

Effective Use of Experts In Mediation

Mediation is a process of assisted negotiation in which the parties attempt to find a mutually acceptable solution or compromise to a dispute. In many cases that go to mediation, the issues in dispute are simple, fact-based, and do not require damage calculations. In such cases, legal experts often are not required.

In the engineering and construction industry, however, project issues and disputes typically are not black and white. Using experts in these situations can prove beneficial for everyone involved.

Because mediation is a type of negotiation, experts can help a client negotiate from a position of strength based on a thorough

technical analysis and effective presentation. Also, this may be the first time the opposing side's senior managers have seen or heard an unfiltered view of the positions.

Experts should be used to address technical design, construction, schedule, delay disruptions, impacts and productivity analyses. They also may provide damage models and address other unique issues. Some of the parties involved in the mediation, including the mediator and executive-level decision-makers, may not be familiar with the technical aspects of the dispute. It is the expert's job to present these issues clearly and articulately.

Because mediation is a less formal dis-

pute resolution method than either arbitration or litigation, it often takes place earlier in the resolution process. For this reason, attorneys may choose not to use experts.

But, if the parties have not adequately developed their positions, then the chance for a settlement from mediation is reduced significantly. When experts are involved early in the process, they can help define issues, objectively evaluate each party's strengths and weaknesses, talk with the client and fact witnesses, and discuss the case with an attorney, which ultimately leads to the parties being better prepared. Investing more time and effort upfront may prevent costly litigation or arbitration.



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Consider allowing experts to make a formal presentation of either their own independent analysis or their client's position. While the client may be emotionally involved and caught up in the minutia of the case, the experts can provide a succinct summary-level analysis and focus on the major issues.

Graphics, illustrations and photographs can emphasize key issues or simplify difficult concepts. If more detailed questions arise, the expert can explain these issues to the mediator during the breakout caucuses.

During a presentation, the expert can explain the facts, themes and "story" surrounding the case. This leaves the client out of the line of fire and allows the client to look like the "good guy" by taking a less strict position and making concessions, which can facilitate compromises on both sides.

The expert should remain at the mediation through the first caucus session to answer any technical questions related to the presentation. However, in most cases the expert should be dismissed after these issues have been addressed. A majority of mediations become commercial settlement

discussions, and the expert's analyses are no longer needed. But, it is a good idea to ensure the expert will be available by phone in case additional questions arise.

Prior to mediation, the attorneys should discuss whether they will be using experts. This will prevent one side from feeling overwhelmed or blindsided, which can derail any potential chance for settlement. A level playing field also can prevent an attorney from looking unprepared in front of a client in the event the other side has an expert.

The attorneys should formally agree to keep all information discussed in the mediation confidential. This confidentiality should extend to any slide presentations or reports prepared specifically for the mediation, including expert work products. These materials should be marked as "For Settlement Purposes Only" to prevent them from being introduced by the

opposing side in arbitration or litigation. If the parties cannot agree to confidentiality upfront, any information provided by the expert in the mediation may be discoverable, and using the expert in the mediation should be reconsidered.

The attorneys also should agree on a general outline for presenting each side's position, including the expected duration of expert presentations. The parties are involved in mediation to settle outstanding issues; one side taking an inordinate amount of time early in the process to present its side can create tension that is detrimental to a successful mediation.

Successful mediations are built on preparation, knowledge of the issues and both parties' willingness to compromise. Having experts involved can be helpful in preparing for the mediation, understanding the strengths and weaknesses of each party's positions and effectively presenting key issues.

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