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JAMS

THE LATEST NEWS IN CONSTRUCTION ADR FROM THE WORLD'S LEADING NEUTRALS

Reflections from the ADR Summit

By Hon. Nancy Holtz (Ret.)

GEC panelist Judge Nancy Holtz recently spoke with some of the attendees of the ABA Forum on Construction Law Fall Meeting in Austin, Texas, which included the Chair of the Forum, Harper Heckman, and Immediate Past Forum Chair Steve Lesser. Also, Forum Membership Chair and former member of the Governing Committee, Wendy Venoit weighed in with her perspectives.

Nancy Holtz: What a great conference! I was honored to be a presenter at this conference. Can you share with us any particular highlights?

Harper Heckman: I think people really liked the change-up in presentation—not so many "talking head" panels and more casual conversational presentations. I also think the unified theme, "the ADR summit," gave the program some solid focus while permitting us to present a wide range of topics.

Steve Lesser: A real highlight was the high-quality speakers in the field of ADR. Legends such as Tony Piazza and Eric Green, as I understand it, rarely ever share the same stage. As the program was for more sophisticated ADR participants, learning some practical aspects of resolving difficult moments in mediation and arbitration was helpful.

Wendy Venoit: This was such a wonderful program; it is hard to highlight certain sessions over others. The speakers truly outdid themselves with TED-style talks that were engaging and informative. It was an open forum to discuss the advantages and disadvantages of ADR—although ADR certainly came out on top! Even the naysayers were forced to admit the benefits in construction cases in particular. I also agree with Harper and Steve: Eric Green and Tony Piazza were great to see together. They really captivated the audience with their wisdom and insights into the mediation process and the mediator's mind.

NH: As a presenter at the conference, I certainly agree that people respond better to listening to a conversation rather than just being on the receiving end of a lecture. I know that's what our panel was shooting for. Can you share with our readers the topics covered?

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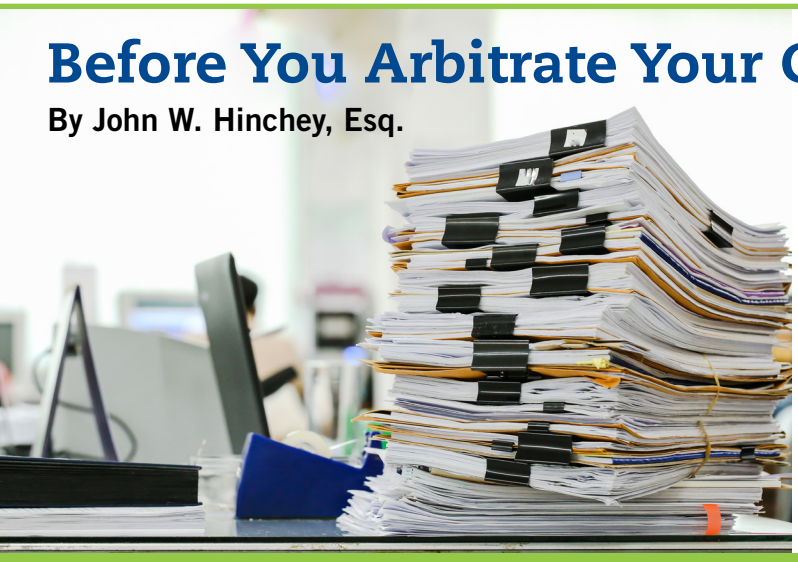
Before You Arbitrate Your Construction Case, Test it!

By John W. Hinchey, Esq.



Construction arbitration can be just as expensive and time-consuming as litigation. Why? Because construction cases usually involve complex technical issues with lots of documents. Knowing that, it only makes sense for a party facing a construction arbitration to settle the case by negotiation and mediation. If that is not possible, that party should thoroughly and candidly evaluate the prospects of achieving a good outcome in arbitration. Even the most competent and experienced

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Also in our Fall 2015 Newsletter:

Four Tips for Successful Construction Mediation

By Bill Short, Esq.

Mediation is the art of balancing interests. The number of interests usually involved in the mediation of a construction dispute is possibly larger than in any other field of law. One of the challenges of the mediation of any construction dispute lies in the ability of the mediator, as well as the parties and their lawyers, to adjust the balance of interests among the multiple participants involved with the construction project in such a way as to achieve a settlement. Because the typical construction project does involve multiple parties and numerous, varied and often complex issues, more advance planning by lawyers and their clients, and by the mediator, is usually required to provide the best-possible negotiating environment for success in the mediation.

Pre-Mediation Issues

Careful consideration should be given to the timing of the mediation of a construction dispute primarily because of the magnitude of discovery typically involved in a construction lawsuit or arbitration. Although all of the facts will certainly not be known or developed prior to significant discovery in a litigation or arbitration of a construction case, the advantages of early mediation should nevertheless be considered. If a construction dispute continues after the completion of the project, the bargained-for resolution is usually limited only to a monetary outcome.

Preparation for mediation should be virtually equivalent to preparation for trial if the probabilities for success are to be maximized. In the context of a litigation or arbitration, mediation is conceivably the most important day in the life of a case next to its trial. As a rule, the better-prepared party succeeds in the litigation or arbitration of a dispute. The same holds true for mediation.

Opening Statements

In construction mediations, opening statements are usually the only time during the entire dispute resolution process that a lawyer has the opportunity to speak to the adverse party. Because all interaction with the other party outside of mediation is controlled by the rules of ethics, no opportunity is available to a lawyer to address the other party, except through the formality of written discovery or depositions. The manner in which a lawyer engages in mediation advocacy in the opening statement can go far in ensuring that his or her client obtains a favorable result from the mediation process.

Private Caucuses

The importance of a lawyer allowing his or her client to speak in private caucus to the mediator without the lawyer speaking for the client cannot be overemphasized. The client must feel that he or she has had an

opportunity to be heard at the mediation, or the client will have difficulty in being flexible in subsequent negotiations throughout the duration of the mediation. Often, lawyers have difficulty remembering that the dispute belongs to the client and that ultimately the decision about settlement is that of the client. Additionally, a client may often have interests in settling a dispute against his or her lawyer's recommendation that only become known through private caucus discussions at mediation. A good mediation advocate explains his or her view of the facts, the law and the outcome that he or she, as a lawyer, thinks is likely, but allows the ultimate decision to be made by his or her client.

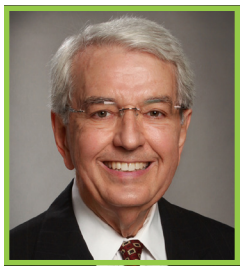
Final Caucuses– Closing the Deal

A lawyer and his or her client should have an understanding of a basis on which they believe the dispute should settle, based upon an evaluation of the facts, the law and other relevant factors, but with the client clearly understanding that what is learned during the mediation may well change the pre-conceived evaluation. If a client has been forced to go too far, too fast by his or her lawyer in the negotiation process, the final stages of the private caucuses at mediation will be more difficult because the client will get "stuck" and not want to negotiate further. Clients should also be prepared for the types of settlements that can be used, because in mediation, unlike trial, settlements can and often do involve consideration other than money.

Lawyers should consider the ramifications of the variety of such issues associated with the settlement of construction disputes prior to the mediation, raise them during the mediation process and deal with them in the settlement agreement. Often, lengthy mediations are resolved with an agreed financial settlement, only to require many additional hours working through the logistics of extraneous issues. From the perspective of a construction mediator, it is very difficult to revisit such issues with parties who, through day-long negotiations, have given much more than their initial settlement limit. If these matters are not carefully addressed at the beginning of and during the mediation, the resolution can be easily imperiled.

Conclusion

Construction mediation involves an endless variety of potential issues and methodologies for dealing with them. These observations should serve to enhance the ability of lawyers (and their clients) to prepare for and participate in construction mediation in a manner that will maximize the possibilities of success. ●



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Reflections

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HH: It was really everything ADR, from drafting ADR clauses to international arbitration to setting up your own ADR practice—and everything in between. We had it covered.

NH: As far as the format, moving away from a lecture-based model, how did that come about?

HH: I feel strongly that in order to educate people, you need to engage and, yes, entertain them. When we were designing the program, we really encouraged our presenters to be animated, creative and flexible in their approach. We were appealing to three groups: the transactional attorneys, the advocates and the neutrals. I think all three groups got a lot out of the program.

NH: You all have significant experience in the ADR world, both as an advocate and neutral. Did this ADR summit give you any new ideas or insights?

SL: Yes. Settling at a late hour can often create issues with participants leaving before the deal is properly confirmed. I learned to consider shooting a video and getting the parties and counsel to acknowledge the material terms could be an option that can be accomplished with an iPhone.

NH: Wendy, how about you?

WV: While I always come away with something new, when I attend Forum programs, the unique focus of this program—and the ability to really take a deep dive into the complexities of construction ADR—provided me with new and unique perspectives on the ADR processes. And, of course, it re-emphasized my commitment to construction ADR and underscored why ADR is almost always the most cost-effective and expeditious solution to construction disputes. I particularly enjoyed hearing how the real challenges to the arbitration process were the litigants themselves, who sometimes try to turn the arbitration into a full-blown federal court–style litigation—or worse—thereby eliminating the very benefits that arbitration promises, and the arbitrators who fail to control the process sufficiently so as to ensure that the ADR process is living up to its promises.

NH: I think we can all agree that this program was terrific. Generally, why do you think the Forum's programs may be of interest to our readers? What brings you back each time?

WV: That's easy—the people, the programs and the publications, in that order. I look forward to each and every Forum meeting because it gives me the opportunity to interact with friends, as well as to meet new members. Now that I am in-house, not only do I have the benefit of that network and their resources, but I have tapped into the Forum's in-house counsel group, which provides valuable insight into the in-house experience but has also proved to be a good source for referrals and recommendations when I need them. The Forum's programs are consistently excellent and a testament to the time and effort that goes into each and every one of them. The amount of preparation required of the speakers shows in the final product presented at the national and regional meetings. Last but not least, the Forum offers outstanding publications and scholarly articles on construction law that are both informative and useful to my day job.

SL: As Past Chair, I can definitely say it is the programming. The Forum has established itself as the go-to group for consistent, high-quality programming. When that is offered, you tend to see your colleagues at each meeting. This leads to building relationships in an atmosphere of learning new twists in construction law. The combination is unbeatable.

NH: Harper, can you give our readers the inside scoop? What can we look forward to in this upcoming year?

HH: We have a couple of really amazing programs coming up and in great locations. In January, our program is located in San Francisco and will address dealing with the kinds of problems our clients ask us to handle, which are "seismic" in nature. After that, we will have our annual meeting in Nashville. Since it is our 40th anniversary, in keeping with the musical theme inspired by our location, we plan on rolling out our own greatest hits: We will be bringing back some of our speakers who are all-time favorites.

Both programs are going to be great, and I would certainly encourage your readers to mark their calendars now.

NH: Since leaving the bench, I have made it a point to get to Forum meetings. There is no better place to learn from—and hang with—the very best construction attorneys. I'm marking my calendar for San Francisco and Nashville, and certainly encourage our GEC readers to do the same! ●

Hon. Nancy Holtz (Ret.) is a JAMS neutral based in Boston. She has more than 30 years of experience as a judge, attorney and ADR practitioner resolving significant multi-million dollar business and construction disputes, as well as employment, wrongful death and other personal injury matters. She can be reached at nholtz@jamsadr.com.

Test it

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construction lawyers have great difficulty in putting their biases aside in trying to determine how an independent and impartial arbitrator would decide the case. So, assuming that settlement is not likely, how does a party go about trying to assess the prospects of winning or losing—before going to arbitration?

Mock Arbitration

A mock arbitration involves presenting a summary of a party's case to one or more independent persons who have similar expertise and experience as do the actual arbitrators. The key difference is that this can be done before going to the actual arbitration. The mock arbitrator(s) will hear the case presentation, which includes a summary of the opposing party's positions as well, and offer their candid views on a confidential basis of how your case strategy would appear to an experienced, neutral third party. For example, which of your claims are likely to be successful and which are not? How will the potential arbitration panel likely react to your fact witnesses and experts? Would a dispositive motion likely be successful? What are the chances that the construction contract limitation of liability or notice provisions will be strictly enforced? Is a fraud claim likely to prevail? How will the applicable law be interpreted, and will that law potentially be applied to your facts and circumstances? Which of your arguments have the most appeal? If the case relies on documents, which documents are likely to be critical to the outcome? Having critical and honest feedback on issues like these—from persons who have no stake in the outcome—will allow you to adjust your case presentation strategy and tactics before it's too late. Or, perhaps, after the mock arbitration, you may decide to settle on less favorable terms or even to abandon the case.

Selecting the Mock Arbitrators

There are several points to consider in organizing a mock arbitration. The first is how many mock arbitrators should be selected. Obviously, having only one mock arbitrator will be less expensive, but having more than one will provide a broader perspective on how your case will be viewed. If your case is going before a sole arbitrator, you may want to retain up to three mock arbitrators to hear the case. If your case is going before a panel of three arbitrators, you may also want to consider having two or three panels of three arbitrators on each panel to expand the diversity of views. The more neutral persons who hear the evidence, the more likely it will be that you will have a realistic view of how the actual arbitrators will consider the case.

The mock arbitrator will hear the case presentation . . . and offer their candid views on a confidential basis of how your case strategy would appear to an experienced, neutral third party."

Before selecting the mock arbitrators, one should first determine the background and experience level of the actual arbitrators. If your actual panel is composed of construction lawyers and experts, you will likely want to pick mock arbitrators with similar backgrounds who have previously served on construction arbitration panels. On the other hand, if your actual arbitrators are academics or retired judges, you will want to consider choosing persons with comparable experience or retired judges as mock arbitrators.

Confidentiality

Of course, it is critical that the presentation and discussions during the mock arbitration be kept strictly confidential. Therefore, an agreement should be made with the mock arbitrators that any and all confidential documents and other information that the mock arbitrator receives or any comments or advice given during the course of the mock arbitration will be maintained in strict confidence with the appointing party.

The Mock Arbitration Process

Once the mock arbitrators are selected, and perhaps a week or so in advance of the mock arbitration exercise, the appointing party will typically send to the mock arbitrators selective portions of the case materials; for example, copies of the demand for arbitration and response, a copy of the relevant arbitration agreement and contract, citations to the applicable law, copies or excerpts of fact witness statements, expert reports and copies of key pertinent documents. Having reviewed these materials, the mock arbitrators will arrive well-prepared to hear the case presentation. Perhaps the most important aspect of any mock arbitration is that the opposing party's positions and arguments are presented credibly and persuasively, and this is typically done by having another lawyer in the appointing party's law firm make that presentation. The standard

practice is that each side's position will be presented in the form of a general background statement—much like an opening statement in a trial—perhaps followed by presentations by expert witnesses, and with the use of PowerPoint demonstrations of documentary evidence. The typical case presentation will take one day or less, but in some complex cases, mock arbitration presentations can last several days.

Deliberations and Evaluations

Other critical aspects of a mock arbitration exercise are the deliberations and evaluations by the mock arbitrators. Having read the advance materials and heard the case presentations, the mock arbitrators will then retire to a private conference room to conduct their "deliberations," or candid discussions of their respective views of each case presentation. In some cases, the appointing party will want to view and listen in on the deliberations, and this can easily be done by video- or audio-recording devices. In cases where more than one mock arbitration panel is used, the party may want the panels to deliberate separately. Obviously, it is important that the mock arbitrators put themselves in the role of actual arbitrators and conduct their discussion and deliberations just as they would if they were serving as the actual arbitrators in the case. Following deliberations and discussions, and having reached their determinations, the mock arbitrators will typically meet with the appointing party to offer and discuss their views on the case in general and especially on how the case might be more effectively presented.

Cost Management

Conducting a mock arbitration will, of course, involve additional cost. However, because the mock arbitration process is completely within the management and control of the appointing party, the process can be tailored to meet the needs and the budget of the party. For example, the mock arbitration can be self-administered by the appointing party, or there are many arbitral institutions and consultants who will manage and administer the process for a fee.

Summary

Certainly, a mock arbitration will add to the case preparation costs, but the expense of a mock arbitration is usually a small fraction of the total cost of preparing for and putting on the actual case. What is more sobering is the prospect of expending the considerable time and cost of going through the actual arbitration with a weak or less-than-persuasive case presentation. Because the cost of mock arbitrations can be managed and tailored to fit the party's needs, putting on a mock arbitration will usually be cost-effective. It is almost always the case that a party will make productive adjustments in its case based on feedback from the mock arbitrators and will agree that the overall benefit of the exercise was worth the additional cost. ●

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The JAMS Global Engineering and Construction Group provides expert mediation, arbitration, project neutral and other services to the global construction industry to resolve disputes in a timely manner. To learn more about the JAMS Global Engineering and Construction Group, go to www.jamsadr.com/construction.

New Additions

JAMS announced the addition of **William B. Short, Esq.** Mr. Short will be based in JAMS Dallas Resolution Center and serve as a neutral in a variety of disputes including Business/Commercial, Construction, Insurance and Real Estate.

Recent Honors

Zee Claiborne, Esq. was recently listed in the 2015 guide of Who's Who Legal: Mediation.

Gordon E. Kaiser, FCIArb was recognized by the 2016 Chambers Canada Guide for Dispute Resolution: Arbitration.

Representative Matters

Philip L. Bruner, Esq. was appointed to arbitration panels to hear disputes arising on a federal government project in Utah, a municipal project in Pennsylvania and as a mediator of disputes arising in New York and New Jersey.

Kenneth C. Gibbs has been engaged as project neutral for the new Apple Campus being constructed in Cupertino, Calif. and as a mediator with respect to disputes arising from the construction of the SR 520 highway project in Seattle, Wash.

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