

Notes from the Editor**Issue No. 38, December 15, 2002**

Happy holidays to everyone. Here we are again at years end, with snow in the northeast of the U.S. and bushfires in the Sydney area. I am pleased to report that last month's **Vitamin M2** article, which introduced an effective management technique to prevent disputed claims at closeout of complex construction projects, was very well received. Tom Lanczi (toml@epcenergy.com) from Toronto, Canada wrote: "Your Vitamin M2 article speaks from my heart and experience. Having project managed about \$100 million worth of shopping center construction, I appreciate the value of dealing with disputes monthly, before they are allowed to snowball into major delays, costs and sometimes complete breakdown of communications between architects, engineers, owner and contractors. At the annual dinner meeting of the Construction Section of the ADR Institute of Ontario, I read part of your newsletter. It created great interest. With your permission I would like to distribute copies to the audience."

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This issue highlights the theory and practice of mediation. To illustrate both of these elements I have chosen a sampling from a recent book published by the Connecticut Bar Association

(CBA). It is titled MEDIATION PRACTICE BOOK – Critical Tools, Techniques and Forms, edited by Professor Harry Mazadoorian, Distinguished Professor of Dispute Resolution Law at Quinnipiac University School of Law in Hamden, Connecticut. The book is available by contacting the CBA at 860-223-4400 or www.ctbar.org. Extracts are published with permission of CBA, LawFirst Publishing and Quinnipiac University School of Law.

To illustrate the application of the mediation process in the building industry, I offer an overview of a role-play presentation to attendees of the "**Build Boston**" conference, which was held last month in Boston. The well attended session was led by principals of BostonSolv (www.bostonsolv.com), a firm established primarily to help the construction industry avoid costly disputes.

Joe Grynbaum, P.E.

MEDIATION PRACTICE BOOK – A Chapter 7 Sampling**by Harry N. Mazadoorian****I. INTRODUCTION**

While the deepest roots of commercial alternative dispute resolution in this country are in arbitration, mediation is fast becoming the most popular and commonly used form of voluntary alternative dispute resolution. Recent surveys have indicated that corporate counsel utilized mediation as their preferred alternative process.

Mediation has been called the "sleeping giant of ADR" by ADR experts. This chapter presents a brief overview of this important ADR process; many of the topics highlighted here are discussed in detail in other chapters.

Mediation is a substantially different process

from arbitration even though many lay people as well as a number of practicing attorneys erroneously classify them as the same process. As stated in Chapter 3 the major distinction between mediation and arbitration is that arbitration is an adjudicatory process whereby an award is imposed by the neutral whereas mediation is non-adjudicatory and allows the parties to come to their own accord. Of course, since there is no award imposed by a third party, the mediation process is by definition non-binding.

The neutral in the mediation process has no power to impose a settlement or award, but serves rather as a facilitator who assists the parties to

forge their own voluntary agreement through a series of meetings and caucuses.

Another critical distinction between mediation and arbitration is that mediation is interest-based rather than rights-based like arbitration. That means that rather than looking backwards and trying to determine the respective rights of the parties from the facts presented and according to law or precedent, mediation seeks to identify and satisfy the true interests of the parties. In this way, settlements are structured which allow the parties to resolve their differences, and potentially to continue a relationship in the future.

Moreover, because the parties structure their own agreement, rather than having the agreement imposed upon them by a third party, a mediation settlement is generally more durable than an arbitration award.

II. HALLMARKS OF MEDIATION

Among the hallmarks of the mediation process are the following:

- ◆ **Confidentiality**—The mediator advises the parties that information which they share with him or her is confidential. To be truly effective, the mediator must convince both parties that they can give their true numbers, positions, and interests in confidence without fear that the mediator will pass such information directly to the other party. Once the mediator is able to glean the true interests and objectives of the parties, the mediator can effectively work with them to bring about an accord.
- ◆ **Presence of the parties**—Mediation only works optimally if the parties are present in person. While the attorneys play the most active role in litigation or arbitration, the mediator very often turns his or her attention directly to the parties to allow them to express their true interests and to understand the objectives of the other side. Since the parties themselves are the decision-

makers, it is essential that they not only be present, but actively participate. Many parties also report, at the conclusion of the mediation, that it was their only opportunity to formally state their positions, have their “day in court” and sometimes “vent” their feelings with the knowledge that both the other side and a third party neutral was actually listening. This opportunity for active participation is frequently an essential ingredient in mediation which brings about a settlement.

- ◆ **Reality testing**—While the mediator does not serve as adjudicator and makes no award, the mediator plays a very important role as a “reality tester,” listening and analyzing the various positions and statements of the parties and playing back to them how realistic and successful these positions might be in a court of law or how the parties might fare in the absence of a mediated solution. Although the mediator plays a non-adjudicative and non-directive role, the role is nonetheless a very active one with the mediator interacting with the counsel and parties to bring about a settlement. Through this reality testing, the parties undergo an educational experience to better understand their case and the case of their opponent. They come to better appreciate the strengths and weaknesses of their cases and frequently come to a different risk assessment and evaluation conclusion than they had previously. Regardless of whether the mediator assumes an evaluative or facilitative role (as discussed in Chapter 9, “Mediator’s Personal Style”), reality testing is a critical role for the mediator.
- ◆ **Parties retain control**—In mediation, the parties retain full control of the process and may in fact exit the proceeding at any time. No decision is made until the

parties agree to that decision, and therefore mediation by its nature is totally non-binding until the parties come to agreement. Mediation is, therefore, largely "risk-free," with no danger that an unfavorable award may be imposed upon the parties.

- ◆ **Option building**—Because mediation seeks to explore the interests of the parties rather than their stated positions, the mediator strives, with the parties, to develop additional options which may be acceptable to them. Unlike litigation, arbitration, and much conventional negotiation, which frequently entertain two polar positions from which the parties are encouraged to retreat or compromise, mediation seeks to develop a number of options in order to create a "win/win" situation whereby both parties can take away something with which they are comfortable.
- ◆ **Active involvement of a facilitating third party**—The following chapter describes the mechanics of a typical mediation, including individual and joint caucuses and "shuttle diplomacy." This "shuttle diplomacy" style can become very intensive as it moves along, allowing the parties to continually evaluate and refine their positions. Critical to the process is the involvement of a skilled facilitator working with the parties both jointly and individually toward building a resolution.

III. ADVANTAGES OF MEDIATION

The mediation process presents many opportunities and advantages to the parties. Probably the greatest advantage is that mediation is an efficient, speedy, low-risk process which can be utilized before, during or after litigation.

Additionally, mediation allows the parties to maintain control over the process while developing options and broad resolutions which focus on the real interests of the parties rather than perceived legal rights or previously stated positions.

Mediation also presents the opportunity for a process which is much less adversarial and hostile than arbitration or litigation, and is much less likely to further break down the relationship of the parties. Indeed part of the "promise of mediation" is that it can improve the parties relationship, even if all the issues in dispute are not fully resolved.

While mediation does not guarantee that an accord will be reached, it frequently results in narrowing of the issues. Even when "unsuccessful," mediation may bring the parties closer to an agreement than they previously were, with fewer issues to be resolved by other means.

Of course, mediation is not without disadvantages. The greatest strength of mediation, i.e. that it is a relatively risk-free process from which the parties can walk away at any time, is also its greatest weakness: mediation may not result in a settlement and the parties, having expended time, effort and money in mediation, may need to look to another process to bring about a resolution.

Dispute Resolution in the Building Industry – A Role Play Mediation Session

The principals of **BostonSolv** wrote and presented a role play mediation session of a conflict between a real estate developer and his general contractor regarding ground water damage to a new headquarters building. The case was based upon an actual conflict previously mediated by two of the presenters. To maintain the confidentiality of

the actual disputants and the circumstances of the case the scripted mediation was heavily disguised.

The scripted mediation role-play proceeded to the point where the building owner offered to contribute \$14,000 toward the estimated \$500,000 repair job which he contended was the

responsibility of the general contractor. As the disputants (presenters) broke up for a coffee break, the attendees of the "Build Boston" session were asked the question "What should the mediator do now?"

Here is a summary of the suggestions offered for the mediator's consideration.

- One attendee insisted that the case would be solved only if a sub-soil engineer could be called in as an expert witness to say who was "right" and who was "wrong". In other words, "there is a missing party here. You, the mediator, need to bring in an expert so you can decide how to settle this dispute."
- The mediator must stay neutral and behave that way.
- Engender more respect between the parties. (The owner disputant had been extremely sarcastic to the general contractor, who by his report, at least, had seemed to have acted in his client's best interest during the construction period.)
- Try to bring the parties closer together; even baby steps would help.

- See each party separately (in caucus) and try to engender more positive attitudes.
- Make sure that the confidentiality of private sessions is emphasized and ensured.
- In private sessions, probe for weaknesses in each party's case, not to exploit them but to bring a sense of realism in each party's case.
- Get more facts to see if that would help.
- Make preserving the relationship a prime goal.
- Consider helping the weaker (GC) side against his more aggressive opponent. (Others commented that this suggestion could cause problems, however.)
- Help disputants consider what they will be in for if they don't succeed in reaching a mediated solution.
- Don't take sides or get involved in what may be "fair". One attendee asked what a mediator should do if he thinks one party is right, the other wrong. One answer was that it is the mediator's job to bring about settlement, not to judge the correctness of positions.

Based on the enthusiastic participation of the attendees and the subsequent written feedback, the presenters felt that their "mock mediation" role-play had accomplished what they had set out to achieve. That is, the attendees were exposed to a dispute resolution process that is completely different from the adversarial models, such as arbitration and lawsuits, that they were previously used to.

In mediation the parties in dispute were being asked to arrive at their own settlement, and take responsibility for the financial outcome and their decisions. The mediator did not offer a quick fix. He acted as a true neutral and facilitated the interaction so as to turn facts into interests, and enable the disputants to craft an informed settlement.

The mediation process counters a tendency in the building industry here in North America to seek somebody else to solve all our problems. We are always looking for the quick fix and someone else to blame. This approach compounds the competitive nature of the business and only leads to further friction and intractable disputes. Mediation offers the building industry an effective tool to resolve disputes in a private and respectful manner.