MEDIATING THE CONSTRUCTION DISPUTE

KEYS TO SUCCESS (OR FAILURE)

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I. Introduction – *Why Mediation*

A topic that fills the pages of multiple articles and books, consumes days of lecture and is the subject of much debate may be distilled to its essence with a few basic considerations. "To resolve the dispute" is the typical response received when attorneys are asked why mediation was selected. (That or "The Judge made me."). But the question remains, "Why mediation?" Trials resolve disputes.[1] Why is mediation an attractive alternative? One answer seems self-evident – trial lawyers should want to control the risk of loss. A negotiated resolution through mediation has certainty. The parties having a right of self-determination control their own destiny rather than leaving it for a third-party to decide.[2]

Another answer also seems self-evident, cost control. A mediated resolution avoids the continued cost of litigation and trial. Unfortunately, this concept of cost control is overused by both litigants and many mediators as a reason to settle in mediation. While cost control is certainly a consideration, it is not the singular consideration particularly where the value of the dispute greatly exceeds the cost of litigation and trial.

"Justice" and "vindication" – are these also answers to the question of "Why mediation?" Usually concepts discussed in the context of non-commercial disputes, these concepts are still debated in the commercial disputes setting. Yet, what most clients (and many attorneys) fail to recognize is that while the laudatory function of the court system is to dispense justice, the reality is that "there is no such thing as justice, in or out of court."[3] Moreover, trials are usually exhausting to counsel and clients alike. And, where a "win" is fleeting and a "loss" remains forever, trial is a poor substitute to negotiated resolution. Therefore, if trial is a poor substitute, what is mediation?

Mediation is opportunity. An opportunity to resolve the dispute without the risk associated with a trial and often on terms more favorable to the client when all factors are considered. Yet, despite this opportunity, many trial attorneys approach mediation as nothing more than a casual get-together to talk about the case and see if it will settle. However, if trials are not casual get-togethers (not unless you want to significantly increase your odds of a loss), why should mediations be treated differently? Unfamiliarity or uncertainty about the mediation process might be an answer. A lack of a sense of urgency because there is always a trial if the case does not settle might be another. But, are the best interests of the client served? If the risk of loss is limited, if a more favorable outcome is available to the client, and if the cost of litigation is curtailed, then a client's interests would seem to be best served by embracing mediation and participating as seriously as though the matter were being tried.

However, there is more to going to mediation than being accepting of the process and willing to talk. As with a trial, parties (attorneys and clients) must prepare for mediation. What are our strong points? What are our weak points? How do our weak points compare to the other side's view of our case? What happens if we lose? These questions and more need to be considered prior to attending the mediation

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[1] Throughout, where "trials" are referenced, binding arbitration is included.

[2] Florida Rules for Certified and Court-Appointed Mediators, Rule 10.310.

[3] Clarence Darrow.

and will likely need to be re-evaluated during the mediation.

II. What's the Dispute?

> *"Law is not justice and a trial is not a scientific inquiry into truth. A trial is the resolution of a dispute."*
>
> *Edison Haines*

If a trial is simply a resolution of a dispute, then how does mediation differ? Mediation is a unique opportunity for parties to collaborate on a resolution of a dispute as opposed to acting as combatants girding themselves for battle. But to take advantage of the opportunities mediation offers, parties should not lightly prepare believing that if the matter does not settle, then preparation for trial can commence. To collaborate, to work together towards a common goal – resolution – requires the parties to communicate about the dispute. If one party or the other does not truly understand the dispute, communication and the opportunity to collaborate on a resolution of the dispute fails.

To understand the dispute, the parties certainly must know the issues in their case. But that is not enough to be adequately prepared to collaborate on a resolution through mediation. To be prepared for mediation, the parties must also understand the risks of loss they face if the matter is to be resolved by a trial. Moreover, truly prepared parties anticipate, appreciate and understand the other side's position; they do not merely defend against statements made. Appreciation and understanding of the other side's position serves as a guide for the evaluation of the party's own risks that must be explored before mediation is drawn to an impasse.

While other factors may weigh into knowing the dispute, the foregoing – 1) Know the Issues, 2) Know the Risks, 3) Anticipate/Appreciate/Understand, and 4) The Demand – are necessary elements to successful mediation. Despite the acerbic nature of Mr. Haines' statement, experience suggests that trials *are* merely resolutions of disputes. The question parties should answer in deciding whether to faithfully prepare for mediation is "Are you willing to let a third-party decide your fate, or is it better to decide yourself?"

A. Know the Issues.

Every case is made up of two basic components – the law and the facts – which seemingly define the breadth of the issues to be considered in any case. Thus, the most basic question to be answered in any case is "how do the relevant facts relate to the applicable law?" However, in a technical industry such as construction this seemingly simple question can quickly become significantly more complex. First, construction law (as it is typically understood from statutes and case law) is often not well developed in any given jurisdiction. Even where components of construction law are codified, such as Florida's Construction Lien Law, vagaries or conflicts within the applicable statutes require the practitioner to consider the purported underlying policy as to why the law was developed. Additionally, the practitioner may be required to look to other jurisdictions for guidance as to how construction law has developed elsewhere. Thus, to answer the foregoing question, the construction law practitioner is often required to interpret what the applicable law is to which the relevant facts will be applied.

Second, "the law" is more than just statutes and case law; the law includes the contract. And, it is not just that part of the contract typically referred to as the "front-end." "The law" also includes the technical specifications, the plans and change orders. Thus, to understand the applicable law often requires the practitioner to become familiar with the technical components of the scope of work to be performed. Because of the technical nature of some of the issues, there is often an inherent need for expert input and advice. Such an inherent need is not in itself problematic, but it comes with concerns.

Blind reliance upon an expert without truly understanding the basis and substance of the expert's opinions has been the downfall of many trial lawyers.

Third, determining the relevant facts – "separating the wheat from the chaff" – often comes at an exorbitant cost to both client and counsel. Up to five years ago, even the most basic construction case came with it a veritable forest of harvested trees to document the travails of owner, designer and contractor during the Project. Today, deforestation has started to give way to the digital age, but it too has a cost. As casual as a phone call, but saved in perpetuity, e-mails and texts are the bane of the practice. No longer are electronic document productions discussed in terms of megabytes; terabytes (10^{12} bytes or 1000 gigabytes) is the new standard. What is the answer? Only time will tell. However, one solution is an iterative process between client and counsel to truly define the essence of the dispute to better identify the key relevant facts that are to be applied to the law.

In addition to knowing the issues in the case, the successful practitioner knows the issues that are outside of the case, but which directly influence decision-making. Are there financial issues? Are there "message" issues? Are there emotional issues? Even in a commercial setting, egos have been known to snatch defeat from the jaws of victory. To better understand these issues that lie outside the case itself, open and frank discussions with the client are required.

Why is "knowing the issues" important to the mediator and mediation process? While the mediator does not decide the case, the mediator is the guide along the path of self-determination. If one party or the other (or in some situations, both) does not "know the issues", the mediator will likely spend significant time simply trying to get the parties to communicate about the same issues allegedly in dispute. Frustration quickly develops, jeopardizing a mediator's ability to bring the parties together. Worse, without the parties traveling paths that ultimately intersect, resolution of the dispute will be removed from their control. Resolution is then left to a disinterested third-party who will not be as well versed on the issues as the parties.

B. Know the Risks.

Construction lawsuits are typically filed because two parties believe their respective positions to be eminently correct.[4] But as a trial attorney, have you experienced the motion, hearing or trial that should have been won that was, in fact, lost? Mediation is the opportunity to explore the boundaries of "risks" in a case without actually having to experience them. To take advantage of that opportunity, the prudent trial attorney should critically consider the risks before walking into the mediation. Like a failure to know the issues, a failure to know the risks of loss will often impasse a mediation – at times, quickly.

There are three basic risks of loss that routinely appear in construction litigation: 1) Damages; 2) Cost of Litigation; and 3) Defendant's ability to pay. Like "issues outside of the case" discussed above, other additional risks may be relevant for consideration: 1) a client's loss of respect or standing; 2) future exposure for a project or an issue; and 3) loss of future work. How these risks are evaluated is particular to the action being litigated and each client. Consequently, attempting to address here some standard by which risks should be addressed is a *non sequitur*. However, the question of when to evaluate risks is worthy of discussion.

Risks of loss are not constants; they are ever changing given the fluid nature of litigation. An evaluation of damages at the beginning of a case may be radically different than just before or even during trial. Thus, it would appear that the best course of action to determine the risks

[4] Or they are filed because one party or the other (or perhaps both) believes that once the litigation is underway, the other side will "cry uncle."

associated with damages is to play out the entire litigation until just before a decision is rendered. However, that practice would obviously run counter to concerns over "cost of litigation" and perhaps "future work." Thus, while the best information about damages may come on the eve of trial, the prudent practitioner, looking out for the best interest of the client, attempts to evaluate the risk of loss associated with the case as early as practicable.

Notably, an early case evaluation of the risks of loss does not end the inquiry. New documents come to light which your client only now remembers. Witnesses confident in pre-deposition preparation become shadows of their former selves once being interrogated under oath. Expert witnesses make underlying and undisclosed assumptions in performing their analyses which once brought to light change the complexion of their opinion. Clients, having felt the pain of litigation (going from "I don't care what it costs, sue!" to whimpering "When are the bills going to stop?"), have a change of heart. The court issues a substantive decision affecting the case. And, while reviewable on appeal, how likely is it to be overturned when it is ultimately reached? These factors, among others, can change an evaluation of the risks of loss.

Too often, though, parties to mediation have not fully assessed or evaluated the risks of loss in advance of mediation. Instead, mediations are often viewed as a subset of trial where parties are determined "not to show weakness" even in the face of peril. While there is a risk in mediation to "setting a floor or ceiling" relative to the damages by offers or demands exchanged, failing to candidly explore the boundaries of the risks of loss often assures a trial on the merits. To take full advantage of the opportunity for resolution offered at mediation, parties should first come prepared. The lack of preparation, as discussed above, either increases the cost and expense of mediation or dooms it to failure.

C. Anticipate/Appreciate/Understand the Other Side.

The study of law is more about the process of getting to a result than necessarily the result itself. The critical, impassionate analysis of the law and the facts leads to the natural result whatever that may be. The practice of law (particularly litigation) is all about the result. The facts are presented in the light most favorable to the client; the law is argued to square with the facts. While that is the nature of our adversarial system, the training received and the ability learned in law school are often squandered in practice. Whether viewed as unnecessary or overlooked due to time (or budget) constraints, critical consideration of the other side's position is sometimes overlooked. That loss is regrettable because the result is an impaired ability to appreciate and understand the issues and to properly evaluate risks.[5]

To fully prepare for resolution, whether through trial or mediation, effective trial attorneys anticipate the other side's argument, appreciate the positions taken and understand from the other side's perspective both sides of the case. Notably, appreciation and understanding do not necessarily equate to agreement. Rather, they represent an ability to critically evaluate the strengths and weaknesses of a position so that the interests of the client are better served.

Because mediation is a path of self-determination, the boundaries of risks may be explored without the certain finality of a trial. A client and its counsel can discuss

[5] Critical consideration of the other side's position is often a fine line to walk in practice. At once, trial lawyers are to be advocates (champions of their clients' position) and counselors (whispering "All glory is fleeting"). Taking a counselor role prior to trial often results in clients stating "Well if you don't believe in our case, maybe I should get someone else." After trial, the advocate may be berated for not fully advising the client of the risks associated with a trial. How these two conflicting views are reconciled often distinguishes the good trial lawyers from the great trial lawyers.

openly the strengths and weaknesses of their position. The attorney can test arguments and theories and gauge reactions without concern that the ultimate decision maker (judge or jury) looks askance at the position being taken and reaches conclusions before the close of the entire case. The mediator can aid in expanding the client's own appreciation and understanding of the whole of the case, often acting as a foil to the trial attorney's advocate role or aiding the trial attorney in the counselor role that must be taken. Whether that open and frank discussion is part of a joint session or private caucus is the subject of some debate. However, irrespective of that debate, the opportunity to explore the risks is significantly diminished if the attorney does not engage in the exercise of anticipating, appreciating and understanding the whole of the case prior to engaging in mediation.

D. The Demand.

Whether through a lack of understanding of the issues or some perceived litigation-oriented bargaining method, there appears to be a hesitancy on the part of some plaintiffs and their counsel to credibly and critically evaluate the damages being sought sufficiently in advance of mediation. Even where there has been a critical evaluation of the damages, a demand is not formulated and communicated to the other side until the day of mediation. In some settings, such as in personal injury matters where non-economic damages are at issue, damages may be difficult to quantify.[6] However, in the vast majority of construction disputes damages should be readily quantifiable. Accordingly, there is no justifiable basis not to formulate a demand in advance of mediation.

There are two primary factors which should be considered when formulating the demand. The first is obvious – what level of recovery does the client desire? The other is not as readily apparent (or is at least overlooked). Credibility is crucial to the collaborative process of dispute resolution that mediation represents. What does it say of the plaintiff's credibility when the demand bears little relationship to the damages sustained? Similarly, a credible, cogent demand demonstrates strength of position and communicates confidence. Wildly unsupportable demands often suggest that the plaintiff is trying to overcome deficiencies in its case by making the perceived risk of loss on the defendant greater. More times than not, however, such fantastical demands have the opposite effect and simply drive the defendant to the conclusion that negotiation is simply a waste of time and resources. Thus, the message communicated with the demand is as important as the need to make a demand in advance of mediation.

Similar comments apply with equal force to the defendant's offer. Obviously, the offer reflects a desire to pay as little as possible towards the plaintiff's claim. However, unrealistic offers which do not critically consider the risks and the defendant's exposure to damages hardens a plaintiff's position. "Why should I come off my number until they make a credible offer," is often the response when the defendant's offer is communicated through the mediator. Plaintiffs left with no alternative but to try the case, take up the thrown gauntlet and a trial ensues. Thus, both plaintiff and defendant should give serious and significant consideration to demands and offers made to foster a climate that encourages rather than discourages a collaborative process to resolution.

Establishing and communicating the "demand" should be done sufficiently in advance of mediation, not the day of. Irrespective of whether insurance factors into the case or not, the defense will need time to perform its own "risk analysis." While mediations often contemplate that a person with authority attends the mediation, the reality is that a defense "committee", not

[6] Yet, even where the damages may be difficult to quantify, plaintiff's counsel is not excused from communicating a demand sufficiently in advance of the mediation to allow the opposing side to evaluate it.

always present at the mediation, has established a maximum amount to be paid. Therefore, it benefits the plaintiff to sufficiently educate the defense in advance of mediation so that the defense attends the mediation with at least an appreciation and understanding of the plaintiff's case. While not a guarantee of success, mediation is about opportunities; the more done in advance to improve those opportunities bodes in favor of a successful resolution.

For those occasions where a plaintiff has not established and communicated a "demand" in advance of mediation, it does not benefit the defendant to simply refuse to participate. Despite protestations to the contrary, construction defendants often have a wealth of knowledge about the dispute available to them irrespective of what a plaintiff may provide. Critically evaluating the dispute and performing a risk analysis in advance of mediation will serve well the defendant's interests. In addition to fostering continued negotiations by being able to credibly respond to the plaintiff's assertions, the defense may be able to educate the plaintiff and require a re-evaluation of their position. Unlike any other time in a case, attorneys are able to communicate directly with the other side's client.[7] Such an opportunity should not go unused. Even if the defendant's efforts that day are not successful, the foundation for a negotiated resolution may be laid.

Defendants should also consider carefully not just the amount and nature of the first offer made prior to mediation; defendants should give careful consideration to whether that offer is communicated in advance of the mediation. Certainly, a communicated untenable offer may result in termination of the mediation before it begins; but, untenable offers should not be presented in the first place unless the intended result is to assure a trial on the merits. By communicating a reasoned offer in advance of mediation, the boundaries of the dispute can be set prior to arriving at the joint session. Rather than spending time and effort simply defining the dispute, the mediator can then collaboratively work with the parties towards a resolution of that dispute.

E. A Well-Defined Dispute

Whether for a client meeting, a hearing before the court, or a trial, preparation is an inviolable rule; attorneys participating otherwise do so at their peril. An attorney's approach to mediation should be no different. While a failed mediation may not result in the immediate consequences of attending court unprepared, a failed mediation represents a loss of opportunity for the client to resolve its dispute without the attendant risks associated with trying a case. Thus, failing to resolve a dispute in mediation due to a lack of preparation is no less a disservice to the client than attending court unprepared.

Importantly, preparation for mediation does not represent a separate path from preparation for trial. Whether for mediation or for trial, attorneys must know the issues and anticipate, appreciate, and understand the other side's position. How else are trial plans and strategies properly developed? Moreover, evaluating the risks is not simply saved for negotiations. Credibility is critical in a trial; unfounded and untenable positions severely damage a party's credibility. Without evaluating the risks, trial preparation is incomplete. Lastly, for the same reason the demand is important in a negotiation setting, the underlying message sent to the trier-of-fact through the demand should weigh heavily on trial counsel.

Stated simply, the opportunity for success in mediation is enhanced if a party is well prepared. Obviously, such effort is rewarded if a negotiated resolution is reached. Notwithstanding a resolution, the effort is rewarded because the party will be better prepared to try the case. Thus, irrespective of whether a dim view is taken

[7] Though raised in context of the defendant addressing the unprepared plaintiff, the same environment exists for the plaintiff.

about the prospects of mediation, preparation is not a wasted effort and should be taken seriously.[8]

III. Pre-Mediation (*Help me help you)*

The vast majority of civil cases represent relatively straightforward disputes which do not require the same level of preparation to mediate or even try as complex construction cases require. Trial exhibits in such cases often number in the handful and can be carried easily in a trial briefcase. Comparatively, for even the most basic construction dispute, trial exhibits number in the hundreds (if not thousands) and require a band of foot soldiers to tote the weapons of war. If the dispute falls into the former category, this Section may seem overkill. If the dispute is the latter or anything beyond, significant consideration should be given to the needed level of pre-mediation effort.

As this field of alternative dispute resolution continues to develop, various theories are espoused as to the process of mediation. One such theory advanced is that a mediator's knowledge of the nature of the dispute and the particular area of the law is unnecessary to the mediator being effective in bringing the parties together. Instead, what is posited is that mediators only need to facilitate discussions between the parties so that the parties resolve the dispute as between themselves. However, in a technical industry such as construction, is a mediator truly effective as a guide along the path to resolution if the mediator does not know how to read a map? Mediators who come to the mediation without any insight as to the industry or the dispute find themselves in only a slightly different position than a juror or the trial judge unfamiliar with case. Before any substantive discussions can proceed, the parties must spend time educating the mediator as though the mediator was actually going to make a decision. That effort, though, diminishes the process because rather than spending time educating the mediator, the parties should be focusing their attention on communicating their respective positions to each other. Therefore, to facilitate the mediation process, the parties should actively engage in pre-mediation communications with the mediator. How that looks and the depth and complexity of such pre-mediation efforts are determined based upon the case itself. However, counsel and clients should deliberately engage in a pre-mediation effort as part of the process of being prepared for the mediation.

A. Selection of the Mediator

From the lead-in it should not be surprising that the selection of the mediator is not to be taken lightly if the goal is to give the best effort to a negotiated resolution. *"Just go with whomever the other side wants,"* is often the reaction from one party or the other supremely confident in its position. The underlying logic is that if the other party hears from "their guy" the weaknesses in their position, then "they will be more likely to listen to reason." But what happens if "their guy" is unable to truly explore the boundaries of the other side's risk of loss; has that mediator served the function anticipated? Or, what happens if "their guy" challenges your position; will you critically consider and evaluate what is said or dismiss it as, "Of course, you would say that, you're their guy"?

The parties should select a mediator in whom both parties have confidence will not come pre-disposed to a party or position. The parties should have confidence that the mediator is not there to adjudicate in favor of one side or the other. Rather, the mediator should be an unbiased, neutral participant to the collaborative process of mediation. That is not to say that the mediator should be an impassionate, tone-deaf automaton who merely communicates

[8] In fact, lack of preparation for mediation simply because one side or the other (or both) believes the prospects of actually resolving are remote becomes a self-fulfilling prophesy to the detriment of no one else but the clients.

each party's latest offer or demand. The mediator should be "passionate" and embrace the collaborative process of negotiated dispute resolution, actively engaging the parties to test the boundaries of their respective risks of loss.

In a highly technical industry such as construction, the mediator's background and experiences should also be considered. Does the mediator understand the various facets of construction law? Is the mediator familiar with the various terms of art the industry uses to communicate? Has the mediator been in the lawyer's position of trying to balance the role of advocate and counselor? Has the mediator faced the various risks of loss often prevalent in construction litigation? The right mediator further enhances the opportunity of a successfully negotiated resolution. The wrong mediator can assure a trial on the merits.

B. Pre-Mediation Conference (*Enhance your opportunity for success)*

Simply, a pre-mediation conference is an *ex parte* meeting with the mediator in advance of the actual day of mediation. Whether it is necessary or simply the mediator "gaming the system" depends upon the nature and complexity of the case. The day of mediation comes attached with it preconceived notions of success and levels of anxiety and expectation. Clients, unfamiliar with the process, presuppose a level of formality and definitiveness normally attached to a trial. Meeting with the mediator in advance does not have appended to it such expectations (or dread of the prospect of failure). Accordingly, parties are often more comfortable to openly discuss issues in the case. Moreover, the mediator can help explore with the parties expectations for the actual day of mediation and help allay client concerns regarding the formality of process (in other words, help calm frayed nerves). Lastly, educating the mediator about the various nuances of the dispute prior to the day of mediation facilitates substantive discussions that day. Accordingly, pre-mediation conferences begin the process of the parties developing rapport and trust in the mediator.

As stated, whether a pre-mediation conference is worthwhile depends on the case itself and the interest of the parties. If done, the parties should be prepared to:

1. Provide a basic summary of the case;
2. Identify the central issues in dispute;
3. Identify the primary risks of loss associated with case; and
4. Discuss concepts of a successful resolution.

Conversely, the parties should not expect "agreement" from the mediator regarding the righteousness of their position. The mediator should be absorbing information and discussing a format for collaborative discussions during the mediation itself.

As an aside, stress inherently exists between mediator and advocate/litigant. Some mediators, believing their jobs are made easier, pressure the parties to give their "bottom line." Advocates, believing that the mediator will simply work towards the stated "bottom line," are reluctant (or refuse) to acquiesce to the mediator's request. Neither position is correct; nor incorrect. Instead, the respective positions are premature at this stage. However, a discussion regarding what each party believes to be a successful (or at least acceptable) resolution provides the mediator insight into later discussions that will and must take place to successfully negotiate a resolution.

Mediations are in part a process of developing trust and confidence and an understanding of negotiating styles. Pre-mediation conferences advance that process so that the day of mediation itself may be better focused on the parties and developing their collaborative discussions of the dispute. While not appropriate (or needed) for every construction case, pre-mediation conferences do benefit the entirety of the mediation.

C. Confidential Pre-Mediation Statements

Pre-mediation statements should be designed to equip the mediator to better facilitate discussions regarding the dispute, to probe the parties' respective positions, and, to enhance the opportunity for a negotiated resolution. A pre-mediation statement is **not** a tool for the mediator to tell one party or the other that they will win or lose. Deciding the dispute is simply not the mediator's role.

A pre-mediation statement is akin to an opening statement for trial; an outline of the case which addresses the fundamental and basic components of the dispute and foreshadows discussions to come. The pre-mediation statement should be concise and direct. Central issues are defined. Primary participants are identified and their respective roles explained. The status of negotiations, the case and the trial date are set forth. If known, the other side's likely response should be discussed. Lastly, parties should also discuss how they anticipate the day of mediation is to proceed particularly where no pre-mediation conference will take place.

A pre-mediation statement is not a closing argument. It is not a treatise on the case. Nor is it an opportunity to complain about the litigation process such as the discovery abuses the other side has committed.[9] Lastly, a pre-mediation statement is not a forum to engage in "name calling." Just as the mediator is not judge or jury, a mediator is not a referee or an umpire. Attempting to color a mediator's view of a party is the antithesis to the collaborative nature of the mediation process itself. More practically, it often backfires. A party knowledgeable and confident in its position, who has assessed the risk of loss, and who appreciates and understands the other side's position, should not debase the clarity of its position.

Though the last comment may appear to suggest that mediation must be a "love-in" where participants hold hands and sing "Kumbaya," it does not. There is a significant difference between a vigorous (and at times heated) debate about the dispute and making *ad hominem* attacks that have no bearing on the dispute at issue. A vigorous debate can often assist in refining the scope of the dispute and bring clarity to the issues. *Ad hominem* attacks only serve to cut short an opportunity to resolve the dispute through negotiation. Admittedly, it is a fine line at times between the two and a heated debate can often digress into something worse. However, knowing in advance the various participants and the dynamics can assist the mediator in keeping the discussion focused on collaboratively resolving the dispute. Thus, for several reasons, a pre-mediation statement is a valuable tool and aid to both the mediator and the mediation itself.[10]

D. What is the Goal of These Pre-Mediation Efforts?

Quite simply, if mediation is to be successful, the parties must engage in the process seriously and prepare accordingly. At a minimum, drafting a pre-mediation statement should force counsel to know the issues, evaluate the risks, and begin thinking about the other side's position. If done correctly, a pre-mediation statement and conference can aid in developing themes and strategies to be used at the mediation. Lastly, these pre-mediation efforts aid the mediator in being effective as early as possible on the day of mediation. The goal of mediation is to resolve the dispute for the benefit of the respective clients thereby capping their respective risks of loss. The

[9] Notwithstanding, a mediator can, at times, assist the parties in focusing on truly needed discovery which aids in resolving the overall dispute.

[10] Even if the matter does not resolve through negotiation, the pre-mediation statement can aid in trial preparation. It can be, among other things, an overview of the case and a means to develop a theme for the presentation at trial.

goal of these pre-mediation efforts is to give the parties the greatest opportunity of successfully achieving the goal of mediation.

Notably, whether in court or in mediation, credibility is a key to success. Credibility is developed through preparation and directly diminished through the lack thereof. In mediation, you want the mediator to project your position in private caucuses with certainty which will likely not happen if credibility is lacking. Even if the mediator is able to convey your position with certainty, how will it be received if you lack credibility? As an advocate, you want the other side to appreciate your position and to re-evaluate and reassess their risks of loss. If you lack credibility, you will likely harden the other side to their position as opposed to bringing them to yours.

IV. The Joint Session Presentation

Mediation sessions are typically divided between a joint session and private caucuses. How the joint session is orchestrated should be considered in advance of the day of mediation. What will be discussed; are presentations going to be made; and who will present are basic questions which cannot be properly addressed the day of mediation. Like opening statements at trial, what is said during the joint session can set the tempo for the mediation and may color the entire process. Accordingly, like so many other things in the practice, preparation is a key to success.

A. To Do or Not To Do?

> *[T]hat is the question: Whether 'tis nobler in the mind to suffer the slings and arrows of outrageous [comments unresponded], or to take arms against a sea of troubles and by opposing them? [To force a trial of the matter?]* …[11]

[11]Shakespeare's *Hamlet*, Act 3, Scene 1 (with liberties taken).

The question of whether to make a joint session presentation turns, in part, on the nature of the dispute. In the context of a construction dispute, a joint session presentation tends to be the rule as opposed to the exception. Typically revolving around technical issues, construction disputes are often better defined when both parties participate in establishing the definition. Moreover, while a risk exists that such a presentation could chill rather than foster communications, the presentation should also represent a window into trial if the matter is not resolved. Each party (including the client) then has the opportunity to consider and evaluate the other party's stated position. Has the stated position changed? Did you anticipate the presentation made and appreciate the other side's position prior to mediation? Or, has something "new" arisen which requires a reassessment of risk? The opportunity to reexamine respective positions is made easier if the parties present their positions to each other.

The mediator in a construction dispute also benefits from a joint session presentation. First, even if pre-mediation statements are submitted and a pre-mediation conference takes place, construction disputes tend to be a dense thicket of facts. If a mediator hears the fundamental and key facts more than once it aids in understanding each party's respective position. Second, the mediator is better able to focus the parties on the dispute if the parties have worked together in defining it. Third, a mediator is not an advocate of one party's position over the other and should not be perceived as such. Using the joint session presentation as a guide, the mediator can begin to explore the boundaries of each party's respective risks without sounding like the other side's counsel.

Lastly, each party benefits from their own joint session presentation. The effort to put together a cogent, but persuasive mediation presentation forces counsel to be better prepared in their case. Of course, there is the danger of believing

your own story to the exclusion of all other reasonable interpretations. However, if done properly, the joint session preparation should help focus the trial attorney and client on the risks associated with trying the case.

B. If You Are Going To Do a Presentation, How?

A joint session presentation in a technologically intensive industry such as construction is a fine balance between overloading the listener with details that only serve to cloud the issues and not sufficiently exploring the key facts that make your position understandable. The balance is best struck if three basic principles are applied; be 1) Organized, 2) Cogent, and 3) Persuasive. In applying these principles be certain to speak in terms others can understand. That does not necessarily mean that you should speak to the other side as though they are simpletons. Rather, if there are particular terms of art which may not be readily understood, define them in some way during your presentation. The overall goal of the presentation is to help define the dispute so that both parties may work collaboratively to resolve it.

The other inherent risk in a presentation is allowing the "show" to override the message. Continued advancements in technology have allowed even those technologically challenged to be proficient in creating computer enhanced and/or animated presentations. However, because computer capacity is quickly becoming limitless, there is a tendency to over-include information into a presentation. For example, whole narrative statements are included on one (or more) PowerPoint slide. The presenter then reads the entirety of the slide as part of the presentation which quickly becomes mind-numbingly dull. Alternatively, the presenter attempts to summarize what is written while everyone tries to read the slide, ignoring what is said.

In addition to incorporating too much written text in a presentation, there is often a desire to incorporate what would otherwise be file drawers of correspondence. Or, if one picture can tell a thousand words, why not add fifty? The presentation either becomes a blur as the presenter attempts to cover all of the slides created in the time allotted or valuable time allotted to the negotiations is consumed. The joint session presentation is not the trial of the case. For truly complex matters, it may not even be the opening statement. From an advocate's point of view, the joint session should persuade the other side to your position (or at least cause them to have doubt in theirs). However, the primary purpose of a joint session presentation is to focus and, if possible, refine the dispute to allow both sides to evaluate and re-evaluate respective positions. No decision by a third party is being made based solely upon the information conveyed in the joint session.

Another consideration in preparing the presentation is, "Who is going to be the presenter?" Client representatives who have direct knowledge of the dispute are worth considering because they should lend credibility when statements of fact are made. In the public works setting, many contracts require some type of dispute review process before a lawsuit is filed. Often, in that context, presentations are required to be made by client representatives and not lawyers. Over the years, many sophisticated clients have become adept at persuasively and cogently making dispute presentations. However, the norm in the construction industry is that while clients may be very good within their field of endeavor, that field does not include public speaking. Nervous, rambling, off-topic presentations will do more harm than good. Notably, confidence and speaking ability in a small group setting with nothing but "cheerleaders" on the side is not necessarily a good indicator of public speaking ability. The inherent pressure to perform at their best in the joint session is often the client representative's undoing.

Moreover, expert witnesses (and claims consultants) are not naturally imbued with the ability to be effective presenters. While a person may be an "expert" in their

field because of education, training and experience, it does not necessarily mean that he or she can convey with clarity the substance of their opinion in a manner that is readily understood. A classic example is the scheduling expert. A cottage industry that has grown exponentially with the advent of more refined scheduling software has not given rise to a singular method of analysis that can be easily understood outside of the industry itself. Rather, for every scheduling consultant there seems to be a different process by which they have analyzed the "delay" requiring the use of jargonized terms like "criticality." Even attorneys who work exclusively within the construction industry routinely are required to consume an inordinate amount of time first understanding the method and results of the analysis and then figuring out ways to convey the same to those who have never heard of the Critical Path Method. If the joint session presentation is a window into the trial, the glass should be clear and not opaque. Consider carefully experts and claims consultants as presenters before making that selection.

If the presenter is not the client and not an expert, then it is left to you to present. While trial attorneys should be effective orators, complex facts and positions cannot be effectively conveyed if the extent of the attorney's preparation is to review the presentation someone else put together. Consider examining a witness at trial simply based upon questions someone else prepared without you reviewing the documents. Or, consider making a closing argument based on someone else's outline. These do not appear to be prudent examples of trial counsel doing their job. Neither should the attorney merely recite what is included within the presentation without truly knowing the issues, the facts and material being presented. Mediation serves as an opportunity to control the client's risks; not adequately preparing for the mediation and the joint session presentation is a disservice to the client.

C. When the Other Side Presents … Listen!

Too often opposing clients either ignore the other side's presentation or dismiss it as fantastical. Attorney's focus on how to rebut what was presented as opposed to critically considering the statements made. Advocacy and positioning create reluctance in accepting any of the statements the other side makes. However, appreciation and understanding does not mean agreement. Being open to the presentation does not represent weakness. Joint session presentations are not just about persuading the other side to your position; they are an opportunity to critically evaluate yours.

Have you considered how the other side's position will be received at trial? Are they able to discuss it in terms that are more easily understood than yours? Mediation is an opportunity to limit and fix risk. But to do so, the risk of loss must be understood. Because the risk of loss is not a constant, it should be re-evaluated after the presentations are concluded. And be intellectually honest when doing so. Consider how the other side's position will be understood and received at trial.

D. *Perception is Reality*

How you are perceived is the reality of the moment. Are you prepared and demonstrate a command of the facts? Or, do you lack an understanding of critical facts or law? Are you organized and express yourself in concise and cogent terms or is your presentation merely a stream of consciousness? Are you able to express yourself in terms which are understandable to all or do you struggle with the applicable industry terms of art? These are all considerations in establishing credibility and creating a perception that if the matter does not settle, you have confidence in your position and are prepared for trial.

Demeanor, too, is a consideration in establishing a perception. Confidence does not necessarily equate to arrogance and

aggressive advocacy does not necessarily equate to belligerence. But like in many things, the lines between the two are fine. Confidence conveys certainty and a level of credibility. Arrogance tends to evoke emotions which may chill collaborative communication. Aggressive advocacy, if handled properly, can aid in refining the dispute and allow both parties a better opportunity to re-evaluate risks. Belligerence may assure a trial.

The same considerations are present in trial. Those that are prepared and organized, able to express themselves in terms that are understandable and display an appropriate demeanor are perceived as being credible and honest and acting with integrity. Not surprisingly, the likelihood of success at trial increases by these factors. So will the likelihood of success at mediation.

Notably, simply because the other side has no ability to display the laudable characteristics recited above, you should not summarily end the mediation. Though made more difficult, you should consider and re-evaluate the risk of loss before allowing emotions to terminate the mediation. The other side's inabilities do not guarantee success in your position at trial. Courts and juries have been known to snatch defeat from the jaws of victory for the most ethereal reasons. Do not squander the opportunities mediation presents simply because parties have disdain for each other (whether counsel or clients or both).

V. Closing the Deal

As the saying goes – it takes two to tango. Many times one side or the other's proposal is gruffly rebuffed as being overreaching or inadequate as the case may be. The much anticipated response is the usual result, "I will not bid against myself." However, rather than simply stalemating the discussion and promptly impassing the mediation, consideration should be given to at least testing the other side's resolve. The end result of a failed negotiation is trial. Settlement demands and offers exchanged do not factor into a third-party's resolution of the dispute. Quite simply, no trial purpose is served by refusing to continue to negotiate even if it means "bidding against yourself." Therefore, the only legitimate concern is what effect such step may have in future negotiations if the mediation were to be unsuccessful at that point in time.

While the effect on future negotiations is a reasonable concern, it does not mandate the automated response. Risks of loss are not a constant; as the litigation continues, the risks of loss change. More likely than not, the inability to resolve a dispute through mediation will result in increased litigation costs, at a minimum. Therefore, at least one question should be asked before simply dispensing with further negotiations, "Can I sufficiently improve the opportunity of a successfully mediated resolution by taking an atypical approach to the negotiations?" In other words, would "bidding against yourself" provide the impetus for the start of substantive negotiations. There is no standard answer, but many mediations impasse simply because parties become intransigent in their initial positions.

A. Trial Advocacy v. Negotiation

There are those who suggest that trial advocacy has no place in mediation; instead, mediations are all about finding a "business solution" without real consideration and evaluation of the merits of the action. Yet, such a theory does not appear to have practical application as a standard to be applied across all mediations. In fact, the concept of a "business solution" would seem to be the exception rather than the rule. First, if a business solution was of preeminent concern to one party or the other, then the likelihood of a lawsuit in the first instance would seem unlikely. Second, there are many instances where a business solution is simply not practical such as suits involving public owners or matters where insurance applies. Third, business solutions are often complex, difficult to memorialize and uncertain as to their enforcement. This

does not mean that parties to mediation should not explore potential business solutions; rather, the likelihood of a business solution being available is often remote.

Notwithstanding the various theories as to how to conduct mediation, trial advocacy is not necessarily an anathema to the process. Trial advocacy can aid in focusing the debate. Moreover, trial advocacy is a reality; adverse parties do not magically become allies simply because they are participating in mediation. If a mediator or a party ignores the advocacy component, otherwise apparent throughout all phases of litigation, they participate in mediation ill-prepared as to how to address advocacy positions when they arise.

At some point in the mediation, however, trial advocacy positions must fade for negotiations to become successful. Critical risk assessment and evaluation in the face of demands made or offers given cannot be done through only a self-serving, myopic view of the dispute. Moreover, continued debate does not foster negotiation and concessions necessary to reach a resolution. If a party is unwilling to make even minor concessions to the other side, mediation is a waste of time and effort. The better path is to try the case.

B. Justice

There are those who believe lawsuits are about "justice" or "vindication." Given the vagaries of the court system, the point is debatable. In construction litigation, it seems unlikely. Construction litigation is typically about money and one side's or the other's appetite for risk. Though a client may believe that through a trial justice will prevail, a trial lawyer should know better. First, the concept of "justice" is based upon a client's belief in their case. While a client may feel committed to their position, it may not be just that they prevail. Second, as Justice Holmes said, "This is a court of law, young man, not a court of justice." Third, even the most successful trial lawyers have lost cases. Thus, if a trial is not a guarantee of "justice," the concept has little practical application to mediation. Rather, proper evaluation of the risk of loss is the key.

C. Money in Dispute

In construction disputes, there are typically four layers of damages as far as contractors are concerned. The first two generally include: Direct Costs – Labor, Materials, Equipment, and Subcontractors; and Indirect Costs – Jobsite and Home Office Overhead. To these costs, contractors typically pursue some level of profit as a percentage of the costs. Lastly, to the total, interest or finance costs are added.

To these damages are additional costs which will likely factor into the dispute. Two are self-evident: attorney's fees and costs ("hard costs"). Less evident are the costs associated with the internal time and energy expended by those employees of the parties who, but for the litigation, would be productive elsewhere ("soft costs"). What drives the litigation at any particular point in time may be different. Typically, early in the action, the positions on entitlement and damages drive the litigation; while the cost of litigation is conceived, it has not been realized. As the litigation continues, the cost of litigation, both hard and soft costs, becomes a more significant factor. Typically, enough discovery has been completed by this time so that the client has a sense of the overall cost if the matter were to be pursued through trial. As the matter approaches trial, much of the cost of litigation has been expended so that no substantive savings may be realized if the matter settles. What drives the litigation at this point is typically a heightened realization of the risk of loss at trial.

Knowing what is motivating the parties at particular points in the litigation is important to not only the mediator, but to each of the parties as well. For example, early discussions focusing on the cost of litigation when the parties are focused on the damages may not sufficiently motivate the parties to engage in substantive negotiations. On the other hand, where the debate focuses

on a financial spread between positions that is eclipsed by the anticipated cost of further litigation, the reality of the cost of litigation should be brought to bear. Thus, while the cost of litigation may be a factor, it may not be the primary factor at a particular point in time. Yet, the cost of litigation seems to be the "old standard" some use irrespective of the motivation of the parties.

As an aside, positional statements like, "*We're sending a message with this lawsuit*," are trite. If the statement is accurate, stop wasting time and try the case. Usually, such statements are mere bravado and represent an attempt at advocacy. However, because they are so hollow, they have either no effect or an effect opposite of what was intended.

D. Does it Really Need To Settle Today?

Mediation is a process; it is not necessarily a single day or series of consecutive days. The process begins with the preparation; it ends with either a negotiated resolution or trial.[12] The answer to the question of whether a matter needs to settle that day is like the answer to so many other strategy decisions in the law … it depends. It depends upon the facts and circumstances surrounding the case and the mediation. The cautionary advice here is a time tested adage; "Do not act in haste only to regret in leisure." Re-evaluate your risk of loss. Re-assess your appreciation and understanding of the other side's position. Enlist the mediator to aid in determining what work may be done to bring the dispute into sharper focus. While construction cases have been and will continue to be resolved through trial, the courts are ill-equipped to address complex technical matters.

[12] Some may argue that an impasse ends mediation. While this may be a correct assessment for purposes of the court, an impasse should not necessarily end the negotiations. Whatever work remains before trial provides time to reconsider positions taken and re-evaluate risks of loss.

Notably, more than one mediated "agreement" has been known to unravel when the parties failed to timely and properly memorialize the agreement. The resolution of a construction dispute often involves more than a standard global release upon the payment of money. As part of the process of preparing for mediation, each party should prepare a draft settlement agreement. Though exact numbers and dates may not be able to be included, preparation of a settlement agreement will require the parties to focus on particular requirements which may have a fundamental impact on the mediation. Moreover, preparation in advance should aid in finalizing the written terms if a negotiated resolution is reached. In fact, there is no prohibition from bringing a draft agreement to the mediation both in hard copy and electronic form. The method chosen to ensure the terms are timely and properly memorialized is not as much the issue as simply contemplating it in advance. Just don't expect the mediator to be the drafter; he or she will likely politely decline.

VI. Closing Comments – *What are the Keys to Success?*

Preparation for mediation should be taken as seriously as preparation for trial. Mediation represents an opportunity to negotiate a resolution which limits the risk of loss, caps legal expenses and puts an end to an ordeal with which most clients have little familiarity and experience. The *Keys to Success* are the fundamentals to mediation:

1. Know your case;
2. Evaluate the Risk of Loss. (Not just once, but continuously throughout the process);
3. Anticipate/Appreciate/Understand the Other Side's Position; and
4. Be Prepared (Both in advance of and during the mediation).

While a negotiated resolution at mediation is not guaranteed, ignore any of the foregoing and a trial is a near certainty.

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