I want them to have as much flexibility as possible in planning, preparing and conducting it.