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SPECIAL REPORT ON CIVIL JUSTICE REFORM
CORPORATE COUNSEL'S ADVOCACY OF MEDIATION IS ESSENTIAL

***Metropolitan Corporate Counsel*, August 1999, by John E. Osborn and Christopher J. Platt.**

As a construction contract and environmental litigation law firm, we firmly endorse mediation as the preferred method of resolving a dispute. Without question, mediation is the best process for cost effective complex business dispute resolution.

We would go so far as to say that emphasis on other civil justice reforms wastes time which might otherwise be spent educating lawyers and businesses about the effectiveness and efficiency of mediation. Pressures in addressing congested court dockets, inefficiencies in jury selection and limitations of damages recovery can all be alleviated by more extensive use of mediation.

In house counsel are increasingly in the forefront when it comes to advocating the use of mediation because they realize that it is more cost effective, expedient, fair and simply represents a better business solution. In house counsel share our view that to be effective in mediation, you need to be very prepared and to see the whole picture. This is in contrast to litigation or arbitration, where the full picture is seldom developed until right before the trial begins.

We are convinced that mediation has so much going for it that if you try it once, you will never be satisfied to be relegated to binding resolution through arbitration or court. We are also convinced that if you do not succeed at mediation, you have not taken it seriously enough or worked hard enough to achieve resolution.

The Arguments In Favor of Mediation Are Compelling

The arguments in favor of adopting mediation as the preferred method of resolving the complex commercial dispute are compelling:

Mediation Works

According to industry sources, in more than 85% of disputes entering mediation, resolution is reached. In addition, virtually all participants in a successful mediation perceive mediation to be fair and efficient.

Results Are Predictable

The mediation process involves the parties laying all of their cards on the table (documents, positions, expert opinions, and witnesses). Even 'off the record' information, which would probably not be aired at trial, can

be discussed openly and evaluated. Each party's business goals can be identified and can be factored into the settlement process.

The Parties Control the Progress

Unlike the court or arbitration process, where a judge or arbitrator controls the pace, the parties can map out a schedule and procedure to suit their specific needs. Disparity in preparation creates an advantage. If mediation does not result in a resolution, the advantage carries over to the trial or arbitration. As we represent owners of real estate in litigation of environmental and construction disputes, our clients are capable of excellent preparation because they most often have good records and superior resources, including in house counsel who is able to help marshal the evidence.

Mediation Saves Money In the Long Run

There is little doubt that one primary advantage of mediation is that it avoids discovery disputes and pretrial motions. It gets to the merits quicker and cuts out a lot of the process leading up to trial. In the initial stages, expenditures will be significant because it will be necessary to analyze documents, interview witnesses and hire experts at an earlier stage. Over the long term, if mediation fails and the case goes to trial or arbitration, these same expenses will have been necessary. The significant likelihood of settlement justifies making these expenditures earlier.

Comparison of Litigation Budget and Mediation Budget Militates Toward Early Resolution

Embarking upon mediation does not alleviate the responsibility to set a detailed litigation or arbitration budget. There is a stark contrast and it makes both in house and outside counsel look good if resolution is reached through mediation because the cost savings are readily quantifiable.

Mediation Allows Each Party to Identify Weaknesses in Their Own Case

In the typical construction or environmental dispute, the weaknesses in your client's case are not known until well into the discovery process. Because mediation forces both parties to get their positions out earlier, you are able to know your weaknesses at an earlier stage and factor them into your settlement position.

Mediation Diminishes Hardball Litigation Tactics

Although mediation does not eliminate hard ball litigation tactics, it diminishes the potential for their use. Withholding information and taking unreasonable positions are not consistent with non binding dispute resolution and because they would indicate a contempt for the mediator as well as the adversary, they are often avoided.

Mediation Sets An Agenda For the Parties to Work Together Again

Participants in mediation often find that the process helps them find common ground. The process is not as adversarial as trial or arbitration and the impetus to involve high level management in the process creates a context for seeing the bigger picture and re-establishing the compatibilities which brought the parties together in the first place.

Unreasonable Positions Are Set Up and Knocked Down

The informality of mediation allows the parties get unreasonable positions on the table. Most often these positions are taken off the list early on. In the context of the construction case, the day to day combatants set up the unreasonable positions and higher level management takes them off the list.

Experts Reach a Consensus Before the Parties Are Able to Do So

One very positive aspect of mediation is that the parties each have their expert at the table. Very often the experts are able to reach common ground based upon broad ranging experience, even when the combatants are unable to do so. Mediators and experts often tend to be candid with each other. All of this lends to resolution.

The Following Are Excuses Parties Set Forth For Not Using Mediation

Mediation is Expensive

We need to pay the mediator, outside counsel and tie up our project management team and executive staff. Why do this until we really have to?

Mediation Duplicates Effort

After all of this focused effort, we might as well just try the case.

A Lot of the Client's Time Is Consumed

They tell us it may tie up three consecutive days. How can we justify tying up all of our personnel over such a long period of time?

We Prefer the Orderliness of the Litigation Process

Why should we voluntarily provide information and our personnel for interviews until we have to? If we wait this out, it will probably settle anyway.

Why Spend Money on Experts Early On?

We wait until just before the end of discovery to hire the experts. We may not need them.

Why Spend Money on Multi-media Presentations, Computer Models and Charts - the Case May Settle?

Waiting until trial gives us plenty of time to prepare the presentation.

If We Engage In Mediation, We Will Show Our Hand

Once we divulge our strategy in mediation, we will be at a disadvantage if we later have to go to trial.

Why Undertake a Full Analysis of Project Documents Now - the Case May Settle?

Gathering documents from our corporate offices and project site will cost plenty, and we would prefer not to get our outside counsel into these documents unless we absolutely have to do so.

Confidential, Privileged and Settlement Information May Get In Front of the Mediator

Once this information is out, we will not be able to protect it. It will hurt our litigation position.

It Won't Work – We Have Already Tried to Settle –Why Should a Mediator Do Better?

We do not know what a mediator looking at the case will do for us. Initial settlement talks have not worked. Why should we believe that a non-binding mediation procedure can get the case settled?

The Role Of Corporate Counsel Is Key: The Biggest Impediments to Successful Mediation Are the Parties Themselves (Or Outside Counsel)

Mediation's success rate is impressive. When in house counsel takes an active role, even greater success can be assured. The following are some of the most common reasons why a mediation fails. Both in house and outside counsel should work together to ensure that they are avoided.

Reason For Failure #1: *Failure to Provide Appropriate Settlement Authority; Lack of Attendance By Key Players*

Mediation can become deadlocked when outside counsel is not given adequate settlement authority or if the settlement strategy is not established with the client in advance. Unless the mediation is attended by the appropriate client representative and unless outside counsel has authority, the process cannot work.

Reason For Failure #2: *Lack of Preparation*

When the parties and their counsel do not have enough familiarity with the case, they cannot settle.

Reason For Failure #3: *Hostile and Incompatible Attorneys*

If the mediation becomes a forum for aggressive, hostile and emotional attacks on one of the parties or attorneys, settlement is less likely.

Implementing Mediation: The Mini-Trial Agreement

Parties advocating mediation need only adopt a basic formula. The mini-trial is a structured mediation procedure. The principal features are as follows:

> Designation of a neutral advisor, usually a person of eminence or highly knowledgeable in the subject matter of the dispute.
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> Principals of each party with full settlement authority, attend the proceedings.
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> Limited discovery is afforded to both parties.
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> Evidence is submitted to the neutral advisor in advance of the hearings.
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> Each party is given a fixed, short period of time to make its presentation. There are no rules governing what evidence can be presented. No objections to evidence are permitted. No cross-examination is allowed, although the neutral advisor can ask questions.

The neutral advisor makes a written recommendation that the parties use as a basis for settlement negotiations.

If the case cannot be settled, the neutral advisor's recommendation is not disclosed in subsequent litigation or arbitration.

Monetary sanctions are provided against the non-prevailing party if the ultimate result of arbitration or litigation is close to the neutral advisor's recommendation.

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