

MAPPING STRATEGIES FOR A SUCCESSFUL MEDIATION

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As court dockets become overloaded and arbitrations become more like litigation, parties are looking toward mediation as an answer to resolving disputes. Nowhere is this more true than in international construction. Parties have many reasons to select mediation as a means to resolve their disputes, including the ability to control costs, time, process and outcome. Although there is no magic formula to guaranteeing the successful outcome of mediation, mapping a strategy for a successful mediation requires planning, preparation and an attack plan. Sitting back and waiting for the mediator to lead the process may not necessarily be the best course of action for assuring success. Experience has shown that those parties who lay out a plan for how to approach the mediation and then execute on that plan have a higher degree of success than those parties who rely on the mediator. That planning includes identifying the correct mediator for the particular dispute, understanding what steps are included in the mediation process and what actions to take within each of those steps, strategizing what to present in an opening statement, devising multiple creative offers/solutions that may be presented as options for resolution of the disputed issues, recognizing the impediments to settlement, knowing how to conduct oneself at the mediation and managing client expectations.

As mediator selection is the first critical step in the process, it is important to understand the style and the tactics that the mediator usually takes in the process. Do these tactics fit with your client's expectations, and will they work in resolving the types of disputes to be resolved? It is also critically important to look at specific abilities that will result in greater success, including the ability to listen, patience, empathy and the ability to encourage creativity in developing options that meet both sides' interests. Finally, the mediator should have knowledge of the issues in dispute and have the ability to weigh the merits of the dispute in conjunction with devising creative solutions to resolving the disputes as a win-win to both parties.

After mediator selection, the next step in mapping a strategy for a successful mediation is to understand the mediation process. Generally there are five further steps in the process that should be well understood before embarking on mediation: convening, opening, communicating, negotiating and closing. Counsel should discuss internally with his or her client what actions should be taken within each further step of the process and confirm that the mediator understands the parties' desires with respect to each such step.

Like a preliminary hearing in arbitration, the convening step is the next most critical step in the mediation process after mediator selection. The convening step forms the rules under which the mediation will be conducted. Thus, counsel should walk the client through each step in the convening process including discussing the following questions:

- How will the confidentiality of the process be confirmed amongst the parties including any preparation work therefor?
- How will the scope of the issues be addressed?
- Will there be a pre-mediation joint session between the parties and/or counsel with the mediator to discuss the logistics?

- Will there be a pre-mediation questionnaire submitted by the mediator, and, if so, how can responding to such a questionnaire be beneficial in furthering the mediator's understanding of the issues?
- Will pre-mediation statements be prepared, and, if so, what should be the length and the format?
- What should be included in a pre-mediation statement in order to focus the mediator on the critical issues?
- Will the pre-mediation statements be shared with the other party?
- Will there be an opportunity to share confidential statements with the mediator outlining the key issues in the case and what the parties believe are barriers to overcoming a settlement?
- How will the actual mediation be conducted?
- Where will the mediation be held, and does neutral ground best serve to resolve the dispute?
- Who should be present at the mediation, and is there assurance that those in attendance will have the authority to agree to a binding settlement?
- Is there any benefit to having experts at the mediation, and, if so, what role will they play?
- Will the parties make an opening statement, and, if so, who will make the opening statement and what will be the format and length?

Counsel play a critical part in the mediation process, and managing client expectations is no easy task. Once the mediation process steps have been discussed and an agreement reached on how the convening step is to be approached, counsel should then sit down with the client and identify a list of the real issues in dispute and sources of friction between the parties that are obstacles to settling the dispute. Determine the best approaches to address in caucus, including disputed issues and the barriers to settlement.

Once the problems and the underlying factors that have prevented resolution to date are identified, counsel should discuss with the client the benefits of an opening statement. Good mediators will have already read pre-mediation statements and potential confidential statements. Thus, openings may not be beneficial unless the purpose is to convey key messages to the opponent's decision-makers. These key messages can indeed set the tone of how serious one may be to settle the issues and how one views the future relationship between the parties. One strategy to a successful mediation is to home in on what those messages need to be, who will convey those messages and how they will be conveyed. While this may seem like a trivial decision, who and how the message is conveyed will set the stage as to how the mediation process will play out, especially when the disputants come from different cultural backgrounds.

Should it be agreed that an opening statement has value, the next determination is whether you wish to be the party who opens first. An advantage in opening is that a party has the first opportunity to affect the other side's expectations about the mediation. Alternatively, allowing the other party to open first may set the mediation boundaries closer to your expectations.

Once the mediation process starts, parties must recognize that the mediation takes the form of a 'dance,' meaning that initial offers are not expected to be what will be accepted by the other party and that there will be several gives-and-takes during the process. It is critical that this process be fully explained to your client and a strategy mapped out as to what opening offers will be presented and how those initial offers may affect the other party's response and the remainder of the mediation. Given that the dance may take several steps, twists and turns before the music stops, the party should brainstorm various options, acceptability, and the potential for mutual gains. Options may include solutions that resolve purely monetary issues but also may include other non-monetary options that address deeper underlying issues that are preventing resolution of commercial issues. An invaluable strategy is to invest the time to identify and deliberate over multiple alternative solutions that can lead to a satisfactory outcome. Brainstorming potential solutions should also include creative answers to problems that may be in lieu of or in addition to the monetary components of the dispute.

Mapping a strategy should also recognize that there will be a number of impediments to a successful outcome including failure to communicate, lack of information, lack of understanding of complex issues, emotionality, differing legal perspectives and inappropriate representatives. Counsel need to prepare clients to 'listen' to what the other party is saying and filter through the rhetoric or emotion. One of the hardest things for clients is to maintain a 'poker face' and to keep emotions out of the mix. Having respect for the opposing argument and showing an ability to listen goes a long way in moving the other party toward understanding that the reason the parties have a dispute is that both parties consider their perspectives, merits and opinions to be important. Identification of information that may be missing but necessary to resolve the dispute is equally as important as what information is presented. Effectively using the mediator to identify and unearth information may be a key in moving closer to resolving a particular issue.

The ability to understand why a particular issue is important to a party is often the key to resolution. The ability to convey that importance and any complexities of an issue to the mediator is paramount. Unless the mediator can understand the nature of a particular dispute, it will be difficult to persuade the other side as to how that affects the settlement offer. Finally, if the decision-makers are not present for the entire mediation process, the likelihood of success is significantly reduced.

Mediation can be a viable and successful tool in resolving disputes in international construction projects. However, as is true with failed projects, mediations will also fail if planning is not undertaken to map out the proper strategy.

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