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Construction Law

The Construction Attorney's Toolbox - Building Solutions Through Mediation

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By Kent Scott

Introduction

Today's current economic climate challenges owners and contractors to complete projects in less time for less money. These pressures have created more demanding time schedules and monetary budgets that, in turn, have created an increased number of disputes. Another developing trend is the increased costs in time, money, efficiencies and lost opportunities taken up by these disputes. The legal fees and costs incurred in resolving disputes become a major component of the dispute. The dollars that should go into project profits are now going into the resolution of project disputes.

The creation of a construction project is both a science and an art requiring the parties to define, design, build, pay and negotiate with each other to produce the desired result. The expectations of the parties involved with a project do not always result in a meeting of the minds. Differences in what was wanted, the completion date and the price paid can give rise to conflict in many forms. Most conflicts are readily resolved, but some continue to fester and grow. Some disputes find their way into legal counsel's office where the client seeks assistance in solving the problem.

This article will discuss the basic concepts of mediation as one of the tools that is used by clients and their attorneys to resolve construction project claims.

Mediation Defined

Mediation is a procedure where two or more parties attempt to resolve their dispute with a neutral party—the mediator. The mediator remains neutral throughout the meeting. The process is confidential. No resolution can be reached without the consent of the parties. If an agreement is reached, the agreement will be binding and can be enforced by the courts.

Anatomy of a Successful Mediation

The success of a mediation is controlled mainly by the parties. Some of the critical components of a successful mediation include:

- The background and capabilities of the mediator.
- The attendance, commitment of informed people with authority to settle.
- The needs and interests of the parties.
- Whether a trial or arbitration has been scheduled.
- Commitment of the parties and their attorneys to participate.

The following is a brief outline of the events involved in a mediation:

- The parties sign a confidentiality statement.
- The attorneys prepare a short and confidential written statement for the mediator.

- The parties summarize their positions in a joint session.
- The parties go into separate confidential meetings .
- The mediator shuttles between the parties in an effort to find common ground.
- If a settlement is reached, a written agreement is created .
- If a settlement is not achieved another session may be scheduled or the mediator may offer some suggestions to consider that may assist the parties in future negotiations.

When and Where to Mediate

There is no set formula to ensure that a mediation will succeed. Mediation can be effective at any stage of the dispute: pre-litigation, during litigation, on appeal, etc. Most mediations occur after a claim has been filed and some exchange of information has taken place. The decision as to whether or when to mediate will vary with each case.

Who Should Come to the Mediation

The following is a brief summary of those who would be expected to attend the mediation:

- Legal counsel. Yes, if the party is represented.
- Client. The person with authority to settle and others with knowledge of the facts.
- Experts. Use experts carefully. Experts often complicate the settlement process. However, they may be helpful to describe and simplify technical information.
- Documents. Less is better. Summaries, graphs and charts are useful.
- Support Personnel. Associates, secretaries or assistants are discouraged. If there is a need, make advanced arrangements so all parties approve and understand their respective roles.

Making the First Move

There is no advantage for one party or the other to move the process forward. The mediator will take the time and make the effort to understand the position and interests of each party. The mediator will know when to start the process of making offers.

How Long Will the Mediation Last?

It is common to schedule mediations for either a half or one full day. More time should be scheduled for mediations that require extensive travel, multiple parties or involve complex factual or legal issues. It is best to build in a margin of “float” time for the mediation session.

Multiple day mediations have built-in challenges. The parties recess after the first day and go home to re-think their case in a light that supports their original position. Consequently, the parties begin the next day needing to “warm up” and get back into the solution/settlement mode.

Conclusion

There is no authoritative study on the success rate of mediation. However, the American Arbitration Association has reported that 85% of the mediations conducted under their administration have resulted in a settled resolution.

Mediation provides an opportunity for people to input how the process is designed and conducted. The parties are given an opportunity to confidentially express their interests and values without compromising their positions in front of the other parties. It provides the parties a sense of involvement and control over the dispute resolution process and the terms of a settlement. In fact, the mediation may be the last time where clients and their attorneys will remain in control of the resolution process.

Happy Mediating to All!

Kent Scott is a shareholder with the construction law firm of Babcock Scott & Babcock located in Salt Lake City. He has mediated over 200 construction law cases both privately and for the American Arbitration Association, numerous Utah District Courts, the U.S. District Court (Utah) and Utah Dispute Resolution. He can be reached at kent@babcockscott.com.