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by Steve Revay

"Discourage litigation. Persuade your neighbors to compromise whenever they can. Point out to them how the nominal winner is often a real loser in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good person. There will be business enough."

President Abraham Lincoln made that statement over a hundred years ago, nevertheless, it rings even more true today. Our legal system is based on an adversarial process, where winning is often more important than obtaining a just resolution. Since 1865 both the amounts and the complexity of issues in dispute increased astronomically. Today, it is not unusual to hear that, by the time the available appeal processes are exhausted, the plaintiff has either gone out of business or been permanently crippled.

The time required to get the final answer through the adversarial process, its costs and the inherent uncertainties forced businessmen to search for alternate methods of resolving their disputes. Whether President Lincoln's suggestion has any impact will never be known. However, what is known is that more and more commercial disputes are now settled through mediation. Mediation can take many forms. For the construction industry, so-called "fact-based mediation" appears to be the most appropriate choice. The lead article of this issue was prepared in our Calgary office in collaboration with S. W. (Bill) Wilson, P. Eng., 35 years of experience, Conrad Loban, Fellow, Royal Architectural Institute of Canada, 35 years of experience, and Francis P. Hartman, 20 years of experience.

This group is organized to administrate the mediation process and its members are available as mediators.

MEDIATION — A More Palatable Solution

At one time it was believed that arbitration would be the solution to circumvent the exorbitant time and cost being incurred resolving disputes in court. Certainly all articles on the subject suggested that to be the case. Experience with the process, however, leaves many with a different conclusion. So common is that experience that both the American Arbitration Association and the Institute of Arbitrators in Australia have published pamphlets providing guidelines for expediting (reducing time and cost) the arbitration process.

As many will attest, arbitration is more and more frequently being conducted as an informal litigation. The trappings might not be evident but the cost and time expended certainly are.

The above referenced publications do provide quite useful suggestions as to how to reduce time and cost. However, they do not address the root problem, i.e. arbitration is like litigation — an adversarial process. There is no escaping that reality.

To avoid the time and cost associated with any adversarial process, mediation, as described in this article, must be considered.

WHAT IS MEDIATION?

Mediation, as defined by the Alberta Arbitration and Mediation Society is, "a process of dispute resolution in which a neutral third party assists the parties involved in a dispute to negotiate their own settlement".

This is quite different from arbitration where the parties refer their dispute to a mutually acceptable independent arbitrator. This process is adversarial in that each party, through an advocate, presents its position to an arbitration panel. At the conclusion of the hearing the panel presents its decision. The decision is legally enforceable and the courts are generally adverse to hearing an appeal, let alone overturning it.

As with arbitration, the third party in mediation is chosen because of a familiarity with the nature of the dispute. Under this scenario however, the mediator is not charged with ruling on the dispute, but rather, with facilitating a mutually acceptable settlement between the parties. Contrary to arbitration, the mediator does not choose a winner and a loser. The spirit of mediation is one of agreement, not of conflict.

MEDIATION: A TRIPLE "E" SOLUTION: EFFICIENT, ECONOMICAL AND EFFECTIVE

Turning to the reasons for mediation's growing popularity, these initial comments deal with time. Mediation is faster, simpler, cheaper, and routinely produces results that both disputants feel are equitable. Contrary to most other processes, except negotiation, mediation can begin immediately upon the parties agreement to the process. Often a one paragraph letter is all that is required to initiate the mediation. Motions and briefs are rare and discovery is seldom used.

In addition, it is not necessary to hold multiple mediation sessions extending over a long period of time. Finally, as the parties themselves control the outcome by making their own decisions, there is no wait for the issuance of a judgement.

Cost savings occur not only as a consequence of the reduction in time, but also due to the absence of advocates and the informality of the process. Advocates, regardless of whether or not they are lawyers, cost money.

The legal profession, because of its familiarity and comfort with court procedures, tend to increase costs as mechanisms are introduced which frequently turn arbitration into a quasi-litigation process. In the mediation

process there is a specific aversion to formal procedures.

Generally speaking, the parties selecting mediation incur two forms of cost: administrative fees and mediator's fees. Administration fees normally cover the services of providing the location for the hearing and for choosing the mediator with the appropriate skills. Mediator's fees are obviously a function of the individual and his background. However, construction people, regardless of seniority, rarely charge fees comparable to those charged by lawyers.

The chart below indicates some of the costs that can normally be anticipated in the more formal methods of dispute resolution, in comparison with mediation.

In large corporations, governments and agencies, the question often arises concerning the choice of in-house versus outside mediators. There are many advantages in choosing someone who has absolutely no connection with the dispute. The parties in the dispute will be more at ease and the claim of complete confidentiality and impartiality is more credible. The mediator has no interests, financial or otherwise, which might be perceived as a bias or influence to the way the mediation is conducted. It is likely that the experienced mediator will be able to help the disputants separate facts from opinions more quickly than in-house personnel. The professional mediator has the training and experience and has learnt how to handle the difficult process of assisting the parties in obtaining a mutually acceptable solution to their problem.

The process is perhaps best expressed by Fisher and Ury in their book, *"Getting to Yes"* in which the authors identify four steps in their process of principled negotiation. These are:

(1) separate the PEOPLE from the FACTS;
(2) focus on INTERESTS not POSITIONS;
(3) generate a variety of POSSIBILITIES before deciding what to do;
(4) insist that the result be based on some OBJECTIVE STANDARD.

This proven and successful process is best facilitated by independent mediators, in the mediation process described here.

A common concern in any dispute is the potential impact on future business relationships between the parties. The two fundamental factors that encourage negotiation of any dispute are the high costs of traditional means of resolving that dispute, and the desire to maintain business relationships. Any process that involves a judgement or decision from a third party will impact relationships, as there is invariably a winner and a loser. Too often, unfortunately, because of the time and cost of the other dispute processes, there are no real winners, only losers. The mediation process, on the other hand, is designed to find a win-win solution through non-adversarial procedures.

In dealing with the process itself, a mediation flow chart has been developed by Revay and Associates Limited (RAL) in collaboration with independent mediators, to better illustrate the steps involved.

This flow chart begins with the parties agreeing to mediation and contacting a mediator. The parties have the choice of selecting a mutually acceptable individual or communicating with a firm that can provide a pool of individuals with broad based construction experience who can understand the nature of disputes and the typical predisposition that each party brings to the table.

Once initial arrangements are made, each party submits a position statement to both the mediator and the other party. Some argue that this should occur at the first mediation session. Whereas this might be appropriate for family or insurance mediation, it is RAL's opinion that waiting until the first session does not consider the typical complexity of construction disputes. RAL also believes that, through this exchange of positions, each party and the mediator will be better focused as they commence the mediation process.

As the first — and often the only — mediation session commences, the mediator must clearly explain the process and seek commitment of the parties to it. Each party should declare they are prepared to accept the guidelines described by the mediator and that they have the authority, to move from their initial position statement if such movement is fair, and/or makes sound business sense.

Although it is recognized that guidelines may vary from one mediator to another, there is a generally accepted rule that all communication should be non-adversarial/threatening and uninterrupted.

Occasionally mediators disagree on the need for "caucus", i.e. separate discussion with one party. Those who advocate the process believe that separate discussion can be useful as this allows the mediator to speak more frankly to one party than might otherwise be appropriate when both disputing parties are together. Those who are opposed to the use of "caucus" are concerned that potential mistrust might arise. In truth, both positions are valid. The best thing is to allow the process to be guided by the needs of the parties and the ability of the mediator. What should not be at issue is the question of confidentiality. Whatever is stated within the confines of the caucus can only be disclosed by the party in caucus, NEVER by the mediator.

The next process is to focus and agree on the issues. Where is there common ground? What is at issue, i.e. disagreement? What facts can be agreed on and what can not? Assumptions are identified and dealt with. Through this process the mediator develops an understanding of the

COST ITEM	LITIGATION	ARBITRATION	MEDIATION
Data collection and review	•	•	•
Interviews/Meetings/Discussions	•	•	•
Claim/Expert report preparation	•	•	
Expert testimony	•	•	
Legal fees	•	•	
Examination for discovery	•	•*	
Court reporter costs at discovery	•	•*	
Court time	•		
Liens – Placement/Removals	•	•	
Settlement costs	•	•	•

*Not always mandatory in Arbitration.

parties and their concerns.

With such an understanding, the mediator can help focus the parties on reaching a mutually agreeable solution. Solutions need not necessarily always relate to money. Often a creative solution can be developed that satisfies the concerns of both parties. The strategy is to assist the parties in developing, considering and agreeing on options which will ultimately become their solutions.

The obvious question which occurs is, "What happens if the parties cannot agree on the issues?". This is perhaps most common in the construction industry where disputes can be complex, involving a variety of issues and events that occurred over a period of months or years.

If the complexity of the issue or confusion regarding events is creating a stumbling block, our mediation model allows the process to continue by encouraging the parties to appoint an independent third party analyst to prepare an evaluation and report on the issues creating the difficulty. The mandate of this analyst must be clearly defined and agreed to by the parties in dispute. The intent of this step is to bring the facts to the table.

The independent analyst must have access to the records and people involved in the dispute. They should also understand that the role is not that of an advocate for either party and that the report will be provided to both parties, and the mediator. This report will allow the mediator to continue the process of developing an understanding between the parties.

It should be mentioned that this is not a novel step. In Alternate Dispute Resolution (ADR) literature, the process is frequently referred to as fact based mediation. The following statements are excerpts from John Tyrrill's article *"Conciliation and Mediation of International Commercial Disputes — The Lawyer's Role"*:

"ADR combinations

It is possible to structure a process which involves a combination of ADR processes. Potentially, there is a significant role for the lawyer in designing and negotiating an ADR process and in documenting the ADR agreement. Particularly, in the case of more complex ADR combinations.

For example, it is possible to combine mediation with independent expert appraisal. The combination can be very powerful. Mediation sessions can be used to define and crystallise the issues to be referred to non-binding independent expert appraisal. On occasions, the same person might be requested to perform both functions."

"Conclusions

There is not yet the extent of use of ADR processes for international commercial disputes that many ADR proponents, facilitators, and dispute facilitation organisations might prefer to be the case. The alternative methods of dispute resolution are conducted in the shadow of arbitration and litigation and often only occur to avoid those more formal and often more costly processes. The alternatives are likely to enjoy increased usage, due to their time and cost effectiveness and, in some instances due to the benefits they can bring to on-going commercial relationships.

Dispute resolution, at least in some industries, tends to be rights and obligations based, which provides a discipline and rigour to their conduct. Often, there is a tendency to demand some form of expert assessment of appraisal as part of the ADR process and as justification for any settlement. That factor tends to mitigate against non-experts conducting ADR processes for particular industries."

As can be seen by the model, further decision support may be provided if a dispute arises regarding costs. In the construction industry the effect of particular events can sometimes be very difficult to quantify. Unfortunately this problem is exacerbated by numerous "experts" who are prepared to provide opinion based on their extensive experience in construction matters, but not, unfortunately, in quantifying effect. The analyst is bound to base his or her evaluation of quantum on job records *not opinion*.

Before proceeding, it must be understood that, regarding costs, the analyst does not have the mandate to assess liability, or the value of the settlement. Rather, he or she is providing a reasonable measure of costs for those issues that are still in contention. It should further be understood that the analyst should be working jointly for the parties in dispute. Together, these parties, with the mediator will agree upon a mandate which is directed to the analyst. In this manner, focus, cost and time are controlled by the parties.

All too often the people empowered to reach a settlement do not have first hand knowledge of the issues, and unfortunately the information provided by subordinates is sometimes dictated by their desire to maintain their career track. That is perfectly human and quite common in construction where site personnel are not authorized to make settlement decisions. Such a situation often requires an independent analyst to research and identify the facts. A firm such as Revay and Associates Limited can readily provide an experienced third party analyst, should the need arise.

The final step in mediation is the parties' agreement. It must be understood that whereas mediation is voluntary, once an agreement has been reached it should be implemented by the parties, i.e. understanding that the parties need or desire to reach agreement is not governed by sanctions, rules or procedures but rather by the concern for maintaining business relations and avoiding the time and cost involved in the other methods of dispute resolution.

It is recommended that a Statement of Agreement be prepared by the mediator so that all concerned are aware (and have a clear understanding) of the agreement reached by the parties. The effective implementation of that agreement can normally be handled through the provisions of a construction contract, such as change order procedures.

ADVANTAGES OF MEDIATION

The benefits of mediation are best expressed by the Alberta Arbitration and Mediation Society as follows:

- leaves control of the outcome in the hands of the disputing parties;
- is flexible, allowing disputants to explore a wide range of options open to them;
- is fast, enabling disputants to save substantial time and money;
- is confidential, avoiding public disclosure of the conflict, as well as confidential business and personal information;
- can preserve or improve business and personal relationships by improving communication and understanding through non-confrontational problem solving.

— municipalities and higher levels of government;
— operators of commercial and institutional complexes, such as shopping malls, office buildings, schools and hospitals.

For interested potential clients, we can provide **sample drawings,** showing the drafting time required to do the conversion. This allows the client to compare the accuracy, quality and computer file efficiency, as well as the cost of our conversion services to any others they may wish to consider.

Before starting a project, Cambric's trained professionals analyze the client's specifications and standards. These people make certain that we understand exactly what the client's needs are, and how we can ensure they are met.

They then analyze the customer's drawings with an eye to:
— standardization;
— the use of repetition to reduce time;
— the creation and use of a symbol library, etc.

Cambric frequently undertakes a "pilot" contract purchase order of about 50 drawings. This provides the client with first hand information on our conversion process. Cambric ships the documents to one of their international production facilities where their trained CAD operators convert the drawings to electronic media, using the owner's exact specifications.

Once the drawings are converted to CAD, they are sent to Cambric's central checking facility in Salt Lake City. There, they are plotted, checked, corrected and back-checked.

The completed files are then sent to the client in electronic form on the chosen medium.

The conversion and checking process adopted by Cambric ensures a **very high degree of data accuracy.** They will correct any flaw in the new CAD drawing resulting from re-creation of the original for free, with no questions asked. If a flaw appears because of an error on the original, Cambric will correct it for the prevailing hourly rate.

Cambric/Revay's marketing and sales are headed by Drew Agnew in the RAL Calgary office, under the direction of Stephen O. Revay, Western Region Vice-President. Drew joined RAL in April of this year, and holds a degree in Mechanical Engineering as well as an MBA, from McMaster University. He has extensive experience in sales engineering and project management, in both the commercial and industrial sectors and stands ready to listen closely to the needs and wishes of our clients.

We are placing ads in selected North American computer magazines to make the public aware of our presence, and introduced ourselves to the North American oil and gas industry from our **"National Petroleum Show"** booth at Calgary's Stampede Park last June.

Meanwhile, response to personal contacts made in Western Canada during the first few months of our initial operation has been very positive. We look forward to servicing an expanding clientele in the months and years to come.

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