

CONSTRUCTION MEDIATION - TRENDS AND TIPS

WILLIAM B. SHORT, JR.
Ford Nassen & Baldwin, P.C.
8080 North Central Expressway
Suite 1600, Lockbox 65
Dallas, Texas 75206
wshort@fordnassen.com
(214) 523-5100

State Bar of Texas
ALTERNATIVE DISPUTE RESOLUTION SEMINAR
October 16, 2006
Dallas

CHAPTER 3.5

TABLE OF CONTENTS

1. Introduction..... 1

2. Pre-Mediation Issues..... 1

 a. Timing of Mediation..... 1

 b. Preparation for Mediation..... 2

 c. Managing Client Expectations..... 2

3. Opening Statements 2

 a. Who to Address 2

 b. What to Say. 2

 c. Your Client—To Speak or Not to Speak..... 3

 d. Visual Aids. 3

 e. Money Demands or Offers. 3

4. Private Caucuses 3

 a. The Importance of the Client's Role. 3

 b. Who Should be Present..... 4

 c. Insurance Coverage Issues..... 4

 d. Strength and Weakness Analysis - Managing Client Expectations (Revisited). 4

 e. Don't Pull Punches or Sugar Coat..... 5

 f. Show and Tell..... 5

 g. Using the Guidance of the Mediator..... 5

 h. Multi-Party Cases. 6

5. Final Caucuses - Closing The Deal..... 6

 a. Client Preparation..... 6

 b. Settlement Agreements..... 6

6. Conclusion 7

CONSTRUCTION MEDIATION - TRENDS AND TIPS

1. Introduction

Mediation is the art of balancing interests. The number of interests usually involved in the mediation of a construction dispute is possibly larger than in any other field of law. The construction industry is the largest single production sector in the U.S. economy. It directly employs one of every 20 workers, represents as much as 13 percent of the gross national product, and touches the lives of every citizen. In 2003, construction accounted for 28% of the total employment and 61% of all establishments in the U.S. economy's goods-producing sector, which included manufacturing and natural resources and mining, and in the U.S. economy as a whole (goods-producing and service-producing sectors), construction employed about 5.2% of all workers and accounted for about 9.8% of all establishments.¹

One of the challenges of the mediation of any construction dispute lies in the ability of the mediator, as well as the parties and their lawyers, to adjust the balance of interests among the multiple participants involved with the construction project in such a way as to achieve a settlement. Because the typical construction project does involve multiple parties and numerous, varied and often complex issues, more advance planning by lawyers and their clients, and by the mediator, is usually required to provide the best possible negotiating environment for success in the mediation. Although no particular template for guaranteed success exists for use by either the advocate or the mediator in a construction mediation, certain experience-based suggestions can be offered as possible guides.²

2. Pre-Mediation Issues

a. Timing of Mediation.

Careful consideration should be given to the timing of the mediation of a construction dispute primarily because of the magnitude of discovery typically involved in a construction lawsuit or arbitration. Although all of the facts will certainly not be known or developed prior to significant discovery in

a litigation or arbitration of a construction case, the advantages of early mediation should nevertheless be considered. In situations in which the construction project is on-going, the likelihood of finding a business resolution is considerably enhanced because all parties will be able to control many more issues under those circumstances, and "horse-trading" relative to those issues becomes much more advantageous. If a construction dispute continues after the completion of the project, the bargained-for resolution is usually limited only to a monetary outcome.

Additionally, by exploring the resolution of a dispute in an early mediation, feelings may not yet be hardened beyond repair so as to damage continued business relationships. While it is not uncommon for parties in a construction dispute to be entrenched in their positions, if the parties still need the cooperation of one another, e.g., for completion of certain scope of work, usually a business resolution acceptable to all of the parties can be attained.

Most lawyers, by training and experience, handle an argument with an eye toward how a trier of fact would decide particular issues. However, in a construction dispute, the interests of clients are better served through the exploration by their lawyers of the potential for a business resolution, especially in disputes involving construction which is not complete.

In situations involving completed projects, lawyers should still give serious consideration to early mediation and, in some instances, even prior to the occurrence of any discovery. Mediating early, in all probability, translates to financial savings by the participants who spend less money on experts, attorney's fees, and other litigation-related expenses, which singularly may increase the prospect of resolution. Because construction disputes are notoriously complex, they are consequently very expensive. The less invested in the legal overhead kitty may mean more financial resources readily available for use in settlement.

Another reason to consider mediating early in the dispute resolution process is to provide the lawyer with the opportunity to spend an entire day with his or her client during which the lawyer can talk with him or her about the dispute, but, probably more importantly, also listen to the arguments and some of the evidence from the opponent. The information and strategies learned at a single day of mediation will often aid in the planning of future or further discovery and strategy if the mediation does not result in a resolution. One clear note of caution is that the use of mediation only for purposes of "discovery" may well be construed as violative of the spirit of the "good faith" rule in mediation.

In the final analysis, one must ask what is to be lost by mediating early, especially since, there is no

¹ U.S. Dept. of Labor Bureau of Labor Statistics at <http://www.bls.gov/iag/construction.htm>

² This presentation substantially draws from the excellent paper "Construction Mediation: What Works and What Doesn't?" by Richard P. Flake and Susan G. Perin, each renowned Houston attorney/mediator and arbitrator, presented in February, 2002, to the 15th Annual Construction Law Conference of the Construction Law Section of the State Bar of Texas. Since superlatives cannot be modified, why attempt to tinker with perfection?

prohibition against a later mediation of the dispute in the process of litigation or arbitration.

b. Preparation for Mediation.

Preparation for mediation is essential. Nevertheless, there seems to be an increasing tendency for lawyers to attend a construction mediation without a developed working knowledge of either the facts, the law, or the claims alleged by the other parties to the dispute. Preparation for mediation should be virtually equivalent to preparation for trial if the probabilities for success are to be maximized. In the context of a litigation or arbitration, mediation is conceivably the most important day in the life of a case next to its trial. (This rule is even more so applicable in pre-litigation situations in order to avoid the initiation of litigation or arbitration.) Why then would it ever be acceptable to be unprepared for a mediation? As a rule, the better prepared party succeeds in the litigation or arbitration of a dispute. The same holds true for mediation. Thus, to maximize the success of his or her client at mediation, maximum preparation by the lawyer is essential.

c. Managing Client Expectations.

Nothing will deflate the momentum and promise of a construction mediation quite like a client who learns, for the first time at mediation, that his or her multi-million dollar claim is in reality worth no more than \$50,000. Unrealistic expectations are often the death-knell to a mediated resolution. Although such disputes are not impossible to resolve despite unrealistic outcome expectations, the chances of successful resolution are substantially diminished if the lawyer does not properly manage the expectations of his or her client in advance of the mediation. Further, failure to prepare a client may well damage the relationship of trust between that client and his or her lawyer, which serves to hinder not only the resolution of the current dispute, but perhaps impact future representation as well.

Even if the position of the client appears to be strong, advising the client well in advance of mediation of the vagaries of litigated (or arbitrated) outcomes, and the very real possibility that the opposition does not see the dispute in the same light (and almost certainly has an adversarial position), will only make the lawyer appear more perceptive when the mediator addresses those exact same issues in private caucuses during mediation.

3. Opening Statements

In construction mediations, opening statements are usually the only time during the entire dispute resolution process that a lawyer has the opportunity to speak to the adverse party. Because all interaction with the other party outside of mediation is controlled by the rules of ethics, no opportunity is available to a

lawyer to address the other party except through the formality of written discovery or depositions. The manner in which a lawyer engages in mediation advocacy in the opening statement can go far in ensuring that his or her client obtains a favorable result from the mediation process.

a. Who to Address

The mediator is not a decision-maker. Many lawyers continue to direct their presentations in opening statements primarily to the mediator as if trying to convince the mediator that the lawyer is correct on the facts and the law. Although the mediator controls the mediation process, the parties control its outcome. Obviously, this concept differs from that of the trial or the arbitration of a construction case when the opinion of the trier of fact or arbitrator is decisive and final. Therefore, opening statements should not be addressed only to the mediator or opposing counsel. Rather, the opportunity should be seized to speak directly to the adverse party. When there are multiple representatives of a party, speak to all of them because at this stage of the mediation process the real decision-maker may not be apparent, especially in the context of a construction dispute. There is a risk in assuming a particular person is the decision-maker and, as a result, addressing only that person. If that assumption is incorrect, harmful consequences may result.

Although addressing the adverse party is encouraged, be careful in the effort of doing so. The adverse party in a lawsuit will have difficulty hearing what is said because of the inherent mistrust which permeates litigation and arbitration. Therefore, speak in a manner which allows the adverse party to most favorably hear the meaning and content of the remarks, and not just listen to the words which are spoken. Further, when addressing the adverse party, a conversational tone of voice is best employed using everyday words without legal terminology that the hearing party may have difficulty understanding. Be professional, be respectful, and use eye contact with that party and other persons present. However, do not be so intense in speaking to the adverse party that he or she becomes uncomfortable with the presentation. Additionally, remember that personal attacks on others in the opening statement may win you some points with your client but may very well derail the possibility of a successful resolution to the mediation.

b. What to Say.

In most situations, remember that the construction dispute being mediated is scheduled for one day. Construction disputes are both issue and document intensive. Within the context of one day of mediation, there is not adequate time to address each and every construction issue. Nevertheless, it is not uncommon

for parties to attempt to rebuild the entire project at mediation.

Attempt to look at the overall picture. Too often in construction cases, lawyers become obsessed with the minutiae, losing sight of more sensible objectives available in the bigger picture. For instance, will a \$500,000 repair of a \$300,000 house make sense some day to a trier of fact deciding the case? Will a two-year repair of a three-month project seem reasonable to a decision-maker? Under those types of circumstances, explain the reasons but do not be afraid to acknowledge any weakness in the position. A rule of negotiating is that a good negotiator admits legitimacy in the point of view of the opponent. In doing so, the other party is assisted in hearing the content of your presentation.

c. Your Client—To Speak or Not to Speak.

Many lawyers have a standing rule against permitting his or her client to make any remarks about the dispute in the opening session of the mediation. This tactic is particularly prevalent in construction disputes where multiple parties and issues are usually involved. However, lawyers should evaluate this tactic based on the circumstances of each dispute. One should remember that the mediation is often the only “day in court” for a client and the most important aspect of the process to some parties is simply to be heard. Allowing a client to speak in opening session can frequently have a huge impact on the likelihood of settlement. Opposing lawyers and their client(s) need to know how an opposing party will sound to a trier of fact. If a lawyer has a client who can speak effectively on the subject matter of the dispute without diverting to topics viewed by his or her lawyer to be confidential, the client’s remarks can oftentimes make a difference in causing the other side to understand a position in a dispute. A lawyer should carefully prepare his or her client for the opening session and provide the client with an opportunity to speak based on an understanding between them of the topics to be addressed so that the client feels that he or she is contributing to the mediation process.

d. Visual Aids.

Particularly in construction disputes, the dates of events are usually critical. One of the most effective tools a lawyer can employ in opening statement and throughout the opening session is a visual time line of important events. There are also other visual aids to use depending on the facts such as charts of the damages alleged, categories for each type of damage, enlarged photographs of an alleged defect, or videos of a walk-through of the project site. Some lawyers, more frequently in complex construction disputes, use presentations by claims experts. However, lawyers should be mindful of the time restrictions involved in

the mediation process. A two-hour media presentation may make little sense in a one-day mediation given the risk of using the available time ineffectively or distracting the adverse party.

e. Money Demands or Offers.

Usually, the discussion of money in the opening session, either by way of demands or offers, is not advisable because afterwards money is often the only subject the opposing side remembers and very frequently serves only as an irritant. An experienced construction mediator knows not to address money or the history of settlement offers in the opening session, since remarkably, opposing lawyers often have different perceptions of previous negotiations and the negotiating position of the other parties prior to the mediation. The experienced construction mediator also knows to ask those questions privately, and if nothing is heard in opening session about prior negotiations, the mediator will start any discussion of numbers in the first private caucus.

In the event that a demand is made in opening session, then the initial amount demanded should be tied to some pre-existing negotiating basis in order not to come as a surprise to the opposing party. The lawyer should also explain the elements and amounts of damages that comprise the demand and have evidentiary support. Additionally, the amount of the demand should not exceed any previous settlement demands because doing so will elicit a mirror response from the other side, which frequently results in several hours being wasted in the mediation process to get the parties back into the settlement range which had been discussed prior to mediation. In any event, each side should be informed of the initial demand of the other so that counsel may prepare their clients.

4. Private Caucuses

a. The Importance of the Client's Role.

At the beginning of the first private caucus with each party, the mediator needs to allow the party to have his or her “day in court” by talking to the mediator about the events that led to the dispute. This approach is particularly important in residential construction mediations, which tend to involve relatively high emotional factors. A skilled mediator should direct preliminary questions to the party since part of the advocacy involved in mediation is for the lawyer for a party to allow his or her client to answer questions and converse with the mediator. Because the private caucus is confidential from the other party, the lawyer should inform the mediator of the issues that the mediator does not have permission to discuss with the opposing side. The importance of a lawyer allowing his or her client to speak in private caucus to the mediator without the lawyer speaking for the client cannot be overemphasized. The client must feel that he

or she has had an opportunity to be heard at the mediation or the client will have difficulty in being flexible in subsequent negotiations throughout the duration of the mediation.

Often lawyers have difficulty in remembering that the dispute belongs to the client and that ultimately the decision about settlement is that of the client. Additionally, a client may often have interests in settling a dispute against his or her lawyer's recommendation that only become known through private caucus discussions at mediation. A good mediation advocate explains his or her view of the facts, the law, the outcome that he or she, as a lawyer, thinks is likely, but allows the ultimate decision to be made by his or her client.

b. Who Should be Present.

As lawyers repeatedly hear from mediators, the person with the decision-making ability and authority needs to be physically present at mediation. In construction disputes, however, it is also imperative that the lawyer have persons at the mediation who are able to discuss and explain all relevant aspects of a project and not just a particular, limited aspect. This necessity often may require the lawyer to have more than one client representative at the mediation. For instance, if the issue is alleged construction defects, it is essential that a client representative who is knowledgeable about the project be present at the mediation. Many times the client representative at the mediation may be the chief executive officer of an organization or other officer who has more organization-wide managerial responsibility but no specific knowledge about the operation of the construction project in dispute. On the other hand, if the issue in the dispute is primarily financial, the accounting or bookkeeper representative of the organization should be in attendance at the mediation together with the person in authority who will be making the ultimate decisions. Valuable mediation time can be wasted by a project manager at the mediation trying to trace the billing history or making phone calls about the financial history of the project rather than having the person with that specific knowledge actually present. Generally, except for the decision-maker, it is not necessary that all persons be present for the entire mediation, but they should at least be present until questions in that person's area of expertise have been addressed.

c. Insurance Coverage Issues.

Issues of insurance are becoming more and more prevalent in construction disputes. In residential construction mediations, which are among the most difficult mediations in which to achieve settlement because of the ever present emotion factor, many homebuilders have commercial general liability policies

under which a defense is being provided with a reservation of rights by the carrier. The lawyer defending the insured builder represents the builder but is paid by the insurance carrier and therefore cannot provide coverage advice to the builder. The builder often appears at mediation with only that insurance defense lawyer and the insurance company representative, even though there are more often than not many coverage issues that are raised by the parties during mediation. Although it is often the builder's choice not to bring to the mediation a personal attorney from whom could be obtained advice about coverage issues, it is sometimes because the insurance defense lawyer has not suggested and stressed that it would be helpful to the insured builder to have another lawyer be present.

A lawyer at mediation with an insurance company representative should be as certain as possible prior to the mediation that the representative possesses the authority to make offers. Frequently, valuable hours in mediation are lost to delays caused by the inability of a lawyer to contact another insurance company representative with more settlement authority than the representative physically present at the mediation. Often the more senior insurance representative is in another city, which may be in a different time zone, and the lawyer, after discussing the developments at mediation, has to wait for that person to have discussions in that office and then call the lawyer with an offer or other response. Although many lawyers attempt to address this authority issue prior to mediation and even though it is sometimes out of their control, this issue should be a priority in pre-mediation planning to avoid disruption of the negotiations and the unnecessary time extension of the mediation.

d. Strength and Weakness Analysis - Managing Client Expectations (Revisited).

The most important work of the mediator in a construction dispute in private caucuses is to focus the attention of the lawyer and his or her client party on the analysis of the strengths and weaknesses in the dispute. If risk and doubt about the success of the party in the dispute are not present, the dispute will most likely not be settled. Managing expectations of clients prior to the mediation has been discussed earlier in this paper. However, it is equally important to manage those expectations during the mediation process. As lawyers, we are advocates, but counselors as well. Litigation lawyers seldom have difficulty acting as advocates for their clients, because that role is, after all, part of a lawyer's ethical obligation. But there are too few lawyers who act as counselors during the mediation process. The private caucus is the appropriate place for the lawyer to switch his or her hat from that of the advocate to counselor.

Lawyers often spend too much time advocating the client's case in attempting to "win over" the mediator. While the lawyer and his or her client may gain some limited satisfaction from convincing the mediator of the validity of their position, as mentioned before, the mediator is not the ultimate decision maker. As a result, little, if any, benefit is gained from the effort.

Additionally, if the client only hears the lawyer advocating his or her side of the issue, it is very likely that the client will focus only on the upside of his or her position in the dispute (as advocated by the lawyer) as opposed to aspects of the issue with potential vulnerability. Consequently, the opportunity for rational, informed decision-making is compromised because of the one-sided nature of the presentation. More seasoned construction lawyers act as counselors equally as often as they do as advocates in mediations, and experience demonstrates that such an approach produces higher resolution rates and higher confidence of clients in their lawyers.

e. Don't Pull Punches or Sugar Coat.

There is a tendency by lawyers to soften the bad points of the client's position. While it is human nature to take a light touch with a client you are representing (after all, a lawyer wants his or her client to have the best argument possible and to win), it is never a good idea to soft peddle bothersome issues.

If a lawyer believes his or her client or other witness will not make a good impression, by all means, the lawyer should not shy away from this reality. No one wants to hear that he or she will not be a good witness, but if in fact the client's position will be compromised because of his or her inability to make an effective presentation, then that evaluation should not be ignored. After all, the client is paying for the advice and counsel of his or her lawyer relative to the dispute, and he or she should be provided the good news along with the bad.

Likewise, there is a tendency to discount troublesome documentary evidence by belittling its effect or using some other justification to overcome a certain issue. The value of documentary evidence, and the outcome of the dispute, may very well hinge on the words of a contract, letter, or other document. Conversely, the lack of documentation may also have a significant effect on an adversarial outcome. The caucus is the place where the downsides, not just the upsides, of the client's case should come to light in a candid discussion with the mediator. Only then can an informed decision be made by the client.

Some lawyers prefer to have the mediator critique the client's position, while the lawyer continues to act as advocate. While this tactic is not necessarily improper or ineffective, experience shows that while a client will listen to the analysis and evaluation of the

mediator, if the same message also comes from his or her lawyer, whom he or she presumably respects, the client will "buy into it" more readily. Thus, lawyers should remember to wear their counseling hat to mediation, which is particularly important in construction mediations where multiple issues are in fact the norm.

f. Show and Tell

In private caucus, the lawyer often discloses information or shows documents to the mediator on the condition that the mediator maintain all as confidential. It is the decision of the lawyer in mediation to determine what information can or cannot be disclosed by the mediator, and the mediator understands that the lawyer's current or future trial strategy influences this decision. Lawyers should understand, however, that mediators deal in risk and doubt and while lawyers are free to keep that information confidential, obtaining movement from the opposing side in the mediation without being able to share detrimental information with that side is difficult.

A lawyer must analyze whether the information to be maintained as confidential in the mediation is nonetheless discoverable and, if so, evaluate whether allowing the mediator to use that information is advisable. For instance, a party must produce all of the project documents in a construction case, but sometimes a lawyer will not allow the mediator to show opposing counsel a project document which may assist the mediator in getting the opposing party to change an offer or demand during the next caucus. This comment is not meant to suggest that lawyers compromise their trial strategy, but only that they evaluate whether the information or document believed to be confidential is actually confidential at all under discovery rules. This assessment should be weighed against the advantages the party may obtain in mediation by allowing the mediator to convey information the lawyer perceives as a particular weakness in the opposing party's case.

g. Using the Guidance of the Mediator.

As a neutral, a mediator should neither express opinions about right and wrong in a dispute nor give assistance to one party to the disadvantage of the another. However, this rule of mediation does not mean that the mediator cannot assist a party in evaluating the effect of information that a lawyer instructs the mediator to convey. Often, the mediator knows that the demand or offer that a lawyer instructs the mediator to convey will be counterproductive to the goal of resolving the dispute. A mediator can focus the attention of a party to this dilemma through the use of role reversal by asking what would be that party's reaction if he or she were to receive such an offer. Often the lawyer and his or her client party answer that

they would react in a certain negative way, which is exactly what the mediator intended for them to understand would most likely happen. Nonetheless, the mediator has been instructed to do exactly what the lawyer has just told the mediator that he or she would not want to hear if he or she were receiving the information. Lawyers are skilled in discerning facts and knowing the law and how to present an argument and try a lawsuit or arbitration. Mediators are skilled in negotiating, conveying information in an effective manner that works toward resolution and not away from it, and in determining interests of parties and possible options. If the lawyer has confidence in the mediator, the lawyer should consider relying on the skill, training and assistance of the mediator in analyzing negotiation issues and in determining how best to present them.

h. Multi-Party Cases.

Construction mediations, more often than not, involve many parties, including the owner, a general or prime contractor, various design professionals, and numerous subcontractors and suppliers in the contractor chain. In multi-party cases, good mediation advocacy requires the consideration of many issues prior to the day of mediation. The lawyer for a plaintiff owner should give thought to negotiation strategy. For instance, will the lawyer give one demand to all defendants as a group or give separate demands; will the lawyer settle separately with one party if a total settlement is not achieved? The end of the mediation day is not the occasion for the lawyer to ask questions for the first time about the legal effect of a partial settlement.

For the general or prime contractor and subcontractors (assuming they are all defendants), the defense lawyers should collectively confer prior to the mediation to determine if they will be able to negotiate as a group and give one number to the owner. They should also attempt to agree on the percentages of contribution. Obviously, equal percentages are a logical place to start, but if that is not possible to achieve, the lawyer should at least have had discussions about the percentages before mediation. Further, if difficulty in obtaining the agreement of the defendants on their percentage contribution is anticipated, it may be helpful for a lawyer to contact the mediator so the mediator can better plan his or her approach to the dispute. In large or complex construction disputes in which the defendants are adverse on the percentage contribution each should make, the mediator may suggest having a day of mediation with only defendants in order to address those issues among them. A second day of mediation can then be scheduled with all parties in an effort to resolve the entire dispute. An integral part of mediation advocacy is advance planning to address issues early

so as to maximize settlement opportunities on the day of mediation.

5. Final Caucuses - Closing The Deal

a. Client Preparation.

Prior to mediation, part of the mediation advocacy of the lawyer should be to explain the mediation process to his or her client and the method and manner in which negotiations occur during the mediation. A party needs to understand that his or her offers and demands will change throughout the day, with the hope of culminating in settlement. A lawyer and his or her client should have an understanding of a basis on which they believe the dispute should settle, based upon an evaluation of the facts, the law, and other relevant factors, but with the client clearly understanding that what is learned during the mediation may well change the pre-conceived evaluation. If this preparatory work is not performed, and the lawyer determines during the mediation that his or her client should continue negotiating beyond pre-conceived evaluation level, the client may be reluctant to do so because clients conduct much of their negotiating at mediation based upon emotion, rather than evaluation factors.

If a client has been forced to go too far, too fast by his or her lawyer in the negotiation process, the final stages of the private caucuses at mediation will be more difficult because the client will get "stuck" and not want to negotiate further. This result also occurs when a lawyer begins the negotiations during mediation at an artificially high or low point and then encourages his or her client to make "significant" moves or "leaps of faith" in each round of the negotiations toward compromise. Closing the deal in these situations will be put at risk by such tactics. Clients should also be prepared for the types of settlements that can be used, since in mediation, unlike trial, settlements can and often do involve consideration other than money. For example, in a construction dispute, a settlement could involve a contractor performing a repair (although there is the risk of another claim), a party being put on the short list for another project, or dismissal of claims and counterclaims, without any money changing hands. These types of issues should very well be addressed before mediation.

b. Settlement Agreements.

If a case is orally settled at mediation, mediators will virtually always attempt to persuade the parties to sign a written settlement agreement. Lawyers are well advised to counsel their clients before mediation that if the dispute is settled, a written settlement agreement will be signed and that such agreement will be a contract (although potentially not the document inclusive of the final releases) and will be binding except under exceptional circumstances. This issue of

documentation of the settlement is rarely addressed with parties before mediation as frequently indicated by the questions asked by the clients at mediation when presented with the written settlement document for signature.

As to the scope of the settlement agreement itself, the inherently complex nature of construction projects and disputes and the sheer number of parties usually involved require construction lawyers to give significant forethought to the complete resolution of the dispute in the final document to be prepared and executed after the conclusion of the mediation. In fact, failure to take this precaution may unravel a settlement apparently already achieved at mediation.

For example, lawyers should give thought to whether they will need any particular terms other than standardized ones in the written agreement signed at mediation. Such possible particular terms can involve the following possible issues:

- Is there a recorded lien which needs to be released?
- Is there a constitutional lien which needs to be addressed?
- What are the mechanics of paying unpaid amounts - by the owner, by the contractor, or by joint checks?
- Do subcontractors/suppliers have liens to be released?
- What are the logistics of paying subcontractors/suppliers and getting appropriate releases?
- Are there warranty issues - will the contractor or subcontractors still be bound on their warranties (extended warranties?) or will the settlement release all from their unexpired express warranties?
- Is there ongoing insurance litigation (unrelated to this dispute) that may be affected by this settlement?
- How will contingent liability for future unknown personal injuries at the site be addressed?
- Will completed operations coverage be affected by a release of "any and all claims, known or unknown"?
- How will indemnity issues be addressed?
- If the same parties in mediation are involved in other projects, how will the agreement be worded so the other projects are not affected?
- If a party settling and being released is still working at the site, how will withdrawal from the site be accomplished and in what time frame?

- If settlement involves additional work on site: what is the scope; when is it to be done; to what standard; and to whose satisfaction?
- If only some parties are settling out, what language is needed?

Put simply, lawyers should consider the ramifications of the variety of such issues associated with the settlement of construction disputes prior to the mediation, raise them during the mediation process, and deal with them in the settlement agreement. Often, lengthy mediations are resolved with an agreed financial settlement, only to require many additional hours working through the logistics of extraneous issues. From the perspective of a construction mediator, it is very difficult to revisit such issues with parties who, through day-long negotiations, have given much more than their initial settlement limit. If these matters are not carefully addressed at the beginning of and during the mediation, the resolution can be easily imperiled.

6. Conclusion

Construction mediation involves an endless variety of potential issues and methodologies for dealing with them. Hopefully, these observations will serve to enhance the ability of lawyers (and their clients) to prepare for and participate in construction mediation in a manner which will maximize the possibilities of success.