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Mediation and Arbitration in Real Estate and Construction Disputes

Leveraging Alternative Dispute Resolution to Achieve Favorable Outcomes

WEDNESDAY, APRIL 6, 2011

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Today's faculty features:

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March 10, 2010

**Guided Choice Arbitration Dispute Resolution: Real Time Customization
of the Arbitration Process to Fit the Dispute**

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“We have to start by defining the process as part of the problem.”
David Plant, ICC Paris, 2009

As compared to a court proceeding, a well designed arbitration process can achieve cost and time savings and an acceptable result. Further, in this era of the need for lawyers to “project manage” disputes and even guarantee legal expense, it is far easier to estimate the costs of arbitration than the costs of court based litigation.

Giving process choice to the parties through customization is the best way to create satisfaction with the arbitration process. It is very difficult to get any agreement to arbitrate in the absence of a pre-dispute agreement. Even with a pre-dispute arbitration agreement, it is difficult for parties to negotiate customized changes to standard provider forms when the nature of a future dispute is not known. While in theory, some customization can occur by agreement during pre-hearing arbitration conferences, changes to optimize seldom occur at that time. This results from the tendency of lawyers to constantly worry about tactical advantages. Arbitrators are reluctant to impose change contrary to the desires of the attorneys.

The best way to achieve customization of the arbitration process is through a facilitated negotiation led by a person trusted by the parties and their lawyers. Unfortunately, that person is seldom a provider case administrator. It is not an appropriate task for the arbitrator who will decide the case. The ideal person to facilitate is a mediator, originally engaged to help the parties settle the dispute, and who is also experienced with “best practices” of the arbitration process. This is not to suggest that the mediator actually be the arbitrator except in rare circumstances with a full understanding of the consequences by sophisticated parties.

Mediation as a pre-condition to litigation or arbitration is common in many standard trade association forms and is often not controversial in custom agreements. However, the traditional mediation process ends when the mediator declares an impasse. Other than because of tradition, there is no good reason why the mediator cannot assist willing parties to facilitate a binding resolution of their dispute which takes cost and time into account. Using arbitration, whether previously agreed to or not, and if properly designed and managed, is usually a far better method of resolving commercial disputes than is using the court system.

The mediator may help the parties identify why the parties are at an impasse and suggest processes to help the parties modify their positions to allow settlement. For example, the impasse may be caused by an early mediation where there is the lack of data and opinion available for the parties to evaluate causation or damages, resulting in difficulty predicting outcome probabilities. If so, the mediator could help the parties agree to an exchange of information, including depositions. If the parties cannot agree on such an exchange, the mediator could suggest an arbitrator be appointed for interim rulings.

Perhaps in resisting the continuation of mediation a party questions the good faith of the other parties to settle. If so, demonstrating that an award will come quickly absent settlement can be accomplished by selection of arbitrator(s), setting of the time and length of the arbitration, establishing the issues to be arbitrated and rules of engagement would encourage further mediated negotiations to continue.

Decision maker and not just lawyer involvement in customizing the arbitration process helps parties perceive a sense of fairness that allows them to more readily accept outcomes.. This is particularly important on decisions that impact time and expense e.g. the scope of discovery and number of hearing days. These issues are usually determined in the context of pre-hearing conferences attended only with lawyers. However, using Guided Choice Arbitration, the subject can be "mediated" before the arbitration process even begins. Again if the parties agree, clients and even ESI and other experts can be involved in the design of the arbitration. Remember all this is accomplished under a mediation or settlement privilege.

The following are suggested terms for Guided Choice Dispute Resolution ("GCDR"). They may be used whether or not the parties have previously agreed to arbitration. If an agreement for process customization is not reached, the parties will default to arbitration, court or any other previously agreed on procedure.

Protocol for Guided Choice Dispute Resolution

1. Any claim, dispute or other matter in question arising out of or related to this Agreement concerning the [Project/Agreement] shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by any party. However, any party having the right to statutory remedies may perfect any such right, including the timely filing of any notice or lien or obtaining of injunctive relief in a court of law to preserve the status quo.
2. Any mediation pursuant to this Agreement may be joined with any agreement by which a person or entity has an obligation to mediate disputes relating to the [Project/Agreement] with any party to this Agreement.
3. The mediation shall be conducted in accordance with the [Construction or Commercial] Mediation Rules of the American Arbitration Association, unless otherwise agreed to by the parties. The parties are free to agree to use other mediation rules or another provider other than AAA or to have no administration.
4. The mediator shall have at least ten years experience as a neutral commercial arbitrator, unless the parties agree otherwise. The cost of the mediation shall be shared among those persons or entities that participate. The parties shall consider that the mediator be certified by the International Mediation Institute www.imimmediation.org
5. If the mediator declares in writing an impasse in the mediation process, then as a continuing part of the mediation process, the mediator shall assist the persons or entities who participated in the mediation, who shall act in good faith, to design a mutually-acceptable arbitration process agreement ("Design Process Agreement"). If a Design Process does not result in a Design Process Agreement within thirty (30) days from the declaration of impasse, then the

parties may pursue previously agreed to arbitration or other available legal remedies.

6. The Design Process Agreement does not obligate any party to arbitrate a dispute unless an agreement to arbitrate otherwise exists. The discussions about the Design Process Agreement shall be considered as settlement discussions within the applicable mediation privilege and shall not be admissible in a subsequent legal proceeding. The mediator shall not offer to act as the arbitrator, but may consent to do so if so requested by all the parties.
7. The issues to be resolved in the Design Process Agreement may include, but are not limited to the following and shall consider the use of the College of Commercial Arbitrators Protocols for Expeditious, Cost Effective Commercial Arbitration.
 - A. Selection of appropriate arbitrators or arbitrator and a panel chair. Criteria will include experience, cost, availability within the timeframe of the parties, and ability to understand the issues in dispute.
 - B. Length of the hearings.
 - C. Site of the hearings.
 - D. Form of the final and interim awards.
 - E. Authority of arbitrator or court to provide for pre-hearing relief.
 - F. The law, including agency rules that governs substantive and arbitration procedural questions .
 - G. Whether and how issues can be narrowed through a document similar to Terms of Reference commonly used by agencies in Europe.
 - H. Determination of a protocol for discovery, including discovery of electronically stored data and procedures for discovery from third parties.
 - I. Parties to the arbitration.
 - J. Whether and how the hearings can be expedited without violating perceptions of fairness to the parties. This includes the use of experts and the extent to which live testimony is required.
 - K. Appeals, if any.
 - L. The extent to which the arbitrators have the authority, if any, to modify the Design Process Agreement.
8. In performing his or her role, the mediator shall maintain the confidentiality of information as required by the rules pursuant to which the mediation is conducted and any more stringent requirements by law.

9. If the parties agree, the mediator will be available to continue to assist the parties in reaching a settlement during the arbitration hearings. However, the mediator will continue his/her confidentiality obligations and is prohibited from communicating with the arbitrator(s), or doing any independent investigations. The mediator's sole source of information will be the record in the arbitration or what the parties choose to disclose confidentially to the mediator.

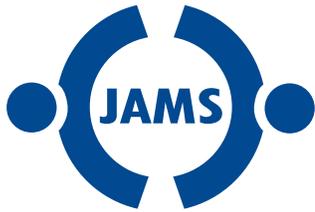
The above language may be easier to include in agreements in the following compact format:

Any claim, dispute or other matter in question arising out of or related to this Agreement concerning the Project shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by any party. However, any party having the right to statutory remedies may perfect any such right, including the timely filing of any notice or lien or obtaining of injunctive relief in a court of law to preserve the status quo. Any mediation pursuant to this Agreement may be joined with any agreement by which a person or entity has an obligation to mediate disputes relating to the Project with any party to this Agreement. The mediation shall be conducted in accordance with the Construction (or Commercial) Mediation Rules of the American Arbitration Association, unless otherwise agreed to by the parties. The parties are free to agree to use other mediation rules or another agency other than AAA or to have no administration. The mediator shall have at least ten years experience as a neutral commercial arbitrator, unless the parties agree otherwise. The cost of the mediation shall be shared among those persons or entities that participate. The parties shall consider that the mediator be certified by the International Mediation Institute www.imimmediation.org. If the mediator declares in writing an impasse in the mediation process, then as a continuing part of the mediation process, the mediator shall assist the persons or entities who participated in the mediation, who shall act in good faith, to design a mutually-acceptable arbitration process agreement ("Design Process Agreement"). If a Design Process does not result in a Design Process Agreement within thirty (30) days from the declaration of impasse, then the parties may pursue other available legal remedies. The Design Process Agreement does not obligate any party to arbitrate a dispute unless an agreement to arbitrate otherwise exists. The discussions about the Design Process Agreement shall be considered as settlement discussions within the applicable mediation privilege and shall not be admissible in a subsequent legal proceeding. The mediator shall not offer to act as the arbitrator, but may consent to do so if so requested by all the parties. The issues to be resolved in the Design Process Agreement include, but are not limited to the following and shall consider the use of the College of Commercial Arbitrators *Protocols for Expeditious, Cost Effective Commercial Arbitration* and the CCA *Guide to Best Practices in Commercial Arbitration (2d edition)*: (1) Selection of appropriate arbitrators or arbitrator and a panel chair. Criteria will include experience, cost, availability within the timeframe of the parties, and ability to understand the issues in dispute; (2) Length of the hearings; (3) site of the hearings; (4) form of the final and interim awards; (5) Conditions for pre-hearing relief; (6) governing the substantive and arbitration law, including agency rules; (7) whether and how issues can be narrowed through a document similar to a "Terms of Reference;" (8) determination of a protocol for discovery, including discovery of electronically

stored data and procedures for discovery from third parties; (9) parties to the arbitration; (10) whether and how the hearings can be expedited without violating perceptions of fairness to the parties. This includes the use of experts and the extent to which live testimony is required; and (11) appeals, if any.

In performing his or her role, the mediator shall maintain the confidentiality of information as required by the rules pursuant to which the mediation is conducted and any more stringent requirements by law. If the parties agree, the mediator will be available to continue to assist the parties in reaching a settlement during the arbitration hearings. However, the mediator will continue his/her confidentiality obligations and is prohibited from communicating with the arbitrator(s), or doing any independent investigations. The mediator's sole source of information will be the record in the arbitration or what the parties choose to disclose confidentially to the mediator. The mediator's sole source of information will be the record in the arbitration or what the parties choose to disclose confidentially to the mediator.

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THE RESOLUTION EXPERTS®

Volume 3, No. 3 · Fall 2010

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JAMS, The Resolution Experts, is the largest provider of ADR services in the United States, with Resolution Centers in major cities throughout the country.

The JAMS Global Engineering & Construction Group provides expert mediation, arbitration, project neutral and other services to the global construction industry to resolve disputes in a timely and efficient manner.

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JAMS GLOBAL CONSTRUCTION SOLUTIONS

Leading ADR Developments from The Resolution Experts

DIRECTOR'S CORNER

JAMS GEC Offers "Rapid Resolution" ADR Training

By **PHILIP L. BRUNER, ESQ.** *Director, JAMS Global Engineering & Construction Group*

One of the most effective ways to control costs incurred in pursuit or defense of claims is to understand and take full advantage of the myriad creative approaches to construction ADR. No two claims may warrant the same approach, and "one size" of ADR clearly does not "fit all" disputes. Although the 2007 AIA Contract Documents and the 2007 ConsensusDocs sought to stimulate business and law firm focus on crafting appropriate approaches to dispute resolution short of litigation

(the "default option" under both forms), for many in the construction industry the dispute resolution issue still comes into focus only after a dispute has arisen or after litigation or binding arbitration has been commenced. By that time, parties frequently regard themselves as locked into expensive contractually stipulated dispute resolution methods, which inexperienced contract administrators or unskilled lawyers tend to follow in rote.

To provide in-house personnel in government agencies, companies and law
See "JAMS GEC Offers" on Page 6

Why Construction Mediations Fail: Two Views

Ten Common Reasons for Failure in a Mediation

By **DOUGLAS S. OLES, ESQ.**



There are many reasons why a mediation can fail, even if all parties are well represented and generally inclined to participate in good faith. The following are some of the more common reasons for failure, a list that may be helpful to review in preparing for a mediation.

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Using Failure Analysis to Design Successful Mediations

By **PAUL M. LURIE, ESQ.**



Mediation is a popular strategy for resolving construction disputes. Standard forms of construction agreements generally contain mediation clauses and many courts now require mediation as a prerequisite to trying construction cases.¹ Not all mediations, however,

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Ten Common Reasons for Failure in a Mediation continued from Page 1

- 1 Lack of full accessible settlement authority.** Effective mediation dialogue usually requires each party to have (or have ready access to) broad settlement authority. If persons with authority are not present, they must be readily reachable throughout the mediation.
- 2 Premature mediation.** Parties will be cautious about compromising their positions without having a clear understanding of the claims against them and having reasonable opportunity to conduct discovery as to the supporting evidence. The minimal discovery needed for effective mediation will vary according to the complexity of claims and the degree to which parties understand each other when the dispute begins.
- 3 Lack of consensus on key issues.** Mediation can easily fail if the parties have differing understandings of the key issues to be resolved. An experienced mediator should attempt to ascertain in advance whether the parties seem to have similar understandings of the issues to be mediated.
- 4 Limitations of the mediator.** In the limited time available for mediation, the mediator must be able to grasp legal, technical and inter-personal issues quickly. A person with demonstrated skills as a methodical and dispassionate arbitrator is not necessarily skilled as a mediator. Technical experience in the subject matter in dispute can be helpful, but a mediator's ability to be a "quick study" may be even more important. If mediators have restrictions on their available time, those restrictions should be communicated to the parties at an early stage of mediation.
- 5 Counterproductive joint sessions.** Joint sessions (e.g. with PowerPoint slides) are sometimes useful in illustrating complex technical subjects of dispute (e.g., in cases involving construction or design). On the other hand, adversarial presentations can evoke strong negative feelings and disrupt the pursuit of a rational mutually acceptable compromise. Many mediators disfavor joint sessions except in rare cases.
- 6 Unwillingness to provide rationale for settlement positions.** At some point in most mediations, discussions of entitlement give way to offers of compromise settlement. Mediators should encourage parties to offer a legal or factual explanation for each such offer (e.g., in terms of assigning percentages of risk to specific claims). Offers that lack such support often lack credibility and lead to frustration of the settlement process.
- 7 Hostility or distrust.** Mediation is often most successful when the mediator can convince all parties to approach the issues in a rational manner. Disputes are much more difficult to settle if one party believes that other parties are devious or untrustworthy. Although such beliefs are sometimes justified, they are equally often a product of misinformation or over-reaction. It is often useful for mediators to help explain how an opposing party's position seems to be in good faith and understandable in light of available evidence.
- 8 Too many parties & too little time.** When a dispute involves multiple parties or numerous specific issues, a single day may be insufficient to mediate a settlement between them. One alternative is to begin by attempting to mediate initially between two or three key parties. Another obvious alternative is to add more than one day for mediation.
- 9 Lack of access to key information.** Parties in mediation should expect to offer documentation in support of their key contentions. If such support has not been included in pre-mediation submissions, it is helpful if parties can bring supporting data with them to the mediation (computer-stored data is particularly handy). It is also helpful

if the place of mediation offers at least limited facilities for making quick copies of documents that address key points raised during the proceeding.

10 Games playing by parties or counsel. In a case where neither party is likely to recover an award of legal fees, it is often unreasonable for a respondent to offer significantly less than the fees it expects to incur to defend the case through trial. There is also too much energy devoted to some of the tactics by which parties deliberately make unreasonable offers

in order to prod an opposing party into making the first significant compromise offer. There is no magic formula for leading a mediation to an “optimal” settlement, but much can be gained by making serious thoughtful offers that fairly and reasonably consider the strengths and weaknesses of a party’s position. ■

Based in Seattle, WA, Mr. Oles is a mediator, arbitrator and project neutral with the JAMS Global Engineering & Construction Group. Recognized as a leader in construction law and public and private commercial contracts, he has been a partner with the firm of Oles Morrison Rinker & Baker LLP since 1987. Email him at doles@jamsadr.com or view his [JAMS Engineering & Construction bio](#) online.

Using Failure Analysis to Design Successful Mediations continued from Page 1

are successful. And a common reason for failure is that the participants and their lawyers, and poorly trained mediators, don’t understand the mediation process. It is much more than just appearing at a “mediation day.”

Mediation is a process that should be designed by the mediator based on his or her perception of the risk profiles of the people who will resolve an impasse or have it resolved by third parties. The steps in the process are:

- A genuine agreement to mediate. Sometimes parties lack a real agreement to mediate even when a judge or pre-dispute agreement requires mediation.
- Mediator selection.
- Analysis of the cause of impasse by the mediator. These can be complex in construction cases which typically involve many stakeholders.
- Design of the process to overcome existing impasses and continue with intervention by the mediator in a facilitated negotiation.²

- Mediation ends when the neutral is no longer considered useful or there has been a final judgment or arbitration award. Thus, the mediation process can facilitate settlement long after a declaration of impasse at a traditional mediation day.

The construction industry is familiar with the use of engineering failure analysis to determine process failure in order to prevent recurrences of such failures.³ But most mediation training for both neutrals and advocates concentrates on mediation success stories. Understanding the causes of mediation failure can also be useful in achieving successful settlement through mediation. Using the lessons learned from engineering failure analysis shows us the common reasons mediation fails:



Mediation is not treated as a client-centric process

A well-designed mediation should be client-centric and not mediator nor lawyer-centric. In unsuccessful

mediations, lawyers often play the key role, presenting the client’s story, both legally and factually, analyzing the risks for the client of not achieving settlement⁴ and determining what offers and demands may be acceptable. In other words, the lawyer treats the process like a judicial settlement process. The client’s minimal role in this process may result in rejection of a proposed settlement that appears reasonable to the lawyers and the mediator.

Mediators can similarly impede settlements by treating the process like a judicial settlement conference. In a typical mediation, the mediator listens to the advocates and then opines, publicly or privately, on the likely outcome -- the classic evaluation. While the mediator’s opinions may have a role when the parties are truly at impasse after extensive negotiations, those evaluations have a negative effect when they are shared early in the process. People who believe the numbers are wrong quickly lose trust in the mediator and impasse is likely.

To achieve settlement, the cli-

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Using Failure Analysis to Design Successful Mediations continued from Page 3

ent-decision makers involved in the dispute must want to settle. This often means more than just agreeing on dollars and avoiding future costs. Some mediations fail because the emotional needs of clients are ignored by the mediator. Examples include situations where there are needs for apologies, perceptions of unfairness, and interpersonal problems among the decision makers, for example, with family owned construction companies or a public or corporate entity without clear lines of decision making for dispute resolution.

Dollar amounts are discussed too early

Lawyers and mediators frequently want to learn the other party's settlement dollar number as soon as possible. As a result, mediators sometimes ask early in the mediation process, "So what is your number?" If the parties do not have sufficient information to evaluate their true position early in the process, they can perceive the other side's number as a sign of bad faith. The party's offering, especially if it comes from a corporate or public body, may create "face saving" problems if the party subsequently backs away from an early number. Experienced mediators know that the right number provided at the wrong time is the wrong number.

The wrong mediator is chosen

Choosing an appropriate mediator can be a very important factor affect-

ing the outcome of the mediation. Unfortunately that selection is often based only on superficial information gathered through inquiries to colleagues and acquaintances or on the same resumes that would be used to hire an arbitrator. Typically, lawyers ask their colleagues only: "Is anyone familiar with Mediator X?" The answer is often the equally general, "Yes, s/he is good." Often mediators are selected because they have served as a judge or arbitrator but may not have any special developed people-oriented mediation skills. Others are chosen based on an assumption that they are more evaluative than facilitative or vice versa.

A better inquiry would probe the following factors:

- What is the mediator's track record? Is the mediator an authority on the business and technical construction situation in dispute? In some situations, expertise in the subject matter of the dispute can give the mediator credibility and create trust.
- What is the mediator's style? What kind of investigation does s/he do before mediation begins? Does s/he encourage the exchange of information before a formal mediation session?
- What are the mediator's interpersonal skills? Is he or she good at "reading" people? At understanding risk appetites? Can the mediator understand any cultural or gender differences at play? Is s/he a "closer?"
- Is the mediator optimistic and hard working? Optimistic media-

tors set the tone of mediation toward a successful resolution.

- Is the mediator creative? Often cases settle because the mediator sheds a new light on the facts and risks. Innovative mediators are constantly on the lookout for ideas to break impasses.

The dispute is mediated too late

The best time to mediate is as soon as possible after the breakdown in settlement negotiations. Settlements achieved at that time can avoid or reduce expensive legal and expert fees, preserve business relationships that can be a vehicle for non-cash settlements, and avoid the deterioration in interpersonal relationships that affect a party's willingness to settle.

However, many lawyers view mediation as a process that should be used mostly to avoid the risk of a binding trial or arbitration decision and therefore schedule a mediation close to the trial or hearing date after a lot of money has been spent and positions, especially those based on experts, have so hardened that they cannot be overcome. Some lawyers may say that it is inevitable that mediations occur late in the process because of the need for discovery. These advocates do not understand that good mediators facilitate the informal exchange of the information necessary for the parties to evaluate their positions. Mediation can take place even without a pending lawsuit or arbitration and can enlist experts into the process.



The mediator fails to make a proper diagnosis of factors creating the impasse

All mediations begin with a failed negotiation - an impasse. The mediation process must overcome that impasse and pave the way toward a settlement. A successful mediation process requires a confidentially conducted investigation into the causes of the impasse and the development of a mediation plan to overcome those factors. Often the investigation incorrectly consists solely of exchange of mediation “briefs” that are carefully prepared by the lawyers and that seldom provide much information about the true reasons for the impasse. Experienced mediators require much more information to explore the legal and factual issues and the risk profile of the decision makers. The lawyers for all parties will help identify to the mediator the stakeholders who must be part of the process. They may include insurance company representatives, experts whose opinions are influential in determining positions, family members, and corporate officers and directors. In some situations, it may be useful for the mediator to meet with the parties before the mediation day.

Based on his or her findings about the reasons for impasse, the mediator should design the mediation process for approval by the attorneys. Mediators should consider factors including whether there should be public sessions, how a travel-resistant insurance representative or stakeholder should be brought into the process and whether public information exchange sessions should be conducted before a mediation

day. Mediators should also consider the role of the lawyer vis-a-vis the client, particularly the lawyer’s level of control over the client and the lawyer’s specific needs.

Construction disputes often involve the differing interests of owners, lenders, general contractors, trade contractors, design professionals and insurers. The mediator should consider these varying interests when designing the process. In particular, the mediator should think about the role of the public session and the parties who should participate in the caucuses. Without a proper diagnosis of the reasons for impasse, the mediator cannot design an appropriate process.



There are unrealistic expectations to achieve settlement on mediation day

Lawyers and mediators often expect that settlements should occur on the mediation day. When the parties and their lawyers do not see progress, they can become frustrated and may view themselves at impasse. However, the mediator may know things that the parties and lawyers do not and that require more time and possibly even an adjournment. A skilled mediator can allow an adjournment that does not cause a irretrievable impasse.

The parties’ frustration can be aggravated by lawyers who do not adequately prepare their clients for what to expect on the mediation day. For example, sometimes lawyers do not discuss with their client the best and worse alternatives if the dispute does not settle. Mediators can be at

fault for not adequately insisting on such client preparation.



The settlement is not documented contemporaneously

After a long mediation day, there is a tendency for the lawyers and parties to want to go home and leave the preparation of a settlement agreement to the lawyers at a later date. However, the failure to memorialize a settlement agreement can lead to mediation failure because the lawyers may later discover new issues and disagree on the precise terms of the agreement. Under most state confidentiality laws, the oral terms of an unexecuted settlement agreement may not be enforceable.

Participants should not leave a successful mediation without documentation of the terms of the settlement. The lawyers -- not the mediator -- should draft the document to avoid a later argument that the mediator breached a duty to anticipate an issue that had not arisen during the mediation. If a binding agreement is not reached at the mediation, it is important that the mediator stay in contact with the parties to avoid the possibility that the process of negotiating the details of the agreement causes a collapse of the settlement.

CONCLUSION

Mediation is perceived by many as a standardized process in which haggling with the help of a neutral will cause clients to settle construction disputes. To the contrary, mediation is a sophisticated process based on the

See “Using Failure Analysis” on Page 6



JAMS Expands in Atlanta, Minneapolis

JAMS Atlanta, GA location has moved to One Atlantic Center (left) with an expanded panel to resolve disputes of all sizes. Our new Resolution Center is three times the size of our previous space and offers a business center and wireless internet access.

JAMS has also opened a new Resolution Center in the beautiful Accenture Tower (right) in **Minneapolis, MN**, featuring eight conference rooms and an environment conducive to resolution of all types of disputes.



Using Failure Analysis to Design Successful Mediations continued from Page 5

mediator's and parties' understandings not only of the probabilities of outcomes, but also the psychological and risk profiles of the parties who must consent to settlement. Most successful mediations of complex cases demonstrate that cases are settled when the mediator understands these principles and designs a process that addresses all the factors leading to impasse. ■

1. Mediation is a condition precedent to arbitration or litigation in all current forms published by the American Institute of Architects, the Engineers Joint Documents Committee, the Associated General Con-

tractors and the Design Build Institute of America.

2. In 1991, Tom Stipanowich led an American Bar Association survey of dispute resolution procedures. An analysis of the data concluded that attention to procedure was the most significant factor in determining the successful outcome of mediations. See Paul M. Lurie, *The Importance of Process Design to a Successful Mediation*, 19:4 PUNCH LIST 1 (1997) citing D. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO STATE J. ON DISPUTE RESOLUTION 105 (1996).
3. Petroski, Henry, *To Engineer Is Human: The Role of Failure in Successful Design* (Vintage Books, 1992)
4. Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1 (1991). This article

describes the social science research supporting the proposition that advocates often are poor predictors of the outcomes of litigation.

5. For an excellent discussion of the confusion caused by the terms evaluative and facilitative see Stempel, W Jeffrey, *Inevitability Of The Eclectic: Liberating ADR From Ideology*, 2000 J. DISP. RESOL. 247.

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JAMS GEC Offers "Rapid Resolution" ADR Training continued from Page 1

firms with training in ADR cost control and nuances of construction ADR methods, JAMS GEC offers half-day and full day in-house training sessions on the effective use of ADR methods to promote early settlement and "Rapid Resolution" of disputes on the job. These sessions cover effective use of stepped negotiations, project neutral facilitation, expert determinations, the "initial decision maker," mediation, adjudication, advisory dispute review boards, non-binding "mini-trials," and other creative ADR methods. As for binding arbitration, the sessions also will address ways to expedite and control costs through detailed statements of claims, dis-

covery limited to relevant issues, pre-hearing motions, control of hearing time through the "chess clock" and written witness testimony subject to live cross-exam, and other highly cost effective considerations.

All sessions are taught by JAMS GEC panelists who have decades of experience in construction law, construction ADR and teaching. To schedule a training session and obtain further information, call 866-956-8104. ■

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