More Effective Mediation

A recent survey of attorneys offers advice about mediation practices

www.colorado.construction.com/opinions/archive/0508-opinion.asp

By Richard Fullerton

Mediation is heavily used to resolve construction disputes, but a survey of attorneys shows that many construction industry leaders don't completely understand the process and its potential advantages.

Pioneered in the mid-1980s, mediation is used extensively to resolve construction disputes. While attorneys recognize it as an invaluable tool, some of their clients struggle with the unstructured process.

Recently, several of Colorado's most experienced construction attorneys participated in a survey about their perceptions of mediation and some of the specific practices they find most effective.

Mediation Prevalence

Of the 13 participating attorneys, seven said they use mediation in more than 80 percent of their cases, and three more reported rates between 60 and 80 percent. Only two said they employ mediation in fewer than 50 percent of their cases.

Some of their reasons for using mediation included:

- the cost-effectiveness and speed of mediation offer obvious advantages to all parties,
- clients are more familiar with mediation because many standard contracts call for it,
- attorneys are required to advise clients of alternative forms of dispute resolution,
- judges often require parties to mediate before hearing their case in court.

Mediation Effectiveness

In addition to wider recognition and mandatory participation, mediation success rates are compelling. Describing mediation as "extremely effective," five attorneys reported agreement rates greater than 80 percent, and five targeted rates between 75 and 80 percent. National studies show that agreements were reached in 80 to 85 percent of mediation cases.

While all the attorneys said they feel strongly that mediation helps to resolve or reduce many claims, some prefer it for specific cases, particularly smaller claims. Others said it can be effective in complex cases without waiting for arbitration or litigation. Disagreements over business issues rather than legal questions benefit more from mediation.

Arbitrators or judges with limited experience in building-industry issues often find that construction cases can be more complicated to isolate disputed issues, hear opposing arguments and render a binding legal decision.

Mediation is distinctly different, and several attorneys find it even more challenging. The mediator works quickly, pursuing pertinent facts to isolate key issues and clarify differing viewpoints so that parties can evaluate the risk of taking the case to court. The attorneys said that the mediator's construction knowledge is one of the keys to a successful outcome.

But the mediator also employs interpersonal skills, active listening and "psychology" to find common ground. In the opinion of one attorney, while arbitrators need a strong factual understanding of a case, mediators require greater emotional shrewdness.

One key difference in mediation is providing parties with a realistic perspective of their role in the dispute. Parties often come into mediation feeling mistreated by the other party and accepting little responsibility for the disagreement.

Mediation displays perspectives from both sides, often asking each to reevaluate their stance in light of new facts and reassess their positions toward reaching an agreement.

Client Familiarity

An earlier study of dispute resolution by Colorado contractors, published in AGC/C's OnSite newsletter in November 2003, showed that a majority of them have used mediation, but many are still unsophisticated in its use.

Attorneys believe that the client's level of understanding about mediation is proportional to their experience. One attorney considered most parties to be "without a clue" about mediation; others found them heavily dependent on counsel for guidance through the process. The risk, according to attorney responses, is that not all lawyers are skilled or motivated enough to find agreement. To improve the chances eventual agreement, they recommend greater client understanding and involvement in the mediation process.

Preferred Mediation Practices

Because mediation employs savvy as much as it does science, no clear rules exist to define the process. However, some patterns emerged from the survey that help to outline common practices.

- **The pre-meeting exchange -** This process typically begins with a conference call between the mediator and counsel or

directly with parties that are not represented by an attorney. This exchange addresses meeting logistics - time, location, attendance, documents and other procedural matters. Some mediators also conduct separate, private phone conferences with each party to probe confidential concerns and establish professional trust.

While arbitrators need a strong factual understanding of a case, mediators require greater emotional shrewdness.

Critical information may not have been shared among the parties. Most mediators require an exchange of pertinent documents before the mediation meeting. Many request a summary of the disputed facts. Attorneys support this exchange because of the insight it allows into both sides of the dispute. Some mediators also ask for confidential input, such as prior negotiations, settlement offers, or case assessments by the attorneys.

• **The joint meeting -** At the beginning of each mediation meeting, parties typically gather in the same room while the mediator offers opening remarks and expectations. Most mediators allow each side to make a factual presentation of their case through the attorney. Several prefer that clients also participate in this presentation. They eventually move to separate rooms, usually for the balance of the meeting while the mediator shuttles between rooms exchanging information and offers. This separation allows the mediator to talk confidentially as the parties assess the strength or weakness of their case.

Attorney opinions differ greatly about the amount of time clients need to spend with the opposing side before separating. They all fear an emotional outburst that could jeopardize the outcome. Two of the attorneys said they prefer no exchange whatsoever between parties. However, most are comfortable with a factual review of the case, including opening statements and limited expert presentations addressing disputed facts. Two attorneys reported positive results where parties remained together throughout the meeting.

• **Controlling emotions -** Although they expressed concerns about contact between the parties during the joint meeting, most attorneys recognize the importance of allowing some type of meeting between the parties. One attorney who strongly opposes joint presentations said he's even more uncomfortable with no client contact, valuing at least a symbolic interaction. Even a limited interaction can create an important emotional connection.

More than half of the attorneys said they prefer to assess the behavior of the parties before deciding how long to keep them together. This controlled involvement allows the mediator and attorneys to share information on behalf of the parties, providing an "arms-length conversation" to explore options in real time.

The attorneys agreed that they are concerned with the emotions expressed by parties during mediation. However, several appreciate a carefully conducted process that, rather than avoiding emotions, channels them toward a productive outcome and allows parties to vent feelings privately in cases where they will not derail the process. Rather than having passions flare up in the open, the mediator draws out frustrations in private caucus, listening for concealed concerns that could obstruct an agreement.

• **Early mediation -** A mediation conducted "on the courtroom steps" after full discovery often takes the place of a settlement conference. Such protracted mediation is often successful, but at considerable expense to the client. It is possible for mediation to be effective much earlier without the expense - sometimes before depositions are taken or even while the project is still under construction.

But attorneys are mixed in their support for early mediation. Two of them expressed skepticism under any circumstance, fearing that the parties would not have sufficient information and motivation to alter their positions. However, more than two-thirds of the respondents support early mediation, particularly in smaller claims or where issues involve business decisions rather than legal questions. Participants need to watch for opportunities to find accord before conducting an exhaustive search of the evidence.

• **Mediation follow-up -** The initial mediation meeting is sometimes inconclusive because of insufficient information or because parties need more time to re-evaluate the information learned during the mediation.

One attorney estimated that 50 percent of cases do not initially reach agreement. The mediator often needs to continue discussions after the meeting to allow more discovery or more emotional distance from the dispute. While some mediators schedule subsequent meetings, the more common pursuit is by phone between the mediator and attorneys.

Attorneys generally find such follow-up to be highly effective, estimating the success rate of subsequent efforts at greater than 75 percent. Participants should encourage open channels of communication, even after the meeting has ended.

In the eyes of construction attorneys, mediation is a valuable resource for resolving disputes. However, a number of construction clients remain unsophisticated in its use, perhaps because mediation is so different from traditional procedures. They may struggle with a cooperative interaction with the opposing party, or they may be unwilling to accept a legitimate share of responsibility in the disagreement.

If construction companies hope to avoid the rigors and risks of litigation, attorneys believe that their greater understanding and participation in the mediation process will improve the likelihood of agreement. <<