How to Structure a Successful Mediation

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How to Structure a Successful Mediation

• Mediation Purpose
  ➢ Provides an expert with an objective viewpoint
  ➢ Allows an expert to help facilitate resolution of the dispute by the parties in the dispute
  ➢ Provides a non-threatening and informal atmosphere at lowered costs
  ➢ Maintains confidentiality
  ➢ Provides a venue for the parties to discuss their goals with the objective expert
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- Mediation Timing
  - Early in dispute resolution process
  - After negotiations have failed
  - Last step before expensive arbitration or litigation
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• Success Rates
  ➢ Range of 85% successes
  ➢ Most settle at mediation
  ➢ Some settle afterwards but before next step in formal dispute resolution process
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• Atmosphere
  ➢ Parties already in adversarial relationship
  ➢ Have spent some time building the “case”
  ➢ Looking for a venue to explain their side
  ➢ Generally have spent significant amount of money already, but recognize that much more will be spent if mediation fails
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• Technical Component
  ➢ Generally have job costs reports
  ➢ Usually have in-house analysis of some type
  ➢ Often have experts on board already
  ➢ Always have attorneys
  ➢ May have a litigation or arbitration calendar
  ➢ May have some depositions or witness statements underway
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• Typical Mediation Process
  ➢ Introductions
  ➢ Process description
    ➢ Note confidentiality of process so door is open for all discussions
    ➢ Discuss success rate but note that both parties must shift positions
    ➢ Looking for a mutually acceptable solution
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• Typical Process
  ➢ Role of Mediator
    ➢ Acts as a “neutral”
    ➢ Decisions are made by the parties, not by the mediator
    ➢ Mediator will not provide legal advice
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• Typical Process
  ➢ Presentations by each party
  ➢ Questions, discussion or sometimes “debate”
  ➢ Separate into private rooms
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• Typical Process
  ➢ Mediator engages
    ➢ Visits each room
    ➢ Reminds everyone of the goal – to settle
    ➢ Encourages reconsideration of positions
    ➢ Encourages offers
    ➢ Delivers offers
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• Typical Process
  ➢ Conclusion
  ➢ Settled - brief meeting to conclude final deal
  ➢ Determination that process needs more time (next day or hiatus)
  ➢ Determination that process will not work
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• Typical types of mediators
  ➢ Water Carriers
    ➢ Simply delivers any offers
  ➢ Horse Traders
    ➢ Pushes to increase offers in order to move process
  ➢ Debaters
    ➢ Wants to promote debate about issues
  ➢ Partnering
    ➢ Attempts to gain a win-win situation
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• Recommended Structured Approach
  - Enables partnering-type mediator
  - Look at lessons learned from actual mediation
    - Usually some principled stand involved that may not be revealed easily
    - Fairness is an important part of most disputes
    - Original relationships have been destroyed or damaged
    - Often part of the battle is just determining which way the cash arrow will point
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• Structured Approach
  ➢ Lessons learned from partnering
  ➢ Team building
  ➢ Problem solving
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• Structured Approach
  ➢ Use team building skills to modify mindsets
  ➢ Put participants in the relationship that they had at the beginning of the project
    ➢ Everyone was excited about project
    ➢ Parties had some greater level of trust
  ➢ Ask why each was selected originally
    ➢ Owner chose CM or Contractor for good reasons
    ➢ CM or Contractor chose Owner for good reasons
    ➢ GC/subcontractor cases are same
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• Structured Approach
  • Team Building

- Remind participants why the project was conceived
- Discuss successes of the project (choose goals reached; on budget, on time, good quality, useful product)
- List things each party did correctly or well during project
- Identify original risks prior to construction
- Identify program failings that contributed to the dispute (moves the discussion from personal to process)
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• Structured Process
  ➢ Problem Solving
    ➢ Acknowledge pain & frustrations to date
    ➢ Note necessity to set aside emotional feelings to focus objectively
    ➢ Note the complexity of the case
      ➢ Simple delay – generally is easiest to resolve
      ➢ Disruption – complicated and hard to prove, requires good records and analysis capable of showing lack of production
      ➢ Acceleration – requires good records and analysis
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• Process

  ➢ Problem Solving
    ➢ Note presence or absence of contemporaneous documents; few cases have good project records
    ➢ Look for any common ground or canceling claims
    ➢ Identify areas of disagreement
    ➢ Tell at least one “horror story” about cases where costs have well exceeded any claims
    ➢ Discuss risks issue – often disputes arise from allocation or acceptance of risks (performance and cost)
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• Process
  ➢ Problem Solving
    ➢ Remind everyone about personnel demobilization
      ➢ Experienced personnel cannot move freely to next job
      ➢ If personnel get involved with new project, case will be inadequately developed
    ➢ This cost is often ignored
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• Process
  ➢ Problem Solving
    ➢ Discuss how escalation happens within the project
    ➢ Problems are ramped up in the project level
    ➢ By the time they get to senior management, they are already disputes and hard to resolve
    ➢ Roughly approximate costs to litigate
    ➢ Compare to opportunity gain
    ➢ This is the reality check
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• Process
  ➢ Presentation
    ➢ Maintain big picture
    ➢ Provide good overview graphics
    ➢ Don’t get into minute detail
    ➢ Identify what went well
7/23 – Purchase Order Issued

Original Contract Duration – 388 CD

7/23 – Purchase Order Issued

Original Planned Duration - 371 CD

8/31 – Substantial Completion

Delay to Project Completion 398 CD
Early Planned Completion -18 CD
Change Order 1 & 6 -107 CD

Total Time Requested 273 CD
(CO 10 - COP 115, 146, 211)
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• Process
  ➢ Presentation
    ➢ Maintain even temper to keep discussion objective
    ➢ Be objective; don’t be afraid to show responsibility where it occurs
    ➢ RARELY is all the responsibility due to one party
    ➢ Keep presentation focused on facts, not personalities or actions
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• Process
  ➢ After Presentation
    ➢ Offer further discussion (Q&A) between experts
    ➢ Identify any areas of agreement
    ➢ Identify where and when the project went into conflict
    ➢ Identify main issue(s) that caused the initial conflict
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• Process
  ➢ After Presentation
    ➢ Attempt to state other party’s case to show that you understand their position
    ➢ Ask other party to state their understanding of your case
    ➢ See if the experts see anything differently from before presentations and discussions
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• Process
  ➢ Breakout Sessions
    ➢ Encourage partnering type of mediation
    ➢ Avoid water-carrying or horse-traders
    ➢ Avoid debaters, although those are better than the water-carriers or horse-traders
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• Process
  ➢ Breakout Sessions
  ➢ Mediator suggestions:
    ➢ Keep the team building issues in the conversation
    ➢ Review weaknesses in each case with that party
    ➢ Remind parties of problem solving issues (complexity, availability or lack of documents, canceling claims, personnel demob issues, escalation)
    ➢ Look for those principled stands that may impede resolution
    ➢ Discuss the fairness of the opposition case
    ➢ Try to reiterate future cost risks
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• Conclusions
  • Mediation requires use of soft skills, such as team building, problem solving, that are not often used
  • The identified issues may not be the real roadblock to settlement
  • Litigating the case in mitigation is not usually fruitful
  • Mediations are often successful just due to the recognition of the predicted cost to continue in formal dispute resolution
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• Conclusions
  • Mediation should be very successful, and lead to improved relationships that promote win-win solutions
  • Most cases that did not settle in mediation and go to litigation would have been better served by settlement offers on the table
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• Questions – Comments?
Thank You For Attending!