

# Mediating Large and Complex Construction Claims Cases

Mar 20 2008

Practice Area: Construction Law and Litigation

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Resolution of large and complex construction claims cases presents significant challenges for lawyers and mediators alike. Such cases typically involve up to 20 or more parties, millions of dollars in claims, complicated factual and legal issues, and intricate insurance coverage questions. They also contain a witches' brew of conflicting perspectives. Designers worry that their best laid plans haven't been faithfully executed. Owners are troubled that they haven't received the quality or timeliness they paid for. Builders are concerned that no one understands the difficulties they've faced from unpredictable weather and the need to coordinate the activities of perhaps scores of independent subcontractors and suppliers, some of whom may have been imposed on them by designers or owners.

The successful resolution of such cases through mediation therefore requires insight into the norms of the construction industry, detailed knowledge of related legal standards, an exceptional degree of mediative skill and diligence, and the application of a mediation process tailored to the unique circumstances these disputes present. And, while no two construction claims cases are precisely alike, some broad lessons can be gleaned from experience in mediating such complex multiparty cases.

## **Why Mediate**

One of the ways in which complex construction claims cases tend to differ from other business cases is that construction industry parties involved in a building project frequently have long and continuing relationships that transcend the immediate conflict. Therefore, the desire, even the need, to preserve those vital relationships tends to suggest the wisdom of using mediation rather than trial to resolve the claims at issue.

Another difference between the construction claims case and the typical business case is that quite often disputes will arise among owners, design professionals, builders, suppliers and subcontractors in the midst of a construction project. When this occurs, it may be imperative that their differences are resolved as quickly as possible. Mediation offers the speed and flexibility necessary to achieve such a result.

In addition, large construction claims cases may test the financial strength of parties who must fund completion efforts or repairs while simultaneously prosecuting or defending expensive litigation in which legal liability and insurance coverage responsibility are determined over a period of many months or years. Because time is money in the construction industry, an accelerated mediation process promises relief from the fiscal stresses that are inherent in construction claims cases.

## **When to Mediate**

Traditional mediation doctrine argues that the best time to mediate a dispute is as soon as possible, preferably even before formal claims are filed. In construction disputes, including large and complex ones, this is preferred, even essential, if the project out of which claims arise is still underway and if the parties have relationships they deem worth preserving. If, on the other hand, the project is substantially completed when disputes surface, or if the relationships of the parties are not highly valued or have diminished in importance, it may be best for the parties to proceed in an orderly fashion to acquire evidence through the traditional litigation discovery process before mediating. This approach helps to ensure that everyone involved can effectively evaluate the nature, scope, strengths, weaknesses and economic value of their respective claims and defenses.

The ideal time to mediate a large and complex construction claims case lacking the two conditions just mentioned may be immediately after the close of discovery, with only weeks or, at most, a few months remaining before the scheduled trial date. At such a time, the parties, their counsel and insurers should have acquired the information they need through the discovery process, and all concerned can focus on the benefits of a mediated resolution when weighed against the costs and risks of trial.

## **How to Mediate (Mediation Style)**

Should the mediator (or mediators; more about this below) in a large and complex construction claims case employ a facilitative style, or instead an evaluative one, as is often appropriate in a one-off litigation claims setting? <sup>1</sup>

Facilitative techniques frequently offer the best opportunity for the parties to preserve their valued relationships, while evaluative methods enable them to have the benefit of an expert parsing of the issues in the case without risking the costs or consequences of a public trial. Experience teaches that in large and complicated construction cases the parties usually want an expert evaluation of the issues as well as traditional facilitated negotiation. Therefore, the best approach is for the mediator(s) in such cases to use a blend of both facilitative and industry-specific evaluative methods.

## **How to Mediate (Mediation Process)**

Traditional practice is to follow a standardized format in the course of a mediation session. This normally means beginning in a plenary (or joint) session with all parties and counsel present for opening statements by the mediator(s) and counsel. The plenary session is customarily followed by a series of private caucus sessions <sup>2</sup> in which the mediator(s) explore confidentially with each party and their counsel their interests, needs and settlement options. And, once the caucus process has produced an agreement, the custom is to reassemble the parties and counsel for a brief signing ceremony to memorialize the essential terms of the agreement reached in the mediation, with a more detailed formal agreement to follow.<sup>3</sup> In a large and complex construction claims case, however, it may be best to modify the standard mediation process significantly in order to optimize the prospects for its success.

One way in which this can be done is for the mediator(s) to conduct brief preliminary caucus sessions separately by appointment with each party a few days before the scheduled plenary mediation session. This technique has the advantage not only of allowing the mediator(s) to become personally acquainted with all parties and their counsel in advance of the plenary session, but also to ensure that all participants, including the least-involved suppliers and subcontractors, have a chance for their concerns to be heard. Moreover, the use of preliminary pre-session caucuses greatly reduces the expensive down-time otherwise experienced by parties and attorneys left waiting for their individual caucuses with the mediator(s) when all parties are assembled simultaneously. And, by the conclusion of these pre-session caucuses, the mediator(s) should be able readily to organize the information thus gleaned from the parties into issue and evaluation spreadsheets that will greatly facilitate, and abbreviate, the normal caucus process that customarily follows the plenary session.

Another method that has been found to aid the large and complex construction claims mediation process is for the mediator(s) to conduct separate caucus sessions with each insured party, on the one hand, and its insurer, on the other. This technique gives the participants the opportunity to have from the mediator(s) the evaluative input they often desire, and it allows all concerned to explore with the mediator(s) both the coverage issues and the merits of the claims and defenses affecting each party without compromising the conflicting positions often taken by insurers and insureds.

Yet another technique found to be effective for a large and complex construction claims mediation is for the mediator(s) to assemble a blind settlement pool from contributions made by each participant without their knowing the specifics of the contributions of other participants. This must, of course, be done with the consent of all parties. The blind pool method helps to minimize the tendency toward a kind of comparison shopping among contributors to the pool, based on the parties' various perceptions of comparative liability of the several members of the construction "team," a tendency which often prevents an effective settlement. To address this problem, all contributions to the settlement pool can be deposited to a trust account maintained by the mediator(s), from which settlement distributions are made, thus preserving the confidentiality of the individual contributions.

The deft use of techniques such as these has been shown to be effective in resolving the most intractable construction case, including one in which prior efforts at more routine mediation methods have failed.

#### **Who Should Mediate (Co-Mediation)**

One of the lessons learned from mediating large and complex construction claims cases is that it is most often best done by a team of two co-mediators. Experienced co-mediators, especially those who have proven to work well together, add value to the mediation process by pooling their strengths, dividing their time efficiently and vetting their evaluative assessments within the team. Experience shows that effective co-mediators save the parties precious time, and therefore money, by streamlining and expediting the mediation process. The use of co-mediators with the right mix of industry expertise and mediation process skills also gives the parties and their attorneys confidence that they won't need to waste precious time educating their mediator(s) about the intricacies of the construction business or related legal principles.

The case for co-mediation in large and complex construction claims cases has been succinctly summarized by experts in the field: <sup>4</sup>

- With co-mediation, chances are improved that settlement negotiations can be concluded within a normal working day."
- "[t]he cost savings from a more efficient co-mediation process easily outweigh the relatively small added expense of utilizing a second mediator when there are more than five or six parties and the issues are relatively complex."

For these reasons, co-mediation is increasingly the way mediation is done in large and complex construction claims cases across the United States.

With this in mind, in today's practice environment, any construction claims case with seven or more parties and an amount in controversy of seven figures or more (the "pair-of-sevens" test) is a natural, indeed a prime, candidate for co-mediation.

#### **Who Should Mediate (Selecting the Mediator(s))**

A particular challenge for counsel in the large and complex construction claims case is to select a mediator or mediators with the best mix of industry expertise and mediation skills for the task at hand. The best mediator(s) for a large and complex construction claims case will have the ability to understand the competing perspectives of all participants because they possess a broad experience in construction law, the economics of the building industry, claims litigation, insurance coverage and mediation methodology. In addition, the right mediator(s) will have demonstrated the capacity both to design and execute a successful mediation process for large and complex cases, and a commitment to honor three fundamental principles of sound mediation practice:

1. they will not get between lawyers and their clients;
2. they will not embarrass lawyers or their clients; and
3. they will distribute the inevitable discomfort of the mediation process fairly.

Construction litigation counsel can gain much for their clients by screening candidate mediators against these criteria.

<sup>1</sup> For a detailed discussion of facilitative and evaluative mediation styles and their relative advantages, see Peppard, Terry F., *Arbitration and Mediation of Business Disputes: a Wisconsin Practitioner's Guide*, 2nd ed. 2008, State Bar of Wisconsin, CLE Books, at secs. 3.19, et seq.

<sup>2</sup> Id, at sec. 3.51, explains the mediation caucus process.

<sup>3</sup> Id, at sec. 3.60, describes the essential elements of an effective mediated settlement agreement and explores related considerations.

<sup>4</sup> Laflin and Piazza, Co-Mediation of the Complex Construction Case, Shepard's McGraw-Hill Construction Litigation Reporter, 1995.

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