



Mediation: Common-Place Yet Misunderstood? Answers to Three Frequently Asked Questions

By Christopher Anzidei, Esq.

It has become commonplace for construction contracts to include a provision that requires the parties to utilize some form of alternative dispute resolution (ADR), most often mediation. The term “ADR” is a broad label that is generally used to describe any process conducted outside of the courtroom. An ADR proceeding can be either non-binding, such as mediation, or binding, such as arbitration. Other ADR methods include dispute review boards, “direct discussions” among project executives (a feature of the new ConsensusDocs), and “project neutrals.”

While non-binding mediation is perhaps the most prevalent form of ADR, it is often misunderstood. This article seeks to answer three of the most frequently asked questions related to mediation:

- Are contract provisions that require non-binding mediation enforceable?
- Why should I invest valuable time and resources in a non-binding mediation process?
- How can I maximize my chances of success in mediation?

The Enforceability of Non-Binding Mediation Provisions

Many clients have asked, “If the ADR process is non-binding, can we skip ADR and go straight to court?”

The answer is usually “no” unless all affected parties agree to waive this requirement. While each case will turn on the specific contract language and applicable law, courts generally enforce provisions that require parties to submit their disputes to non-binding ADR. This is especially true where the contract provides that ADR must be conducted as a “condition precedent” to filing a lawsuit. In such instances, some courts have ordered a stay of the prematurely filed lawsuit to allow for mediation while other courts have dismissed the lawsuit altogether for failing to exhaust remedies.

The Benefits of Mediation

Clients also ask, “While I may be required to attend mediation, why should I devote any significant time or resources on non-binding ADR?”

While there is no guarantee that mediation will be successful, it will undoubtedly fail if one or both of the parties are not invested in the process. So why invest in mediation? There are many reasons. Construction disputes are usually complex and expensive to litigate. Judges, however, are simply too busy to devote any substantial time to your case and jurors typically struggle to grasp the details. In contrast, a qualified construction mediator will have the expertise to assist in evaluating your case and, just as importantly, will dedicate his/her time to your mediation until the process is exhausted. Finally, the ADR process represents your last opportunity to control the outcome of your dispute.

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Tips for Maximizing the Success of Your Mediation

Clients always ask, “What do we need to do for mediation?” Here are three tips for maximizing your chances of success:

- *Be prepared.* This maxim is not just for Boy Scouts. Even though mediation is non-binding, you should prepare as if it were a court hearing. A well-planned, persuasive position paper or


presentation can drive settlement by educating the mediator and framing the discussion favorably for your side. Similarly, you should be prepared to rebut the other side’s anticipated arguments. An effective response can win over the mediator and demoralize the other party, often softening their settlement stance.

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- *Assess your case beforehand.* Your preparation also should involve assessing both the strengths and weaknesses of your own position. This pre-mediation homework will assist you greatly in setting your goals, managing expectations and privately evaluating offers once the exchanges begin.

- *Leave emotional baggage behind.* Every troubled project has baggage—a reneged “handshake deal,” embarrassing mistakes, personality conflicts. Both parties would be well served by sticking to the construction problems at mediation and leaving behind any emotional baggage. Emotion won’t likely sway the mediator, and it could drive the other side away from the bargaining table before “best and final” offers are exchanged. **CM**

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