Mediation 101 – "Help Me Help You" Musings of a Mediator and an Attorney

by Kent B. Scott and Cody W. Wilson

Introduction

A construction dispute, which began after a cave-in of a large resort roof causing $5,000,000 in damages, eventually resulted in a lawsuit naming fifteen parties. The case was in litigation for several years and generated significant legal fees, due in large part to the taking of ninety fact and expert witness depositions. Another twenty depositions remained to be taken. The court had failed to bring the parties to an agreeable resolution in two settlement conferences. A trial date had still not been scheduled. The parties then agreed to try private mediation and were able to schedule a mediation conference the same month. The parties agreed on an attorney with significant construction litigation experience to serve as the mediator. The case settled for a six-figure sum after three days of mediation. The mediation fee was $7,100. The parties were all satisfied with the outcome. And of critical importance in the construction industry, their relationships remained intact.

Mediation can serve a range of purposes, including giving parties a chance to define and clarify issues, understanding each side's perspective, exploring solutions, and ultimately arriving at a mutual agreement. The advantages of mediation can include speed, privacy, choice of the mediator, expertise of the mediator, informality, and cost. On the other hand, litigation is often lengthy and expensive. Construction disputes can be highly varied. They can involve defects in workmanship, delay in completion, cost overruns, terminations, environmental harm, and injury to workers among other things. Despite these challenges, the construction industry has long been a leader in the use of alternative dispute resolution to successfully and cost effectively resolve the industry's disputes.

This article focuses on the critical issues that must be faced and addressed for a successful mediation. In order for a mediation to have its best chance to succeed, both the mediator and the participating parties need to work together in "helping" each other achieve a resolution that is better than litigation. An awareness of how to "help" one another throughout the mediation process is fundamental in building a foundation for a successful mediation.

Is There a Recipe for a Successful Mediation?

Mediator Scott: The success of a particular mediation is mainly determined by the parties. It is their process. They are in control of the ultimate result. However, there are some common elements that make the mediation more likely to succeed.

- Work with your client to discuss objectives and interests. Let him or her know what the process and procedure will be like.
- Discuss with your client options that may be pursued if the mediation is not successful and the resources required to pursue those options.

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- Select a mediator with the skills, knowledge, and style that fits the dispute and personalities involved in the mediation.
- Bring the people with knowledge of the dispute and the authority to settle.
- Counsel should exchange enough information that would allow each to understand the positions and the perspectives of the other.

Attorney Wilson: The mediator, attorney, and client should work together to create a recipe that will increase the likelihood that mediation will be successfully resolved.

- Pre-mediation preparation with the mediator will go a long way to give you your best chance for resolution.
- Discuss your client's objectives and interests with the mediator.
- Be committed to making the mediation work. Get your client committed. Don't give up on the process too early. Explore all available avenues and options.

How Do We Get Started?

Mediator Scott: The attorney's role in preparing the client for mediation is essential. Design a process that will best help the parties to be comfortable, feel safe, and be assured that their concerns and confidences will be respected.

Selecting the correct mediator for the issue: Attorneys, talk to your clients about what to expect and how to act. Discuss options for settlement. Also talk about what the alternatives would be if the matter is not settled, including the requisite resources to resolve the matter through the traditional litigation process.

Attorney Wilson: Determine how much information should be presented in your mediation position statement. What kind of an opening session do you want: Opening statements followed by a question and answer exchange? PowerPoint presentation? "Meet and Greet" followed by recessing into caucus groups? Moving directly into caucus? The attorney should be searching for his client's concerns, needs, and objectives, taking into consideration the money, time, and emotions the client will be spending should the mediation not succeed.

The Pre-mediation Conference

Mediator Scott: Hold a brief pre-mediation conference to discuss the time, place, and "ground rules" for the mediation. The mediator will ask the attorneys to submit position statements. Should this statement be confidential or should it be exchanged with opposing counsel? If the statements are exchanged, should separate confidential statements be submitted? Carefully consider what essential facts, law, and points will best assist the mediator in advancing the client's interests. If the case is in litigation, consider furnishing the mediator with the key pleadings and other filings.

Attorney Wilson: Treat items such as client objectives, range of offers, and a discussion of strengths and weaknesses confidentially. Hybrid statements are often used where the facts, law, and points of argument are shared by counsel, and other more confidential and sensitive matters are provided for the mediator's eyes only.

Confidential Pre-mediation Conferences

Mediator Scott: Most mediators consider it helpful to be informed of any potential hurdles or difficulties. Discuss with the mediator what has kept the parties from settling the case thus far. Inform the mediator of any personality characteristics of the parties that would assist the mediator in working with them at the mediation. The quality and character of the relationship that opposing counsel have with one another is also important for the mediator to know. Think outside the box. Give some thought to providing the mediator with your preferred version of the settlement agreement.

Mediation Preparation

Mediator Scott: Who should come to the mediation? More is not better. Plan on bringing the people who know the facts and have the authority to get the dispute resolved. It is imperative to bring the decision maker. If the decision maker is not able to attend in person, have him or her available by phone, or have the entity send a representative. In any event, the attorneys and the decision maker should work hand in hand in preparing for the mediation and in establishing mediation objectives and strategies.

Attorney Wilson: A word of caution: Oftentimes company employees most involved in the dispute focus on protecting their personal turf. Counsel and the decision maker for the client will need to address how to work with an employee who has an interest or an "agenda" that doesn't fit in with the client's objectives for resolution.

Mediator Scott: Should you bring experts? Generally, clients and their attorneys should ask experts to help in the preparation efforts. On occasion, experts may use the mediation process as a means of advancing their own positions, which can complicate and add an additional level of advocacy to the mediation process. If an expert is going to come to the mediation, discuss what role the expert will play throughout the process.

Attorney Wilson: Work with everyone who plans on attending the mediation and establish what each person's role will be. Remember to remain flexible and avoid "drawing a line in the sand." Trust and work with the mediator to consider all possible options. The mediator will have the best sense as to what it will take to achieve closure. The mediator is the only person who has been to all of the caucuses. Ask questions as to the mediator's impressions and do a little "reality testing" of your own with the mediator while in your private caucus session(s).

Mediator Scott: Bring all documents that were provided to the mediator or exchanged with the other side. Also consider preparing summaries, graphs, and charts that illustrate key points. These items are useful in the opening statement or in private meetings with the mediator. Finally, bring any specific information requested by the mediator.

The Mediation

Mediator Scott: Every mediation is different and unique. Seek a format that is best suited for the particular dispute. Generally, the mediation is conducted in four stages: Opening, Private Caucuses, Breaking through Impasse, and Disposition (Settlement, Suspension, or Termination).

Attorney Wilson: I recommend a short "Meet and Greet" session, followed by private caucus. All information should be exchanged by this point. If not, we attorneys have not done our job.

Mediator Scott: I also prefer the "Meet and Greet" format. I encourage an open exchange of information with counsel including an exchange of mediation statements. Any confidential or private matters can be discussed with or presented to me prior to the mediation.

Attorney Wilson: The private caucuses have three functions: information gathering, negotiation, and consensus building. It is important to the success of the mediation process to have a direct dialogue with the mediator about the strengths and weaknesses of a case.

Mediator Scott: The mediation process eventually shifts from information gathering to negotiation. Every client undoubtedly wants to know who makes the first move in mediation. Again, the mediator is the only person who has been in all of the caucuses with all of the parties. Work with the mediator to come up with a "negotiation strategy."

Attorney Wilson: Impasse is inevitable. Discuss impasse strategies with your client and the mediator in preparing for the mediation and during the caucus sessions. The mediator may decide to bring the parties or counsel together for direct negotiation. Always trust the mediator.

Mediator Scott: The mediator may ask legal counsel for permission to speak with the clients out of the presence of their counsel. This is a risky proposition, and I have only permitted it when I have had a sophisticated client.

Where an impasse is evident, I discuss what is likely to happen if a settlement is not achieved. I want everyone to always be aware of their alternatives if the mediation fails and to weigh those alternatives in view of what they have thus far achieved. At this point, we make an effort to "brainstorm" and create new ideas, or even add a new twist to old information that would assist in overcoming an impasse. Sometimes, however, the circumstances call for a suspension, recess, or termination of the mediation process.

Settlement

Attorney Wilson: When the parties reach a settlement, no one leaves until the settlement is memorialized in writing. I often bring with me a thumb drive with a blank generic mediation agreement. Without a written memorandum setting out the material terms of the resolution, the courts have no means of enforcing the settlement. *Reese v. Tingey Constr.*, 2008 UT 7, ¶¶ 12–14, 177 P.3d 605.

Mediator Scott: I orally summarize the main terms of the resolution to counsel and their clients. I ask the attorneys to prepare a draft summary of the settlement covering all material

points, *which the parties and attorneys sign*. I prefer a detailed settlement agreement, as this document is legally binding and enforceable in court.

Attorney Wilson: Settlement agreements often contain a dispute resolution mechanism, such as arbitration or mediation. I like to include terms appointing the mediator or a named third party to handle any disputes over the interpretation of the mediation settlement agreement.

Suspension and Termination – The Mediator's Proposal

Mediator Scott: If the parties do not agree to a settlement, I review the progress the parties made during the mediation and advise them of their options, such as providing one another with additional information, meeting again later for further mediation, going to arbitration, or going to court. I always follow up with counsel a couple of weeks after the mediation to determine if there would be any merit in further discussing settlement. I sometimes ask the parties if they would consider me giving them a "Mediator's Proposal" that would address all the areas of the dispute. All post-mediation discussions or proposals remain part of the mediation process and are therefore confidential.

Attorney Wilson: After a suspended or terminated mediation, the parties retain their right to settle, resume mediation, arbitrate, or litigate. Oftentimes, the parties decide to take a break from mediation and then reach a settlement on their own or resume mediation later. Otherwise, we proceed to litigation.

Client Follow-up

Attorney Wilson: Where a resolution is reached at the mediation, I follow up with the client. The day after mediation, some parties experience "settlement remorse." The client has invested so much into advancing the dispute and may feel unfamiliar with his or her new found condition. I remind the client of the reason he or she decided upon resolution. I point out that the client is now free to use his or her time to attend to the affairs of the business. After all, the client is better at making money operating its own business than spending time preparing for or attending court or arbitration.

Enforcing the Settlement

Mediator Scott: No party is bound by anything said or done at the mediation unless a written settlement is reached and signed by all necessary parties. *Reese v. Tingey Constr.*, 2008 UT 7, ¶¶ 12–14, 177 P.3d 605. A signed agreement reached during mediation is enforceable in court just like any other settlement agreement. Because a court will look to the face of the document, it is important to spend quality time and effort in drafting the mediation settlement agreement. The court cannot take testimony from the parties, counsel, or the mediator as to the interpretation of the settlement agreement. There are statutory exceptions "where the interests of justice outweigh the parties' need for confidentiality." *Id.* ¶ 9. Courts often require a high threshold of proof to overcome the confidentiality protection afforded by mediation.[1]

Conclusion

"Help me help you." Mediation is an effective process that helps parties settle disputes. Mediation is appropriate for most commercial business disputes. It has the advantage of allowing the parties to choose and control the process and the outcome of their dispute rather than have it determined for them by a judge, jury, or arbitrator.

"Help me help you." Attorneys and their clients can work together to design the mediation process they plan on using. The parties can select the mediator they want to assist them in resolving their dispute and discuss with that mediator the means and methods by which the mediation is to be conducted.

The mediator may not have much in the way of authority to impose a resolution upon the parties; however, a cooperative work effort among the mediator, counsel, and parties is the recipe for creating resolution. Happy mediating to all!

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1. *Reese v. Tingey Constr.*, 2008 UT 7, ¶ 12, 177 P.3d 605; *Lyons v. Booker*, 1999 UT App 172, ¶¶ 10–11, 982 P.2d 1442, *see also Lake Utopia Paper Ltd. v. Connelly Containers*, Inc., 608 F.2d 928, 930 (2d Cir. 1979); *Ryan v. Garcia*, 33 Cal. Rptr. 2d 158, 161 (Cal. Ct. App. 1994); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Price*, 78 P.3d 1138, 1141–42 (Colo. Ct. App. 2003); *Wilmington Hospitality, LLC v. New Castle County*, 788 A.2d 536, 541–42 (Del. Ch. 2001); *Gordon v. Royal Caribbean Cruises Ltd.*, 641 So. 2d 515, 517 (Fla. Dist. Ct. App. 1994); *Cohen v. Cohen*, 609 So. 2d 785, 786 (Fla. Dist. Ct. App. 1992); *Hudson v. Hudson*, 600 So. 2d 7, 8–9 (Fla. Dist. Ct. App. 1992); *Vernon v. Acton*, 732 N.E. 2d 805, 808–09 (Ind. 2000); *Spencer v. Spencer*, 752 N.E.2d 661, 664 (Ind. Ct. App. 2001).