Strategies for Winning at Mediation

VTCA Annual Meeting
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VANDEVENTER BLACK LLP
ATTORNEYS AT LAW
1. What is mediation?
2. What disputes should be mediated?
3. When should you mediate?
4. Choosing the mediator
5. Preparing for mediation
6. Who should attend?
7. What to bring
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9. Concluding the mediation session
10. Other challenges
What is mediation?

me·di·a·tion
/ˌmēdēˈāSH(ə)n/

noun

• intervention between conflicting parties to promote reconciliation, settlement, or compromise;

• derived from the Latin for “everyone leaves unhappy”
What is mediation?

• Different from negotiation, arbitration, & litigation
• Never binding
• Mediate at any time
• Whole process is confidential
• Not a win/lose situation
What disputes should be mediated?

• Might be mandatory:
  - VDOT, Virginia courts, North Carolina courts

• Can be voluntary

• Issues to consider:
  - Fact vs. legal
  - One-off vs. precedential
  - Is there a continuing relationship?
  - Are there pass-through claims?
When should you mediate?

• Tradeoff between:
  • Early enough to save litigation costs
  • Late enough to have information
• Both parties must agree
• Contract term can = agreement
Choosing a mediator

- Parties must agree
- Retired judge vs. industry person vs. someone else
- Level of technical expertise
- What is your desired result?
  - Facilitator vs. evaluator
  - Aggressive vs. passive
  - Someone who will work after mediation session?
  - Do you want a written recommendation?
Preparing for mediation

• Should you hire an expert?

• Written statements:
  • At mediator’s discretion
  • Confidential vs. shared with other side
  • Level of detail depends on mediator & case

• Initial conferences:
  • At mediator’s discretion
  • Can be *ex parte* (with one party)
  • No *ex parte* communications in arbitration or litigation
Who should attend?

• Who from your company?
  • Executive?
  • Project level?
• Lawyers?
• Experts?
• Insurer/surety?
• Subcontractors?
• Owner?
What to bring

• How will you present your case?
• What documents do you need?
• Settlement authority
• Should you bring a pre-written settlement agreement?
• **Most important**: open mind & managed expectations
During the mediation session

• Opening presentation:
  • How you see the case
  • Chance to talk directly to the other side

• Mediator’s tactics:
  • Caucuses
  • Shuttled diplomacy
  • Bracketing

• Mediator’s obligation of confidentiality

• Mediator is **NOT** your friend!
Concluding the mediation session

• How does it end?
• Settle entire dispute at mediation
  • Don’t forget mechanic’s liens, bond claims, etc.
• Unique resolutions (e.g., additional work)
• Don’t leave without written agreement
• What if you don’t settle?
  • Narrow issues
  • Bring parties together
• Settle after session ends
Other challenges: Localities on LAPs

• On locally-administered projects:
  • Relationship changes
  • Political issues (e.g., accountability for funds)
  • “Protecting the public trust”

• Problems with settlement authority:
  • Counties
  • LAPs/VDOT

• Owner’s legal costs

• Plus: Mediation result can be persuasive
Other challenges: Multi-party disputes

- Pending subcontractor claims
  - Do you have settlement authority?
  - Liquidating agreement
- Do you want a global settlement?
- Privity:
  - Ex. Dispute between owner, contractor, and designer
  - Virginia vs. North Carolina
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