

DE-CONSTRUCTING CONSTRUCTION MEDIATION

AN INSIDE LOOK AT WHAT WORKS AND WHAT DOESN'T



HON. JACQUELINE
CONNOR (RET.)



JOHN
HANOVER, ESQ.



TED
LEVIN, ESQ.



BOB
MANN, ESQ.



28
APRIL



12:00 P.M. -
1:15 P.M.



ZOOM WEBINAR
1.25 HR CLE



Outline

- I. Process of a mediation
 - a. What is your goal? Possible goals:
 - i. Prepare the case for a later, “money day” mediation;
 - ii. Obtain free discovery;
 - iii. Flush out insurance coverage issues;
 - iv. Educate other parties about perceived weaknesses in the case;
 - v. Narrow the issues in dispute
 - vi. Reset Your Client’s Expectations
 - vii. Resolution of the Case
 - viii. Ratchet up the other sides’ costs
 - b. How to prepare to reach your goal
 - i. Transparency and information exchange
 1. Publish a key analysis prior to mediation, such as a detailed defect list and cost of repair, a schedule analysis, a change order review or a cost accounting
 2. Publish these documents at least 60 days before mediation:
 - a. Counsel and experts need to evaluate
 - b. Insurance carriers/Adjusters need to set reserves and provide authority
 - c. In-house counsel need to review with key executives
 - ii. Consider a pre-mediation mutual expert meeting
 - iii. Consider a pre-mediation meeting or call with the mediator

- iv. Make the site available for inspection
 - 1. Answer questions---there should be no secrets
 - 2. Share your mediation brief
 - 3. Consider any non-monetary obstacles or opportunities for resolution
 - 4. Obtain adequate authority to resolve the dispute
- II. Know your case
 - a. What is the insurance picture?
 - b. Is the defendant judgment proof? Asset search?
 - c. Are there payment or performance bonds in play?
 - d. Are attorneys' fees and costs recoverable
- III. All other relevant contract provisions that can affect the case, such as indemnity provisions, waivers of consequential damages and limitations of liability.
 - a. What is the forum to try the dispute--- court or arbitration
 - b. Are you dealing with a single purpose LLC with no assets?
 - c. Have you considered multi-party dynamics?
 - a. Are you positioned to argue coverage issues? Have they been disclosed?
 - b. Do you have qualified experts:
 - i. Construction Defects
 - ii. Delay, Disruption and Escalation
 - iii. Design Professional Issues
 - iv. If it's mixed defect/nondisclosure case, an appraisal expert
 - v. Consider bifurcating issues, including focusing on the major issues in a multi-issue/ multi-change order case; "hot-tubbing" of experts/issues
- IV. Set reasonable expectations
 - c. Make sure your case is ripe for mediation
 - d. Prelitigation potential if parties are incentivized
 - e. Explain to the client the concept of resultant property damage
 - f. Emotional Distress damages are not recoverable
 - g. Defective work product is not an insurable claim
- V. Don't oversimplify or overcomplicate
 - h. A 3-page brief in a complex case is not helpful, but a 35-page brief with hundreds of pages of exhibits is also not helpful
 - i. Have your expert(s) be prepared to address in straightforward terms the most important and even technical issues (they will likely need to do it for trial, so may be beneficial for them to do in advance).
- VI. Work on Establishing Credibility with the Mediator
 - j. Avoid extreme positions
 - k. Avoid overreach on damages
 - l. "Own The Case" meaning, know your case inside and out
- A. The Concept of Mediation
 - a. Mediation, in construction cases, is 95% risk analysis and 5% personalities
 - b. Be open to the Mediator's risk analysis ---you paid for it!
- B. Common Tropes in Construction Cases
 - a. Delay claims:
 - i. Contractors:

1. Defective or Deficient Plans
 2. Non-responsive design professionals
 3. Differing site conditions
 4. Owner changes in the scope of work
 5. Owner's delay in approval of change orders
 6. Owner indecisiveness
 7. Owner's failure to make timely progress payment
 8. Owner's unrealistic expectations
 9. Owner's unreasonable behavior
 10. Changes mandated for governmental agencies
 11. Late or no pay
- ii. Owners:
1. Contractor working outside area of expertise
 2. Underbidding
 3. Failure to read and understand the plans
 4. Lack of supervision/ inexperienced supervision
 5. Failure to adequately staff the project
 6. Turnover in personnel---the revolving door
 7. Failure to buy out the project timely
 8. Inability to schedule the work of subs
 9. Poor communication
 10. Prior Acceleration Payment Covers Delay
- iii. Subs
1. Assets available
 2. Ego or personal intractability
- a. Liquidated Damages
- i. The danger of oversimplifying an LD claim
 1. LD claims require intensive expert analysis
 - a. Delay analyses are extremely expensive
 - b. Delay analyses are difficult for the trier of fact
 2. Are the LDs the only recoverable consequential damages?
- e. Attorneys' Fees. Prompt Payment Penalties. And Interest.
- i. Without attorneys' fees, can you afford to win the case?
 - ii. Will Prompt Pay save the day?
 - iii. Is Your Client Really Entitled to Interest?
 - iv. Costs of going forward to war
- f. Change Orders:
- iv. Contractors:
 1. "We did the work and are entitled to be paid"
 2. Owner verbally approved the work---work now, paperwork later
 3. Construction Manager approved the work
 - v. Owners:
 1. Read the contract---No Change Order, No Money
 2. The impact of [Opinsky](#) in public works cases
 3. Failure to Give Proper Notice
 4. Effect of Prior Waivers in Change Orders or Progress Payment Documents

5. Responsibility for owner retained design professionals actions and inactions.
 - vi. Design Professionals
 - vii. The Real World---the tension between law and equity
 - g. Oversimplification Epidemic
 - i. Beware of briefs that ignore complexity.
 - ii. Support all damage claims.
 - iii. Don't let coverage counsel show up at 3 PM.
 - h. Close-out cases
 - i. Start with contractor/design professional who wasn't paid; hit with construction defect case in return
 - ii. Common scenario in public and private projects.
 - iii. Expect mechanics liens, stop notices, bad product claims, or delay claims.
- VII. Key Takeaways for Effective Mediation
- a. Prepare thoroughly
 - b. Set realistic expectations
 - c. Share information generously
 - d. Help your client make a sound business decision

Speakers

Hon. Jacqueline Connor (Ret.)

judgeconnor@adrservices.com

Case Manager: ellateam@adrservices.com

John Hanover, Esq.

jhanover@adrservices.com

Case Manager: eveteam@adrservices.com

Ted Levin, P.E., Esq.

tlevin@adrservices.com

Case Manager: eveteam@adrservices.com

Bob Mann, Esq.

rmann@adrservices.com

Case Manager: eveteam@adrservices.com