

Representing the Contractor in Mediation: Best Practices

Eric J. Wittenberg, Esq.

Cook, Sladoje & Wittenberg Co., L.P.A. and Ironclad Dispute Resolution Services, LLC



In my 34 years of handling construction cases, I've seen pretty much all there is to see—from the extraordinarily complex to the absurd. Initially, many construction cases seem simple, but grow more complicated as the case progresses. Often this is due to privity of contract

issues. For example, a property owner typically has privity only with the general contractor. Hence, the property owner does not have the right to directly sue errant subcontractors. The property owner's recourse is to sue the general contractor, who can then bring the offending subcontractors into the case. As a result, construction cases become unwieldy due to the number of lawyers and parties involved. These characteristics can make construction cases some of the most difficult to mediate.

The following are some basic ideas that will make your construction mediation more efficient and successful:

- 1. Choose the right mediator.** You're most likely to get a positive outcome from your mediation by having a mediator who is experienced in handling construction cases and who understands exactly what's involved. An experienced mediator can provide better insight and creative solutions to knotty problems.
- 2. Come prepared.** The attorneys should both know the relative strengths and weaknesses of their cases and be prepared to discuss those strengths and weaknesses candidly. They should also prepare their clients for the mediation by ensuring that the clients understand the process.
- 3. Have realistic expectations.** With multiple parties involved in construction cases, it may not be possible to get the case settled with a single mediation session. However, that first mediation session may provide the parties with what they need to resolve

the case on their own later. If necessary, additional mediation sessions can also be scheduled.

- 4. Check egos at the door.** Part of the mediator's role is to provide a candid assessment of the strengths and weaknesses of a case. Sometimes, that means pointing out real problems. Litigants and their attorneys should not allow those honest and unblinking assessments to ruffle their feathers. Doing so can prevent them from recognizing good offers and it reduces the probability of settlement.
- 5. Think outside the box.** Often, the best settlements are those that hinge upon creative solutions. A good mediator should have the ability to think outside the box and to use that creativity to help the parties come to resolutions that they might not have recognized on their own. Litigants and their attorneys should be open to entertaining those creative solutions.
- 6. Provide your mediator with a good mediation statement.** Parties should view the mediation statement as a chance to detail their side of the story and their stake in the controversy for the mediator's eyes only. The better prepared your mediator is, the more likely your mediation will be successful.

This list is not exhaustive but adopting these ideas will make your settlement mediation sessions more efficient and more productive. Happy mediating!

Eric J. Wittenberg, Esq., is a graduate of Dickinson College and the University of Pittsburgh School of Law. He is a shareholder in the Dublin, Ohio law firm of Cook, Sladoje & Wittenberg Co., L.P.A. his practice has consisted of construction, real estate, and business litigation. He is also the owner and principal of Ironclad Dispute Resolution Services, LLC, which focuses on mediation and arbitration of construction claims, homeowner warranty claims, real estate and business litigation.