



CONSTRUCTION CITE

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NEW CONSTRUCTION

Mediating Construction Disputes - Understanding Different Approaches and Strategies

Mediation is widely used and almost considered standard in the construction industry for attempting to resolve disputes. In fact, if you have used an AIA form agreement recently, you may recall that one of the standard dispute resolution provisions requires mediation as a condition precedent to either arbitration or litigation. Despite the prevalence of mediation requirements in construction agreements, the actual mediation process, including what strategies the mediator can and should be using to help the parties resolve their disputes, remains somewhat unclear for many people. This article describes some of the standard mediation approaches, and also discusses some mediation techniques that are not frequently used, but can be very helpful resolving disputes in the right situations.

The “Typical” Mediation

There are several different approaches mediators can use, but the two most common are facilitative mediation and evaluative mediation. In facilitative mediation, the parties spend a considerable portion of the mediation in a joint session so that the mediator can facilitate a conversation between the parties. The parties typically present and exchange information, and the mediator’s role is to guide the discussion so that the parties have an increased understanding of each other’s position, and develop solutions to their disputes. The mediator accomplishes this by asking questions and paraphrasing and normalizing responses for the other side. Typically, in facilitative mediation, the mediator does not give his or her opinion regarding the positions that each party takes. Similarly, facilitative mediators do not opine as to the amount for which they believe the case should settle, and they do not give their opinion regarding what they think a judge or jury would decide if the case were to go to trial.

Mediators who use the evaluative approach, on the other hand, do give their opinions as to the parties’ claims, and they often predict the outcome of a case if it were actually tried in front of a judge or jury. Under the evaluative approach, mediators spend time separately with each party in order to understand their positions on legal and factual issues. Parties typically have very little face-to-face interaction, so the mediator is fully in control of the flow of information between the parties. Because a mediator using this approach typically weighs in on specific legal issues and the merits of each party’s claims, it is important that he or she not only have legal expertise, but also substantive knowledge regarding the construction industry in order to properly evaluate the parties’ positions.

Although facilitative mediation has been widely used for decades, many parties opting for mediation today believe that part of the value of mediation is receiving a third-party objective evaluation of the case. Thus, many construction mediators use a combination of approaches, often beginning a mediation using a facilitative approach and then transitioning to an evaluative approach for the remainder of the mediation. A typical construction mediation begins with the parties meeting in a joint session where they exchange information and detail their positions. Parties then break into separate caucuses, and the mediator shuttles back and forth for much of the rest of the mediation having separate discussions with the individual parties. During these separate discussions, mediators typically discuss the parties’ positions in more detail and offer their perspective on the strengths and weaknesses of each party’s case.



The Mediator's Proposal

Even though many mediators will not stray from the typical formula described above, a good mediator will be flexible and adapt his or her strategy during the mediation to meet the parties' needs, interaction, and stage of the dispute. This adaptation can include the implementation of alternative approaches, which are not necessarily widely used, but can be useful in specific situations. For instance, should the parties come to a true impasse at the end of a typical mediation, some mediators will offer to provide the parties with a "mediator's proposal."

Under this approach, the mediator is asked to choose a proposed settlement amount, which he or she offers to both parties, separately. Generally a mediator's proposal represents a number where the mediator believes the case is most likely to settle, rather than his or her opinion regarding the value of the parties' claims. The parties are free to accept or reject the offer, but their responses are only communicated to the other party if they both accept the offer. If one party rejects the offer, then that party will never know whether the other party accepted the offer. One of the benefits to this approach is that parties do not feel like they have to make the final concession in order to reach an agreement.

Double-Blind Multiparty Mediation

Multiparty mediations with multiple defendants can add an additional layer of complication to settlement discussions. For instance, some defendants refuse, on principle, to pay more than other defendants. In other cases, insurance companies or sureties do not want to establish a precedent for paying certain amounts on certain claims. One mediation strategy that can help address these and other issues is the "double-blind" approach.


Under this approach, the parties may have an initial joint meeting to exchange information and state their positions. Then, they are divided into separate caucuses, and the mediator obtains an opening demand from the plaintiff. This opening demand is communicated to all defendants separately and each defendant is asked how much they would like to contribute to the "pot" in order to settle the case. The mediator never tells any of the defendants what the other defendants have offered to contribute, nor does the mediator communicate to the plaintiff how much each individual defendant has offered toward settlement. Instead, the mediator adds up the proposed contributions of all the defendants and discloses the total amount to the plaintiff as one single collective offer.

Assuming the plaintiff rejects the initial offer and decides to make a new demand, the mediator goes back to the defendants and communicates only the gap between the new demand and the defendants' initial collective offer. The specific dollar amount of the new demand is kept confidential. The mediator then attempts to elicit additional contributions from each individual defendant, and the process continues until there is an impasse or a settlement. If there is no settlement, one benefit to this approach is that there are no assumptions regarding future negotiations—the defendants never know how little the plaintiff was willing to accept and the parties never know how much each individual defendant was willing to contribute.

Additional Considerations

It is important for parties to enter into mediation with an understanding of their particular mediator's techniques. It is equally important to keep in mind that the mediator's goal is to resolve the dispute. So even when a mediator provides an opinion regarding the merits of a case, it may not accurately reflect the likely outcome, but rather where the mediator believes the case may settle.

Alston & Bird's Construction Group has a wealth of experience mediating disputes throughout the country. We are always available to discuss additional advantages and disadvantages of the mediation strategies described in this article, as well as other options that are available for resolving any dispute that may arise during or after completion of a project.





UNDER CONSTRUCTION

SUMMARIES OF RECENT DECISIONS FROM AROUND THE COUNTRY

FEDERAL (7th Cir. Ct. App.): Construction Manager's Obligations May Include Duties To Subcontractors

Parties often question what, if any, standard of care construction managers (CMs) owe on a project. The 7th Circuit Court of Appeals recently addressed this question when a “greenhorn” carpenter was injured while trying to make repairs on the upper floors of a Trump Tower construction project in Chicago. The carpenter sued the project’s CM, arguing the CM was negligent by allowing work to continue despite high winds, and by not requiring the greenhorn to work with a more experienced “journeyman” carpenter.

The CM acknowledged that, under Illinois law and the Restatement of Torts, it owed a duty of care if (1) it entrusts work to an independent contractor; and (2) retains control of any part of the work. Conceding that it retained a “high degree of control over this worksite,” the CM argued “that it never entrusted work to [the subcontractor] because [the CM] never entered directly into a contract with [the subcontractor].” Relying on *O’Connell v. Turner Constr. Co.*, the CM contended that the subcontractor contracted directly with the owner, but the CM only signed the subcontract as the owner’s agent, so therefore it did not “entrust” the work and owed no duty to the subcontractor’s employees.

The 7th Circuit distinguished *O’Connell* by pointing to the fact that the CM actually selected the subcontractor:

In [*O’Connell*], the court concluded that a project manager did not entrust work to a subcontractor because it had not “actually selected the contractors or subcontractors,” even though it had helped the site’s owner in drafting contracts and handling construction bids. Here, in contrast, the record shows that [the CM] selected [the subcontractor]. [The CM] does not explain why it should matter that it was technically acting as an agent for the owner when it made the selection.

Due to the CM’s control in selecting the subcontractor, the 7th Circuit concluded that the CM “entrusted work” to the subcontractor, even though it was only acting as the owner’s agent. As a result, the CM owed a duty of care to the subcontractor’s employees, and a jury had to decide whether the CM violated that duty.

The opinion does not address why the CM had a duty to ensure safe working conditions rather than the subcontractor—the plaintiff’s actual employer. While the court plainly focused on the CM’s role in hiring the subcontractor and its continuing control over the work, the court did not address the apparently undisputed principal/agency relationship between the owner and the CM, but instead, only questioned “why it should matter” that the CM was only the owner’s agent.

Perhaps the indemnity obligations owed to the CM by the subcontractor and the owner will define the true scope of the CM’s exposure. However, premising liability on the nebulous concepts of how involved a CM is in selecting a subcontractor and the degree of control the CM retains—rather than on the CM agreement and the subcontract itself—could prove to be a Pandora’s box of responsibility for construction managers that otherwise believe their exposure is relatively limited. Moreover, the holding may give CM’s a negative incentive to be less hands-on despite obligations running to the owner, because the express principal/agency distinctions do not alone protect the CM, even when the CM is acting within its scope as agent.

For a more thorough analysis of this case and cases like it that came to different conclusions, as well as the lessons to be derived from these authorities, read Alston & Bird partner Chris Roux’s article titled, “Construction Site Safety – What Duty of Care Does a CM Owe to Contractors, Subcontractors, and Their Employees,” published by the CMAA National Capital Chapter at <http://www.cmaancc.com/images/Documents/Articles/newsletter%20july%202012.pdf>.

Sojka v. Bovis Lend Lease, Inc., (July 10, 2012).



WEST (TX): Owner's Material Breach May Excuse Contractor from Obligation to Perform

When things go wrong on a construction project, parties often engage in a “you-breached-no-you-breached” scenario. In a recent Texas case, an owner and contractor both alleged the other party breached the contract first, thus excusing their own further performance.

The owner, who was also the general contractor, hired a contractor to provide site preparation, utilities installation and concrete work for a warehouse construction project. The contractor sought damages for breach of contract because the owner had not paid outstanding invoices. The owner alleged the contractor abruptly stopped working on the project and left the job wholly unacceptable, claiming the contractor failed to complete a detention pond, which was required to obtain a county permit.

At trial, the contractor argued the parties had agreed the owner would provide the necessary dirt needed to fill in the detention pond and when the owner failed to provide the dirt, the contractor could not complete the pond. The owner contended that the contractor breached by leaving the project and sought damages flowing from the contractor's breach and the owner's efforts to salvage the project. The jury found in favor of the contractor.

On appeal, the owner argued the contractor was precluded from recovery because the contractor breached first by failing to complete the detention pond, which was essential to the project. The court of appeals stated that to recover on a breach of contract claim, a contractor must have in good faith intended to comply with the contract and any defects in the work could not have been pervasive or a deviation from the general plan. But, the appellate court found that the owner committed the first breach by failing to provide the dirt for the detention pond, and any failure by the contractor to perform was a result of the owner's prior breach. Affirming the trial court, the court of appeals held that the contractor's lack of substantial performance does not preclude recovery for a breach of contract claim when the other party commits the first material breach.


It is important to note, the court stated 1) the contractor must have in good faith intended to comply with the contract and 2) that a first material breach by the owner was necessary for the contractor to recover (the court considered numerous factors to determine if a breach is material). As a result, if an owner appears to breach the contract, it is imperative that a contractor continue to attempt to perform its contractual obligations, and if it ultimately chooses to abandon a project, be confident that it can demonstrate the owner's breach was material. The best example of a material breach is, like here, where the owner's breach directly prevented the contractor from performing.

1.9 *Little York, Ltd. v. Alice Trading Inc.*, 2012 Tex. App. LEXIS 2112 (Tex. App. Houston 1st Dist. Mar. 15, 2012).

SOUTH (GA): Property Owners May Recover Cost of Repair and Diminution in Value under Standard Insurance Policy

Many insurance policies provide coverage for “direct physical loss of or damage to” property that gives the insurer the option to pay the cost of repair or the loss of value. The Georgia Supreme Court previously held in *State Farm Mut. Auto Ins. Co. v. Mabry* that an automobile insurance policy requiring the insurer to pay for loss to the insured's car required the insurer to also pay for any diminution in value of the repaired vehicle. It has been unclear, however, whether this same interpretation should be applied to insurance policies insuring real property.

That was the question before the 11th Circuit Court of Appeals in *Royal Capital Dev. LLC v. Maryland Cas. Co.*, when the owner of a commercial building in Atlanta submitted a claim to its insurer after construction activity on an adjacent property caused physical damage to the insured's building. The owner sought from the insurer both the costs of repair and the post-repair diminution in value resulting from the damage. The insurer acknowledged that the damage to the building was a covered cause of loss and paid to compensate for the costs of repairs, but refused to acknowledge any responsibility for the diminution in value.





Because this precise issue had never before been addressed by Georgia courts, the 11th Circuit certified the question of whether the *Mabry* rule extends to standard insurance contracts for buildings to the Supreme Court of Georgia:

[I]f the insurer elects to repair the building, must it also compensate the insured for the diminution in value of the property resulting from stigma due to its having been physically damaged?

The Supreme Court of Georgia held that *Mabry* is not limited by the type of property and the insurer's obligation to pay can include paying for any lost value. The Court stated that the measure of damages is intended to place an injured party in the same position they would have been in if the injury had not occurred. Therefore, "The *Mabry* rule applies to the insurance contract at issue in this case. Accordingly, whether damages for diminution in value are recoverable under the [owner's] contract depends on the specific language of the contract itself and can be resolved through application of the general rules of contract construction."

The *Royal Capital* decision is the first extension of the logic of *Mabry* since it was decided in 2001. In the aftermath of the original *Mabry* decision, insurers were forced to pay hundreds of millions of dollars in settlements and sanctions. Although the implications of the *Royal Capital* decision are still not completely clear, it seems that insurers could be faced with large settlements with property owners seeking "stigma" damages. These amounts could far exceed the stigma damages contemplated by the *Mabry* decision given the relative value of the property at issue. It also seems that after extending the *Mabry* logic from cars to property, the logic could be extended further into other areas of insurance, such as CGL policies, ultimately costing insurers even more as the rationale behind the decision continues to spread.

Royal Capital Dev. LLC v. Maryland Cas. Co., 2012 WL 1909842 (Ga. May 29, 2012).

OTHER CONSTRUCTIVE THOUGHTS

UPCOMING SPEAKING ENGAGEMENTS AND PUBLICATIONS OF ALSTON & BIRD'S CONSTRUCTION GROUP

- Alston & Bird partner Chris Roux wrote an expanded analysis of the *Sojka v. Bovis Lend Lease* case mentioned above in the Under Construction section, including comparisons to competing authorities and lessons that may be learned from these cases. The CMAA National Capital Chapter publishes Mr. Roux's article at <http://www.cmaancc.com/images/Documents/Articles/newsletter%20july%202012.pdf>.
- In October, Jeff Belkin and two colleagues, including regulatory counsel for UPS and an assistant United States attorney, are speaking at the Society for Corporate Compliance and Ethics' (SCCE) 11th Annual Compliance & Ethics Institute in Las Vegas on the anatomy of a government investigation from inside counsel, outside counsel and government attorneys. Compliance professionals and lawyers are encouraged to attend this premier compliance organization's convention, and registration is available at <http://dev.complianceethicsinstitute.org/>.
- Andy Howard is speaking on the topic of conducting business across state lines at the ABA Forum on the Construction Industry's fall meeting, scheduled for October 18 and 19 in Boston.

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