CONSTRUCTION MEDIATION: BEST PRACTICES FOR SUCCESS

By Steven C. Bennett[1]

Mediation, as a tool for dispute resolution, is uniquely suited to the special circumstances of construction projects. But mediation is no panacea. The structure of the mediation process, the character and qualifications of the mediator, and the strategies employed by mediating parties—all these and more can have a profound effect on the success (or failure) of construction mediation. This Article briefly summarizes practices that may improve the chances that mediation can resolve a construction dispute, quickly, cheaply and fairly. The intended readership for the Article is both the counsel who participate as advocates in construction disputes, and their constituent clients.

Introduction: Forms Of Mediation

Forms of mediation vary widely, but (in broad terms) two main types have developed. The focus of this Article is on "facilitative" mediation—a process where the parties engage in negotiations with the assistance of a mediator. The mediator may comment on and question the parties regarding the strengths and weaknesses of their claims and defenses, and may suggest forms of compromise that could be adopted by the parties. But the mediator does not, *per se*, provide an opinion on the likelihood of success of each party. That form of "evaluative" mediation, though non-binding (absent mutual consent of the parties) often involves more formal attempts to persuade the mediator of the merits of each party's position, and thus may resemble more of the adversarial process (arbitration, litigation). Facilitative mediation typically

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embodies, as a central feature, control of the process (and the outcome) by the parties themselves.

Facilitative mediation also differs in kind from a judicial settlement conference. A settlement conference before a sitting judge is often mandatory (i.e., ordered by the Court). Typically, the only parties that appear are those who are formally part of the litigation (thus, in a multi-party construction project, the settlement conference may omit parties who have not been joined in the litigation). A record of the conference is often public (as a docket notation for the case), and the scope of confidentiality attendant to a settlement conference may be less clear than in mediation (where, presumptively, all aspects of the mediation are confidential). The conference is generally conducted at the courthouse, using the Court's facilities (often, in the chambers of the judge assigned to conduct the conference). The judge often has only a limited amount of time for the conference, and it is relatively rare for conferences to be conducted on more than one day. Many judges apply evaluative techniques, suggesting (in effect) that the parties settle because their "case is not as good as counsel thinks it may be." Significantly, moreover, this is an appearance before a judicial officer. Contending lawyers often treat the conference as the equivalent of a formal hearing, rather than an opportunity for creative, cooperative thinking about alternatives for resolution of the dispute. The imperative for the judicial officer is generally docket-clearing. Some courts use settlement conferences as a screening tool to weed out cases that should not clog the trial docket. Thus, in at least some senses, the "neutral" is not really neutral.

An array of other forms of dispute resolution that incorporate aspects of mediation exist, including: dispute resolution boards, "mini-trials," early neutral evaluations and more. These forms too are not the subject of this Article.

PART I: PREPARATION FOR MEDIATION

This Part concerns the period, prior to "live" mediation sessions, wherein the parties choose a mediator, decide on the logistics of mediation, and submit pre-mediation statements.

When In Doubt, Mediate Early

Construction disputes can be immensely expensive to litigate (or arbitrate), and may take years to bring to completion. Early resolution through mediation thus may be an attractive option. And even if mediation does not produce a resolution, it can sharpen the parties' awareness of the nature of the dispute, thus improving further settlement negotiations (or a later renewed mediation) and processing of the case, if it must go through litigation or arbitration.

But finding the "right time" to mediate is a matter of considering the circumstances of the dispute and the parties. It may be that discovery (and sometimes expert submissions and financial analyses) are necessary before a reasoned evaluation of the case is possible. There may be a key legal issue in the case, that (if resolved by motion practice) could substantially affect the calculus for settlement. And it may be that a business decision (merger, acquisition, refinancing and more) will determine whether and when a party can engage in settlement discussions.

Discussions with other parties and their counsel can help determine when best to proceed with mediation. In some instances, parties select a mediator, and after preliminary discussions with and through the mediator, conclude that mediation sessions should not be scheduled immediately. The selection of a mediator, in advance, can speed the process of preparation for mediation once the parties are ready to engage. Parties also sometimes plan for a single day of mediation, to start, with the understanding that the mediation may adjourn without an agreement,

but with the expectation that additional discussions will take place (outside of formal mediation sessions), and/or a plan to arrange a further mediation session at a later date. And there are instances when only a portion of a complex dispute is susceptible to mediation (because, for example, not all parties will agree to mediate, or because discovery with regard to some parties is incomplete). Parties and counsel may plan for limited mediation, with the hope that later negotiations can include a broader array of project constituents.

Similarly, court-ordered mediation may proceed, even though the parties declare that they are "too far apart" to settle. Even these sessions, if approached with the right attitude, can yield settlement, and (if not) other benefits, in terms of information exchange, preliminary analysis of positions and preparation for further negotiations (and perhaps later mediation sessions).

Recognize The Flexibility Of The Process

Mediation is not always consensual, in the sense that the parties may not have all agreed, at the time the dispute arises, that they wish to mediate, and that they wish to follow a specific procedure. Often, the requirement to mediate is an element of one or more construction documents, which may require that mediation take place before arbitration or litigation.[2] Or mediation may be required under the rules of the court where litigation is pending (or a judge may order the parties to mediation). That does not mean, however, that the parties are precluded from adapting the mediation process to the needs of the matter. The parties may agree to forgo mediation, defer it, or conduct it in a form that differs from their prior agreement, or the rules of court. If the modification is useful and reasonable, most courts will approve the process. And

[2] See, e.g., American Institute of Architects, A201-2007, available at www.aiacontracts.org.

contractual terms for mediation, like any other contract provision, may be modified by mutual agreement of the parties.

Even if the mediation process is established by prior contract or court rules, informal modifications are always possible. Will the mediation be purely facilitative, or will it involve a mediator's evaluation (or recommended settlement)? How will the parties structure the submission of mediation statements, exchange of information, and conduct of the mediation meetings themselves? Do not accept a "cookie cutter" form of mediation if it does not work for you, and especially if you can think of a better process that is more likely to succeed. After mediator selection, work with the mediator (and the adversary) to discuss the needs of the matter, and work to shape a process that suits your particular circumstances.

Choose The Right Mediator

The choice of a mediator can have a critical effect on the conduct of mediation. It is sometimes said that a good mediator cannot succeed where parties truly do not wish to settle, but a bad mediator may impede a successful settlement even where parties do wish to settle. Many mediators are lawyers and ex-judges: they are often strong on legal analysis but not necessarily trained in the fields of architecture, engineering, or construction management. Other mediators are construction subject matter experts, but may have less experience with the conduct of mediation and the formulation of settlement alternatives. Still other mediators may combine the skills and experience necessary to serve as a mediator in a complex construction dispute, but charge rates or have scheduling limitations that make them unavailable. And there may be circumstances where a particular expertise (such as experience in public-sector projects, or knowledge of insurance issues) may be vital to resolution of the disputes.

In general, parties look for certain basic qualifications in a mediator: impartiality, fairness, intelligence, judgment, listening skills, creativity and forcefulness. Everything beyond that is "gravy:" experience in the construction industry, knowledge of construction law, experience in mediating construction disputes, and experience litigating and mediating the specific type of dispute presented in the matter at hand. A mediator experienced in construction matters can provide a very useful "reality check" for parties that have "fallen in love with their case," and who may have ignored gaps in their proof, limitations of the trial process, and other practical realities.

It is rare to find a "perfect" mediator for a case (there are too many variables in a construction dispute to think that one person will have the complete combination of skills to manage all such variables). Indeed, some of the desired characteristics are paradoxical. An effective mediator must have a strong personality, capable of commanding the respect of the parties, but at the same time humility, empathy and patience are essential. As with virtually everything in mediation, the choice of a mediator is generally a matter of compromise. If you cannot always find the "perfect" mediator, at very least you should be able to eliminate candidates who are clearly not right for the job.

Parties and their counsel should think carefully about the character and experiences of the kind of mediator best suited to handle their dispute, and gather as much information as they can about mediator candidates. Such information includes the mediator's official *curriculum vitae*, of course, but may include many other sources of information. Seek out industry participants and their counsel who have experience with the mediator, who can speak to intangibles (patience, fortitude, commitment and more) that can enhance the chances of a successful resolution. Most often, moreover, you are permitted to interview mediator candidates, to ask

questions about (among other things) experience with the kind of dispute present in your case (both as an advocate and as a mediator). If specific understanding of the circumstances of the dispute is vital to the mediator's assistance with settlement, this "vetting" of the mediator may be an essential step in making a selection. And do not fear to discuss the information you gather with opposing sides and their counsel. Nobody wants an unqualified person to serve as mediator; parties often can, by agreement, at least eliminate candidates not right for the job.

Finally, ensure that the mediator candidate is provided complete information about the parties and personnel that will be involved in the mediation. Mediator independence is a key element of the trust that the parties must invest in the mediator. Full disclosure ensures that conflicts can be avoided, and the mediation conducted smoothly, without "surprise" discovery of potentially disqualifying connections between a mediator and individual parties or their counsel.

Work With The Mediator Before Formal Mediation Begins

The temptation of many parties and counsel (and even some mediators) is to view the mediation as starting when the parties walk in the door to the mediation room. Not true. Mediation actually begins the moment that the parties select a mediator. From that point on, the parties can and should think of the mediator as a resource, to help plan the mediation process, and to think through decisions that can help (or hurt) the process.

A mediator can provide suggestions, and also lend an imprimatur to decisions that the parties cannot easily make on their own. One simple example concerns the presence of persons with authority to settle the dispute. Some parties may hesitate to send a senior executive to a mediation session, contending that the time will be wasted, and that the executive can be available ("on the line") when needed. Counsel may have difficulty convincing their clients

otherwise. The mediator, however, may encourage the presence of the executive, to provide necessary authority for settlement, but also to ensure that the executive (who may not otherwise know the case well) has an opportunity to learn the details of the dispute, including its costs and risks, and to become invested in the process of settlement. Often, in response to an out-of-the-blue phone call from the mediate site, seeking approval for a deal, an executive can more easily say "no" than when the executive has sat through the process, in person, and is fully aware of how the parties got to that point in the negotiations. An experienced mediator can provide insight on this and many other decisions that affect the process.

Often, shortly after appointment, a mediator will schedule an initial conference call with the parties (or, at least, their counsel). The call may reveal that the parties have not actually thought much about how they want the mediation to proceed. They may assume that some "standard" form will apply, or that the mediator will dictate the form. The mediator almost certainly will encourage the parties to "meet and confer" to discuss the form and logistics of the mediation, and may schedule an additional pre-mediation conference to work out the details.

Typically, moreover, once they select a mediator (if not before), the parties are free to engage in *ex parte* discussions with the mediator. Parties and counsel may provide confidential information to help the mediator understand the players and the personalities involved in the dispute, any problems that may have arisen in prior communications between the parties, and other non-legal factors that could affect the course of mediation. Such confidential discussions may help the mediator formulate strategies aimed at overcoming obstacles to settlement. A simple example relates to personnel attending the mediation. On occasion, the principal disputants (the owner's engineer, and the contractor's field manager, for example) may have developed a "toxic" relationship. Although they both have vital knowledge of the project, the

question is whether their presence at the mediation will (on a net basis) hinder the process of negotiation. The mediator can assess that issue, and a mediator suggestion that this "toxic" pair stay home, or be available "on the line" rather than live at the mediation, may avoid an unnecessary roadblock to settlement.

Candid discussions, in advance of the mediation session, can also help the mediator budget time and establish priorities for discussions during the mediation. If there is a central issue that must be resolved, the mediator should know to attack that issue first, and hard. In multi-party cases, and especially in cases where insurers are involved, the mediator may need to know who "holds the purse-strings," and who has relatively marginal interest in the outcome of the dispute.

Seek Early Agreement (On Something)

Mediation is not about persuading an adversary to admit that you are right; it is about persuading an adversary that they can (and should) work with you to resolve this dispute. One of the best ways to make that point is to demonstrate that you are willing to cooperate and compromise in a reasonable manner. Look for that opportunity, as early in the process as possible. For this reason, for example, many advocates recommend accepting any qualified, independent mediator suggested by the adverse party. But smaller points of potential agreement abound. Where to conduct the mediation? On what schedule? You are not "giving away the store" by forgoing the chance to fight against anything an adversary suggests on those kinds of logistical points. Just the opposite—you are actually building a record of reasonableness, and in the process, improving trust between the parties, a key element in successful negotiations generally, and with mediation of disputes in particular. And agreement with opposing parties on

some issues (such as the confidential treatment of everything in the mediation) can reinforce the sense that, despite the clash of views about the dispute, the parties do in fact share common interests in effective dispute resolution.

Ensure Necessary Information Exchange

Live mediation sessions should focus on analysis of the strengths and weaknesses of each party's position, establishment of potential parameters for settlement, negotiation of essential terms of settlement, and creation of (at least) a term sheet reflective of the agreement of the parties. The time for basic information exchange relevant to settlement is before the live mediation sessions. Without such advance exchange of information, the parties may be unable to assess the risks associated with their positions. At the mediation sessions, moreover, the parties may need to spend precious time educating themselves and the mediator on key facts in the dispute. And (as often occurs), if an insurer is involved, authority to settle cannot be established absent development of essential information.

The basic question is: What do the parties need (in the way of information) in order to have a reasonable chance of settling their dispute? The parties should, at very least, have equal access to essential project materials: the contract(s) and subcontract(s), plans and specifications, change orders, minutes of job-site meetings and the like. With regard to major items in dispute (e.g., claims of delay, defective work or design flaws), additional information may be required. If the parties have not already exchanged such materials, they may wish to defer mediation until such disclosures are made. If one or more key depositions (or expert reports) are required to answer essential questions, again, mediation may be deferred. Perfect knowledge, however, is not required. Indeed, lack of complete knowledge is often an impetus to settlement, and time

and money spent in exhaustive discovery can often better be used to negotiate a settlement. The point is that the parties should ask themselves whether they have what they need to negotiate effectively.

Create An Effective Pre-Mediation Statement

Pre-mediation statements serve a variety of purposes. Parties and their counsel should carefully consider which of these purposes may be most important in their particular circumstances. One basic purpose is to educate the mediator about the facts and claims in dispute, so that the mediator can effectively assist negotiations. But, in many instances, there are a variety of other documents (pleadings and briefs from the ongoing case, expert reports and the like) that can provide more concentrated and complete discussion of at least some of the issues. There is little point in "reinventing the wheel" if such is the case. Instead, a very brief summary of the case, with reference to the already-existing materials, may suffice. You should recognize that the mediator is a novice (at least as to the facts of your dispute), so try to keep the statement free of jargon, make sure to provide definitions of key terms, and consider providing aids to understanding of the dispute, such as a timeline of key events.

A second, often more important, purpose is to inform opposing parties about the strengths (of your positions) and weaknesses (of their positions). The goal, at a minimum, is to ensure that opposing parties understand your position, even if they do not agree with it. This kind of analysis is hard work. It requires more than repeating the claims previously stated. Rather, an analysis of this type should look ahead, to the potential trial (or motion practice) in the case. As a claimant/plaintiff: What claims appear very likely to succeed (and what are the damages that will probably be awarded on such claims)? As a respondent/defendant: What claims are likely to

fail, what defenses are likely to prevail, and what damage theories cannot be sustained? Is there key evidence, including admissions at deposition, that probably cannot be rebutted? Is there a significant gap in the other side's proof, problems in the admissibility of evidence, or a particularly weak key witness, that will affect the outcome if the case is tried? And, if there is discovery remaining in the case, does the burden of discovery (and, ultimately, the burden of trial) lie particularly heavy on the other side? For example: must the opposing party conduct significant third-party discovery to prove its case? Highlight such points if possible.

The purpose is not to convince the other side that you are right, and they are wrong. That will almost never happen. Instead, the purpose is to plant seeds of doubt, to suggest that the outcome (in the absence of settlement) is not as rosy as the other side may predict. Where the result is uncertain, and the time and expense to achieve the result is burdensome—there lies incentive to settle.

Parties and counsel sometimes worry that a pre-mediation statement (or mediation in general) offers "free discovery" to the other side, or that it may provide opportunities for other parties to think of new arguments, claims or defenses. On that basis, some choose not to disclose their "smoking gun" evidence, or disguise their legal analysis in generalities. Most often, that approach is mistaken. It decreases the chances for successful mediation, as it reduces the ability of the parties to fairly assess the risks and benefits of settlement and may produce resentment at the perception of "ambush" tactics. It may not even work, since ordinary discovery and briefing processes generally reveal the central factual and legal issues in a case before trial. And a skilled mediator will encourage parties and counsel to "show their cards" as part of the mediation process. Generally, the better approach is to provide a cogent, powerful statement of your side's

position, with the implicit message to other parties that "our case will only get stronger as we prepare for trial."

A third purpose for pre-mediation statements is to help frame the structure of negotiations. By providing a cogent analysis of the claims and defenses at issue, and of the damages that may be awarded, a pre-mediation statement can make the mediator's job (helping each side to view the dispute in a new light) much easier. So, too, a well-organized set of supporting materials (key potential exhibits, graphics, excerpts of depositions, expert reports and copies of helpful cases and other relevant authorities) makes the mediator's job easier, and demonstrates that your side is well-organized and prepared to do battle if the matter does not settle.

A final purpose for pre-mediation statements is to apprise the mediator of any obstacles or opportunities for effective negotiation that may arise out of facts that are not strictly relevant to the legal dispute. Typically, parties may agree (or the mediator may solicit) private (*ex parte*) statements that can address such obstacles and opportunities. It will be helpful for the mediator to know the history of negotiations (if any) to date, along with any insights into the reasons why the case has not yet settled. It may also be helpful for the mediator to know something about the personalities (and personal histories, including any animosities or affiliations) of the personnel involved in the negotiations. And there may be information (sometimes, only guesses) about the circumstances of the opposing party (such as executive shuffles, mergers and acquisitions, or financial difficulties) that could make settlement more or less likely. Any specific suggestions for how to address obstacles and exploit opportunities will help the mediator prepare for more effective negotiating sessions. Many such suggestions may also arise as part of the private caucusing in the mediation itself.

Parties and counsel may be tempted to refuse to provide copies of their pre-mediation statement to other parties, on the rationale that they prefer to "surprise" an adversary with an argument or evidence at the mediation. That temptation should be resisted, as refusal to provide the statement sends a bad message: that the party has something to hide, or that the party is not confident in its case. If there is something that needs to be kept confidential, however, the submission of a separate, private statement to the mediator (in addition to the main pre-mediation statement) can best serve that purpose.

PART II: CONDUCTING THE MEDIATION

This Part concerns the actual "live" mediation sessions, wherein the parties meet with the mediator in person, sometimes in joint session and sometimes in private caucus, to explore possibilities for settlement.

Set (And Observe) The Ground Rules For The Mediation

Often, as part of the pre-mediation process, the parties and their counsel establish "ground rules" for the mediation. In some instances, the ground rules will be reflected in a specific agreement (often, a form prepared by the mediator), which the parties and/or counsel sign in advance of the mediation sessions. If there is no agreement on ground rules, one of the first tasks in the live mediation sessions is often to discuss and agree on basic rules that will affect the conduct of the mediation. The parties often prepare an express written agreement on (at least) the fundamental ground rules for the mediation.

The most elemental (and most widely-shared) rule is that all discussions among the parties, and discussions with the mediator, are for settlement purposes only, and cannot be used

as evidence in any subsequent proceedings. A related rule is that the mediator's notes, if any, of the discussions, are confidential, and will not be subject to subpoena after the mediation (indeed, the mediator may be asked to destroy all such notes). And the mediator will never be called as a witness in any proceeding. Finally, a typical rule of confidentiality is that the mediator will not reveal the content of discussions with one party to any other party in the mediation, without authorization.

Further rules might include a commitment from all parties to stay until the end of the mediation day, no matter the circumstances of the negotiations. Parties also often discuss the logistics and schedule of the mediation, e.g., when and how long to break for lunch and dinner, start and stop times, and room assignments for private caucuses. To facilitate communication, parties sometimes agree that cell phones and computers will be put away during joint sessions, and that a "one at a time" no-interruption rule will apply to speaking during joint discussions. If some of the parties are new to the process of mediation, the mediator may also give a mini-tutorial on the etiquette of mediation: focusing on solutions, not personalities; avoiding name-calling; and the like.

One might assume that agreement on such rules is a trivial thing; after all, you might think: "we're all adults in this room." But the rules set the tone for later discussions; and they serve as a reminder to the parties of what they came to do—determine whether a reasonable, fair, consensual resolution to their dispute is possible. Construction industry personalities can be strong (and sometimes abrasive). Thus, setting a tone of calm, business-like efforts at cooperation is essential.

Plan For The Opening Statement

Parties sometimes forgo the opening statement in mediation, on the theory that "the other side already knows enough" about the case, and "it's time to get down to negotiating." Neither assumption is necessarily correct. Typically, prior to mediation, the decision-makers on each side may have let their field staff (and counsel) handle development of the facts and analysis of the law of the case. As a result, they may not know the case well, and may rely on the overly-optimistic assessments of their subordinates. The opening statement may be the first time a decision-maker hears an unvarnished review of the issues, and the opening statement is generally made without interruption or objection from the other side. Although decision-makers on the other side may not be fully persuaded, they will at least hear the statement, in its entirety. A well-organized, reasonable opening statement may cause the decision-makers to think: "I don't agree with all of that presentation, but I can see where an arbitrator, judge or jury might find some of that persuasive." That tiny change of attitude may be critical in opening a decision-maker's mind to a more realistic evaluation of the strengths and weaknesses of the case.

Significantly, the opening statement is part of negotiation, even though often it does not involve statement of a specific demand or offer of settlement. The point of the statement is to advance the process of identifying the key issues in the case, which the parties will typically discuss as part of their negotiations. General agreement on which issues will most affect settlement is often a key to developing a framework for the negotiations. Thus, an articulation of the essential facts of the case (from your side's perspective) is vital to the negotiation process. If the parties disagree about basic facts, it is better to establish some procedure to address the disagreement, jointly, rather than to discover the disagreement later, and have the mediator shuttle back and forth between private caucus rooms to try to reconcile the disparate positions.

The opening statement, moreover, can set a positive tone for the mediation. Parties and their counsel can express respect (and even empathy) for the other side in the dispute. They may thank the other side for cooperating in the process of setting up the mediation. They may state that they are willing to take the opposing side's views into account as part of the negotiations. They may express confidence that a reasonable compromise is possible, and emphasize their commitment to pursue the mediation process in good faith. And a compelling opening statement can demonstrate that your side is well-organized, confident in its position, and prepared to "bargain hard" through the mediation.

One simple form of opening statement is a timeline of important events in the life of the project. When did problems first arise? When were requests for changes made? A timeline, listing these kinds of important dates, can help educate the mediator (making it easier for the mediator to facilitate later negotiations). The creation of an agreed timeline can also help focus the parties on critical events and see the "big picture" of the dispute. In substance, if the event is on the timeline, it matters; if not, it is probably not critical to settlement.

A key element of an opening statement is a clear summary of your side's position regarding damages. As the claimant/plaintiff, the more specific the itemization of damages the better. A "round number" demand or undifferentiated "total cost" claim often lacks credibility, and an open-ended demand ("we believe the damages could be in the millions of dollars") may make rational discussion of settlement numbers quite difficult. Because the mediation process is covered by the privilege for settlement communications, a high/low range of expected outcomes might be something you wish to provide. Even if you do not provide it in the opening, the mediator will almost certainly ask for it as part of your private caucusing. The point is to recognize that, as with the valuation of any asset, there is a range of values that may be

considered "reasonable." As a respondent/defendant, the same rules generally apply (indeed, your side may have counter-claims or offsets, such as liquidated damage claims for periods of delayed completion). If you have specific defenses to the claims presented, itemize them, and explain how they may affect any damage calculation. A "general denial" of liability and a laundry list of defenses is fine to answer a complaint, but a general denial in settlement negotiations suggests that you have not done much to study the case, or (worse) that you do not have a well-considered defense at all.

An often-missing element of opening statements (and pre-mediation statements) is a realistic analysis of the costs of the dispute if no settlement arises. Such costs include an estimate of attorney's fees and expenses to bring the case through discovery, motions, trial and (potentially) appeal. Harder to quantify, but worth considering, are the "soft" costs of a dispute: diversion of attention and resources from profit-making activities, reputational damage and (often quite significant) cash flow issues. Especially where such costs lie more heavily on an opposing side, they may be worth mentioning as part of the opening, as a reminder to the other side's decision-makers that more is at stake than just the damage amounts in dispute.

If the opening statement is to be presented through demonstrative exhibits or a Powerpoint presentation, take care to avoid overwhelming the mediator and adversary with detail. You cannot hope to jam a week's worth of trial evidence into a single mediation session. Aim for a relatively simple outline of your side's position. A handy basic guide is to keep the presentation short (certainly less than an hour, and often much shorter), with perhaps 10-15 key demonstratives/slides for the presentation (more, only as absolutely necessary). That abbreviated form does not mean that you must omit all useful information. Rather, the message should be: "Here are the headlines, from our point of view. We have backup detail for those headlines,

which we are prepared to share and discuss." A well-prepared pre-mediation statement (and appendix) can help greatly in this regard—the mediator and opposing side will know, by virtue of that statement, that your opening statement is well-supported.

One important question regarding preparation of the opening statement revolves around the issue of "who" is in the best position to state your side's position. Typically, counsel take the lead. But, for certain technical matters, an engineering, scheduling or other expert may be helpful. And, for recitation of events in the case, field staff may have particular knowledge. Cogent, credible statements from experts and project personnel can enhance a party's stature, giving the air of confident mastery of the case. Name-calling and wild accusations do the opposite. Keep in mind that the other side, in evaluating the strengths and weaknesses of its position, will surely assess the capabilities and credibility of your witnesses. If a senior executive is present, a very brief, positive statement may add value. The executive might communicate a simple message, such as: "We are all business-people here. We believe that a reasonable resolution of the matter is possible; and we are committed to working with you to see if we can find an acceptable solution."

Remember that preparation of an opening statement, should be a team effort. The statement should be strictly accurate, and aimed at the most important "big picture" issues in the case. That requires review and input from everyone with knowledge of the dispute, and a focus on what matters in the mediation. An opening statement is advocacy, but of a very special kind. The central goal is not to "win" the approval of the mediator (whose job is to foster agreement, not decide the case). The central goal is not to impress your team of the rectitude of your position (they are already convinced). Instead, the goal is to "set the table" for the negotiations and discussions to follow, expressing confidence in your position, and at the same time a

willingness to listen to the other side. For the delivery of that kind of delicately balanced message, you need all the help you can get.

Get Organized For The Negotiations

If they have not already been exchanged as part of pre-mediation disclosure and/or the submission of pre-mediation statements, bring multiple copies of critical documents to the mediation. Make sure that they are organized and easily available for review, as questions arise during the course of the mediation sessions. If the documents are too many, or too voluminous, to be recreated in paper form, consider (in advance) whether some technical solution might be available (e.g., a projection system, to permit review of the documents, or "call-outs" (relevant excerpts from the record) or other graphic summaries.

Knowledge is power (here, bargaining power). The ability to retrieve, review and refer to critical documents quickly means that you can maintain a position of strength throughout the negotiations, rebutting factually erroneous statements, responding to financial analyses, and confirming the status of pleadings and proceedings in whatever arbitration or litigation may be ongoing. That organization, moreover, sends a message of quiet confidence in your position, and (though subtle) can influence the outcome of negotiations.

Do A Critical Self-Analysis

In the ordinary give-and-take of any negotiation, every party wants to maximize its return and minimize its cost. But settlement negotiations, and mediation in particular, generally must focus on "needs," not "wants," to succeed. An owner wants to pay the least amount possible for completion of the project, but, at core, needs to complete the project as soon as possible, so that

it may be brought into useful service. A contractor wants to pocket the largest amount of profit possible, but actually needs to meet a payroll, service debt, and satisfy obligations to sub-contractors and suppliers. Needs, although not immutable, tend to be much more stable than wants. And recognition of a party's needs is much easier for an opposing party to accept than is "caving in" to demands to satisfy a party's wants (or even threats that the other side will "bury you" in the costs of discovery and trial). The mediator almost certainly will explore the difference between your side's needs and its wants. Be prepared to itemize and support your list of needs so that the mediator can help the parties formulate a realistic assessment of the actual gap between their positions. Your needs list and calculation rarely will determine your first (or even your last) settlement offer or demand. But it can give the mediator a better idea of the shape of the dispute, and the distance in party views that must be crossed.

You also need an objective assessment of the strengths and weaknesses of your position, and the position of the opposing side. Consider your "best case," "worst case" and "likely case," in terms of potential outcomes. View the matter from both the long term and the short term. As the claimant/plaintiff: Yes, it may be true that your complaint will survive a motion to dismiss; but will it survive summary judgment (and will discovery in the case reveal gaps in your proof)? Yes, your expert's opinion in the case may be impressive, but will it be admissible at trial, and will the other side's expert (and cross-examination) reduce its impact? As the respondent/defendant: Yes, it may be true that you have a shot at dismissing some claims through motions, but will the case nevertheless ultimately go to trial on some claims? Yes, there are useful facts on your side, but what might the discovery process reveal that is unhelpful to your position? A critical self-analysis does not automatically lead to concessions. Rather, it

helps you prepare for questions from the mediator, and helps you focus your presentation and negotiation posture on your strongest points.

Finally, calculate the consequences of failure to settle, sometimes called "BATNA" ("Best Alternative To No Agreement"). What is the range (high, medium, low) of expected costs (for each side) to try the case (including the possibility of appeals)? Include in that calculation a rough sense of the intangible costs of a continued dispute (diversion of personnel and executive attention, reputational effects, lost opportunity costs, delayed cash flow and more). The mediator is almost certain to emphasize, for all sides involved, that the risks and costs of failure to settle may outweigh the costs of settlement. Be prepared for such mediator questions, and help the mediator make a strong case with opposing parties that the risks and costs suggest that they too should accept a reasonable settlement.

Maximize The Benefit Of Private Caucusing

The temptation, for some parties and their clients, is to view private caucuses with the mediator as opportunities to collude (in effect) with the mediator. They may ask the mediator to reveal "what the other side is thinking" (even though the mediator is not authorized to do so). They may expect the mediator to convey their positions unquestioningly, even where they are clearly based in puffery (or, worse, a misstatement of facts). They may view the caucus as a chance to get the mediator "on their side" in the negotiations, so that the mediator will "beat up" the opposition. That, as they say in Alcoholics Anonymous, is "stinkin thinkin." Mistrust, deception and manipulation may have gotten the parties into their dispute, but those old behaviors and attitudes are unlikely to get them out of it. The mediator role is that of a neutral,

independent of the parties, and with ethical obligations to maintain a fair process. Most mediators take that role and obligation very seriously.

A private caucus is a time for candor. The caucus is cloaked with confidentiality. The mediator will not tell anyone else anything that you do not want the mediator to reveal. And if there is any question about that rule, ask the mediator to confirm the arrangement. In a spirit of candor, and cloaked with confidentiality, the private caucus should be part of a creative effort: to analyze the possibilities for settlement, to gain insights into the strengths and weaknesses of each side's position, and to plan next moves in the negotiations. The mediator has seen what works, and what does not work, in negotiations. The mediator has a feeling for the attitudes of the participants in the process, and where they are likely to go. If you ask for it, the mediator may even offer a range of what could be reasonable settlement values in the matter. And, if there are procedural steps that appear necessary (additional information exchanges, outreach to decision-makers not in the mediation forum, agenda and sequencing for further discussions) the mediator can assist in forging a reasonable framework.

Encourage all members of your negotiating team to speak with the mediator. Let them get answers to their questions. Let them make suggestions for how to proceed. Let them listen to the mediator's analysis of the circumstances, and provide their reactions. Mediation is a team sport. Restricting private caucus to dialogue between counsel and the mediator wastes opportunities for creative thought.

Maintain A Positive Attitude

Inflammatory rhetoric, name-calling, threats and exaggeration rarely succeed in convincing anyone that they should settle a dispute. Anger and emotionality should be checked

at the door to the mediation room. And parties should recognize that there will almost certainly be parts of the mediation process that they find upsetting. An opposing party will make an outrageously high demand (or low offer). The mediator may strongly criticize a claim or defense, giving the impression that the mediator is "not on your side." Do not panic; and do not react defensively. It is all part of the process.

The easiest, most professional response to anything upsetting in mediation is simple: acknowledge the comment ("I hear you"); acknowledge the validity of the other person's perspective, without admitting that it is correct ("you have given me something to think about"); and express confidence in the process ("I am glad we are having a candid discussion; that's what is needed to clear the air and get a resolution"). None of the foregoing are "magic words." Make these kinds of points in your own way. But recognize that "my way or the highway" may work when you're in command of an organization, but it can fail miserably in the context of mediation.

One key conceptual element of mediation is worth keeping firmly in mind: Settlement is not a zero-sum game. All sides have an interest in resolving a dispute, if they can, to save money, resources and time wasted in continuing the dispute, to save good relations with other participants (and a good reputation) in the industry, and to move on to more productive (and profitable) endeavors. That simple fact is true, even if you believe you have a "slam-dunk" winner of a position (and, in complicated construction disputes, there are not many slam-dunk winners anyway).

Don't Waste Time

The mediation process can sometimes resemble life in the Army: "hurry up and wait," with "long periods of boredom punctuated by moments of chaos." Especially when the parties separately caucus, the mediator may spend lengthy periods with one party, while the others wait in their separate rooms. The least that can be done in anticipation of those waiting periods is to bring some reading material. Avoid developing an attitude of frustration, that the process is taking too long, and you are wasting your time. The process takes as long as it takes, and if you have to spend a large part of the day reading reports and memos that you could never get around to before; well, at least you have not completely wasted your time. Since lawyer and client are in the same room, however, they may quite productively discuss the facts and law of the dispute, planning strategy in the event that the dispute does not settle. Indeed, it may be rare for a lawyer to have an entire day alone with a client to discuss a case.

But more—the negotiating team can always benefit from fresh review of information gathered in the mediation. What did team members think of the opening presentation of the other side? What about the statements, if any, by the actual witnesses and decision-makers for the adversary? What next steps can be anticipated, given the negotiating history so far? This is hardly an exhaustive list. The point, however, is clear—keep actively engaged in the process. It can be tiresome, but the party that thinks, carefully, about the circumstances, and the options (versus waiting to react), is the party that is more in control of the process, and more likely to succeed.

On occasion, in multi-party mediation, two or more parties will meet separately (without the mediator), while the mediator works with yet another party. Such multi-party caucuses can

serve to share information and strategy, and to brainstorm on methods to structure discussions. And there is nothing to stop a party, or counsel, from wandering the halls of a conference center during periods when the mediator is otherwise occupied. You may encounter another party representative, and strike up a conversation. It may just be a friendly exchange (a joke, a remark about sports or family) that contributes to a cooperative atmosphere. Or it may be an opportunity to have a private, face-to-face discussion on a key issue that can move the process forward. Do not lose such opportunities by hunkering down in your private room.

PART III: COMPLETING THE MEDIATION PROCESS

This Part concerns the "end game" of mediation—coming to settlement terms (if possible), recognizing impasse (if necessary), and following up, to document the settlement or plan for further steps aimed at resolving the dispute.

Recognize The Stages Of Mediation

Experienced mediators and counsel know that most mediations (and certainly most complicated cases in mediation) go through a series of stages. After introductions, the mediator's initial comments, and discussion of ground rules for the mediation, the parties typically proceed to opening statements (and sometimes answer mediator questions in a joint session). Thereafter, typically, they break into separate caucus rooms, and interact with each other principally through the mediator's "shuttle" activities. Most mediators will begin private caucusing with questioning to each side—about the strengths and weaknesses of the case, about the costs of litigation, and about the range of potential settlement outcomes (among other things). In a one-day mediation, that entire process can easily last through the lunch break (or later), all without anyone putting a number on the table. For that reason, in complex cases, parties and

counsel often plan for two-day (sometimes more), back-to-back sessions of mediation, to provide ample time to pursue all stages of mediation (and handle the considerable follow-up that may be required for a final resolution of a complicated, multi-party dispute).

When the initial settlement numbers are exchanged, parties and counsel sometimes experience "sticker shock;" they complain that the initial demand (or offer) suggests that the other side is "not really serious about settling." Mediators frequently hear such sentiments expressed. Experienced mediators, however, are not deterred. They know that parties typically want to leave themselves with plenty of room to bargain. Parties and their counsel should trust a mediator who says: "That's just an opening offer (or demand); now let's get down to the work of getting the parties close enough to bargain toward resolution." This "zone of bargaining" can be reached in a variety of ways.

One simple method to help narrow the gap is to ask (generally, through the mediator) how the other side came to its number. Is it based on a formula? Is it a form of risk versus benefit analysis? Are there elements to the analysis, with percentages of likelihood associated with each element? A discussion on that basis may yield movement, as you present a counter that reflects differing views of the elements, and the opposing side comes to recognize that there is "play" in the structure of their analysis.

Alternatively, either because the other side refuses to reveal its formula, or because there actually is no formula on their side, you may wish to respond with your own offer (or demand) tied to a formula of your own. Often, a very significant unilateral move, coupled with a cogent explanation of the rationale for your number, can demonstrate that you, at least, are quite serious about a commitment to pursue settlement, that you "don't want to play games" with opening

numbers, that the number you have proffered is real, and supportable, and that you do not intend to vary much from it, absent good reason. Under those conditions, if the other side remains committed to an unreasonable position, then the mediator knows where the problem lies, and can expend maximum effort to discover the basis for the resistant party's intransigence, and attempt to dislodge the party from an unreasonable position.

Foster Cooperation With All Constituents

In construction disputes, the disputing parties naturally separate into "owner's side" constituents and the "contractor's side." The owner's side may include the owner's staff and other representatives (often, an engineer or construction manager who is not a direct employee of the owner), the architect, and in some instances sources of financing (such as a bank or consortium of lenders). The contractor's side may include the contractor's staff and a host of outside consultants, sub-contractors and material suppliers, as well as the contractor's insurer or surety. In broad terms, the "big picture" question in settlement is whether money flows from the owner's side to the contractor's side, or the other way around, and in what quantity.

The "sides," however, may get even more complicated. On a public project, for example, more than one agency (and more than one source of funding) may be involved. The same is true on a public-private combined project. And, for certain public projects, settlement can only be authorized "on the merits" (i.e., the settlement must be justified in detail before the responsible agency will approve), and multiple layers of approval may be required. In many instances, moreover, not all constituents are available for mediation. Absent arrangement to postpone mediation, the parties and the mediator must work with what they have got, even if the roster of constituents is not complete, or some of the participants do not have full authority to settle.

On the "big picture" question (directionality of money flow and amount), the members of each side (owner and contractor) may be generally united in common interest. Subsidiary to that "big picture" question, however, is the share of money received (on one side or the other) and money paid (on the other side) by the constituents of each side. And, even if the "big picture" question is not resolved, certain constituents may insist on resolution (by settlement or formal dispute resolution processes) of their particular claims. Thus, for example, a sub-contractor may demand payment even though the contractor has not been fully paid (or the contractor has additional claims against the owner). And an owner may call upon a surety bond, even though the contractor's liability for project defects and lateness remains to be established.

With so many interacting parts, a construction dispute can present substantial challenges, for the parties, their counsel and the mediator. The first step is to recognize (and to inform the mediator of) the roles and conflicts of the various constituents involved in mediation. If a significant constituent will not be part of the mediation process, the mediator must adapt the process to address the available cast of characters. Further, organizing calls or introductory meetings may be appropriate, with each main side's constituents (individually or collectively), aimed at helping orient the mediator to the dynamics of the dispute, and offering suggestions for methods to adapt the mediation process to the parties' needs.

Finally, within the constituency for each side, there should be some rough agreement on the preferred methods and logistics for conduct of the mediation. Will all constituents submit separate pre-mediation statements and make separate opening statements? Will they sit in separate caucus rooms (and, if so, has enough space been reserved)? Is the aim to resolve the "big picture" question first (or something else)? How will decisions be made, within each side's

constituency, during the course of the mediation? These questions, and many more, may be addressed through pre-mediation discussions.

Bomb-throwing and resistance in the run-up to mediation can doom the chances for successful negotiations. Where possible, fostering a spirit of cooperation best serves everyone's interests. Be the party that suggests and facilitates discussion of mediation logistics and processes. Be the party that offers alternatives, and is willing to compromise, on structuring the mediation. These and other similar gestures of cooperation and good faith give you a "place at the table" (as plans for the mediation unfold), and they mark you as a prepared, organized and credible participant in the negotiations.

Establish Authority To Settle (And Know What Limits Apply)

It is common for mediation agreements and court rules to require that parties appear at a mediation with settlement authority, but that general direction does not answer the specific questions that may arise in the context of a construction project. For a company involved in a substantial dispute, board approval may be necessary for settlement (or settlement above or below a certain range). For a public authority, a specific process of approval may be mandated by statute or agency regulation. For settlement by a representative (e.g., a contractor settling on behalf of a sub-contractor), a specific "liquidating agreement" may be essential. If an insurer will make some or all of the settlement payment, the insurer's approval will be required.

The question of authority is not something that should arise for the first time at the mediation (or worse, arise only after the parties think they have come to an agreement). To ensure implementation of any settlement derived from the mediation, parties should discuss the question of authority in advance. It may be that not all affected parties can participate in the

mediation, or that unlimited authority to settle cannot be established in advance of mediation. And it may be that no deferral of mediation can solve such problems. But parties should know, going into the mediation, whether they have authority to settle, and whether the other parties involved also have such authority, and they should know, if the authority is limited, what process will be required to implement any settlement that results from mediation. The question of authority not only affects the ability of parties to settle; it also affects timing of payments and other steps that may be required as part of the settlement (e.g., release of liens).

Get Creative

When it comes to the matter of compensation and remedies, generally, the more variables at play the better. If the question is only who will write a check, and for what amount, the negotiation may stall if the parties cannot approach a comfortable range within which to make a deal. But if there are additional terms, especially additional forms of compensation or remedy, that can be considered as part of the negotiation, then the range may be expanded, and impasse sometimes broken.

Get creative; what parties can negotiate in the course of settlement discussions far exceeds what a court or arbitrator could order as a remedy. The question is: What can you offer the other side that might satisfy some of their needs, with relatively little impact on your side? As a contractor (claiming losses on a project): Could you accept structured payments (over time)? What about an agreement for additional work on other projects? As an owner: Could you accept correction of defective work (perhaps at a reduced rate of payment, or with the owner supplying necessary materials)? What about an extended warranty, in lieu of dollars? These kind of "out of the box" ideas are generally not the first subject of mediation discussions. But,

having such creative ideas in reserve, as "extras" to help close the deal at the end of the process, can be part of smart bargaining.

Many other creative ideas may involve mechanisms for resolution of the intractable portions of a dispute. For example: the main dispute (most often, money allegedly owed the contractor) could be resolved, even though the proportional share of the obligation, among the various defendants, would be left for later mediation (or resolution through arbitration or litigation). So, too, parties may agree to put certain claims in the hands of an independent expert for resolution. Or they may agree to a formula for resolution of a claim, even though the specific number that may result from the formula is not known.

Be Prepared For Potential Impasse

Often in mediation, parties will "draw a line in the sand" and suggest to the mediator (or, directly, to the other side) that they cannot go any further, or that there are certain elements of settlement that are "non-negotiable." Experienced negotiators know that such declarations may be part of settlement posturing. And often what seems to be an essential condition of settlement may become less important, as discussions continue. The key is to keep talking! If there is a sticking point on an issue, the parties may table the question, to be addressed later in the process. Alternatively, they may attack the problem head-on (through the mediator or in joint session) to ask questions: Why is this issue so important (and immovable)? What is the party's actual need with regard to this issue? What information might change a party's views on the issue? What trade-offs exist (in terms of other things of potential value in settlement), to balance a party's position on this issue? Occasionally, a meeting between experts, or between senior executives,

can help to clarify technical issues and expand the range of business options for settlement, thus breaking apparent deadlock.

Aside from preparation for line-in-the-sand tactics from the other side, parties should avoid creating their own easy path to impasse. At least at the outset of negotiations, the essential attitude (and the essential message to the mediator and other side) should be: We are willing to listen to any reasonable proposal. This does not mean that a party cannot be firm in bargaining. It is quite valuable to establish priorities for negotiations, that is, to focus on discussion of issues that are essential to meeting your side's needs. And, in the give and take of negotiations it is entirely appropriate to reject demands and offers that do not meet your needs.

What parties should especially avoid is the view that: If the other side does not agree to one or more essential terms, then there cannot be a deal. That view is short-sighted, in that it is quite possible that, through discussions, the parties and mediator may arrive at solutions that were not previously considered. And it is also quite possible that an opposing party may change its initial rejection of your position, in the course of further bargaining. Maintain commitment to the process, and encourage the other side to do so as well.

As the process progresses, moreover, there may be a temptation to walk out (or threaten to walk out) of the mediation. Parties in construction are used to "hard bargaining," and the walk out is a familiar tactic in some circles. The walk out in mediation, however, typically cuts off communication (a key to successful mediation). And it can send the wrong message, giving the impression that your side's legal position is too weak to defend. Worse, a walk out, followed by a return to bargaining, detracts from credibility, suggesting that your words ("I will not bargain

further") are not to be trusted. And, if a walk out returns the parties to the heat of litigation, the momentum toward successful settlement may be entirely lost.

Instead, if the process has reached an apparent impasse, and especially if the parties are tired, they may best adjourn the mediation, to continue negotiation (by phone, or by scheduling a further mediation session) at a later date. Indeed, if the parties agree on nothing else, they can at least discuss (and preferably agree on) a "way forward" in the wake of a mediation session that has not produced settlement. Use the mediator to provide insights and alternatives for continuing the process, and to ask questions about the needs of the parties. What should be the schedule for further negotiations and mediation? Is there some additional information exchange or analysis that could change the parties' views? Is there an additional participant required for decision-making in any future mediation session? Should the parties wait, for developments in the arbitration or litigation that may affect their calculus of risk and cost? Is there a business or financial circumstance that could affect the calculus? In effect, the parties, with assistance, can "mediate about the mediation." The parties may "agree to disagree" about the merits of the dispute, but if they walk away from a mediation session with some hope that continuing the process may still yield benefits, and with a relatively specific plan for the continued process, they help carry the momentum toward eventual successful resolution.

On occasion, at the point of impasse, parties may invite the mediator to make a non-binding evaluation of the dispute (in the form of an opinion as to likelihood of success of the parties on the claims and defenses advanced, or in the form of a "mediator's proposal" as to a settlement framework that appears reasonable). This step is not to be taken lightly, however, as from that point on the mediator's position is not entirely neutral, and further mediation efforts may be impaired.

In some instances, parties can obtain at least partial settlement of their dispute, or settlement of the dispute between one pair of disputing parties, but not everything else involved in the matter. Such partial settlements are much better than nothing. They show that settlement is possible, and they tend to encourage additional efforts at settlement by the remaining group of disputants.

Even if there is no settlement at all, parties often can narrow issues for formal proceedings (in arbitration or litigation), or they may brainstorm about how to separate parts of the larger problem for resolution through continued mediation. Parties may use the mediation process, for example, to agree on the focus of additional discovery, which can perhaps help return the parties to negotiation, or at least streamline the process of formal dispute resolution.

Finalize The Settlement

Successful mediation typically results in an agreement on the "big picture" elements of negotiation, chiefly the amount of money to be exchanged. In theory, a "handshake" agreement on the money alone could suffice to conclude a settlement. But there have been cases where parties left a mediation, thinking that they had (orally) settled a matter, only to learn later that another party's view of what had been settled was unclear: as to amount, as to scope of claims resolved, as to conditions for settlement, or other grounds. There is also the danger of "buyer's remorse," where a party (after mediation) comes to believe that the deal is not as fair or valuable as originally conceived, and may invent excuses (including debates about what actually was settled) to scuttle the deal. As Samuel Goldwyn supposedly once said: "An oral contract isn't worth the paper it's written on." While oral contracts are often enforceable, it is far preferable to

have a specific, written agreement (at least a Term Sheet listing major points of agreement), signed by the affected parties, as clear evidence of what has been agreed.

And there are important aspects of a settlement (other than money) that should be agreed before the parties leave the mediation site. Is the settlement confidential? If not, what statements (if any) may the parties make concerning the settlement? What parties will be released by virtue of the settlement? For sub-contractors and suppliers, for example, will the contractor take responsibility for obtaining releases? How will any liens on the project be extinguished? How will warranty and indemnity issues be addressed? These kinds of questions should not be resolved before the parties declare the mediation process closed. And, it is often difficult to take up these issues at the very end of a mediation day (perhaps the wee hours of the next morning), when all participants are tired and anxious to leave.

The solution is to plan for completion of the settlement, at least as to principal terms, before the parties even enter the mediation rooms. It may be that counsel can discuss and agree on the form of a Term Sheet (with some specific terms, such as monetary compensation, to be filled in), before mediation begins. Or a list of key elements of a settlement may be part of the opening statements at mediation. At very least, it is extremely helpful to have a form of Term Sheet prepared, in advance of the mediation, and to bring the Term Sheet draft (in electronic form) to the mediation, so that it can be studied by the parties, and modified as necessary, to create a final, mutually-agreed form, fit for signature, before the parties leave. It is entirely possible that the parties will agree to draft a more complete set of settlement papers, based on the Term Sheet, after the mediation. But major misunderstandings and conflicts can best be avoided by making sure that there is an enforceable agreement before the mediation ends.

Follow Up, And Debrief

If the mediation yields a settlement, in most instances, there will be some follow-up work to do. The follow-up may include drafting and signing a more definitive settlement agreement (beyond the Term Sheet that might be executed at the mediation). If the settlement arises out of arbitration proceedings, the parties may wish to have the settlement entered as an agreed order of the tribunal. If it arises in litigation, some form of dismissal agreement or stipulated order may be required. Follow-up on settlement also includes, however, some of the logistical aspects of the mediation, such as final payment of the mediator (or payment through the mediation-sponsoring organization). Typically, upon discharge of the mediator, the parties and the mediator have no further relationship, and the mediator should destroy any records of the mediation. A notice to the mediator regarding termination of the process may be appropriate, for that purpose.

If the mediation does not yield a settlement, or if the settlement is only partial, then the parties must plan for their next steps in resolving the dispute. It may be that the conclusion of the mediation session addresses questions of timing and form for further negotiations. If not, then those kinds of questions should be addressed promptly after the parties leave the mediation site. Keep the momentum of negotiations moving, by suggesting a reasonable schedule and structure for further discussions.

It may also be that the mediation leads to the conclusion that the case cannot be settled. If so, the parties should at least capture some of the benefits of mediation by taking what they have learned about the dispute to plan the remaining course of formal dispute resolution (discovery, motions and trial processes).

In all events, after any mediation session, conduct some form of debriefing within your own negotiating team. What worked during the mediation? What did not work, and what alternatives might better enhance the process in the future? Every mediation is unique, but "lessons learned" from successful (and even unsuccessful) mediation can help guide strategies in future proceedings.

Conclusion

Surveys show that sophisticated parties and their counsel believe that mediation is a useful tool for inexpensive, private dispute resolution that allows parties to maintain control of the process, avoid the delays and expense of arbitration or litigation, and adapt the process with great flexibility to meet their needs. Mediation may be especially appropriate in the kind of multi-party, complex disputes that often arise out of construction projects, where no other mechanism can so readily bring constituents into a single forum, with a relatively efficient structure for dispute resolution. When parties arrive at their own solution to a dispute, moreover, there is generally a higher likelihood of compliance with the agreed settlement terms, and (where relationships continue) a better chance for productive cooperation in the future. Even where mediation fails (in the sense of no final resolution of a dispute) parties often obtain a better understanding of their dispute, which can aid subsequent negotiations, and improve the efficiency of a trial or arbitration hearing, if the matter cannot be resolved.

But mediation is a tool, which is most effective when used with appropriate preparation. As they say in carpentry: "Measure twice; cut once." So too in mediation. The aim of this Article has been to aid parties and their counsel in such preparation.