

# Seven Tips For A Successful Mediation

**MEMBERS OF THE CONSTRUCTION** industry are often called upon to participate in Mediation. Mediation is simply a form of negotiation which is facilitated by a mediator. In mediation, the parties insert a third party into their dispute in an effort to increase the prospects that the parties will reach a mutually agreeable solution to the dispute. The fundamental principle of mediation is that the parties retain control over their future. Unlike a trial or an arbitration, in mediation both parties have to agree for there to be a resolution. In fact many construction contracts, including the Standard AIA form contracts require mediation prior to submitting a claim to litigation or arbitration.

As Mediators and attorneys, we are often asked to suggest best practices for lawyers representing their clients in mediations. There are a number of things lawyers can do to be more effective in a mediation. This article, however, will discuss seven ways that you, as the owner/contractor/subcontractor, can assist in making a mediation successful.

## 1. BE PREPARED. PREPARATION

Preparation. Preparation. A mediation is similar to most other endeavors. The one who is best prepared usually has the best result. Research your facts. Create a time line. Organize your documents and drawings. Be ready to present your case and support for it in summary form. Be ready to answer the questions of others. Anticipate arguments and opposition. One of your goals at a mediation is to convince the other side that you have a strong case and are prepared to take your case to litigation or arbitration if the mediation is unsuccessful. Finally, know the consequences of a failure to reach an agreement in the mediation: what is the best possible outcome in litigation, what is the worse

possible outcome in litigation and what is the effect of each on your business.

## 2. PROPERLY DOCUMENT YOUR FILE

Think like a lawyer. How can I best organize an document my file? Train your people to take the time necessary to do this well. A properly documented file gives you an advantage over your opponent and will make it easier for you to accurately evaluate and determine fault and risk. A well documented file will also make your attorney's job easier and hopefully reduce your costs in attorney's fees.

## 3. HAVE THE RIGHT REPRESENTATIVES PRESENT

Construction disputes are different than many other disputes. It is not uncommon in construction disputes to have laborers, foremen, managers, supervisors, consultants and owners all having information relating to the disagreement. Anticipate who might be called upon to answer, explain or respond to an issue at the mediation. Consider bringing those people to the mediation or at least having them available by telephone to provide information. Additionally, you must have the person who has authority to settle the issue present at the mediation.

## 4. BE COURTEOUS

"Sugar catches more flies than vinegar." While this adage may not apply to every situation in life, it does apply in mediations. Rude behavior is rarely helpful in mediations. Mediations present an opportunity for sharing information, answering questions and resolving disagreements. A spirit of civility and cooperation - courteousness - is much more effective than being angry or rude. People feel better about compromising claims and resolving differences with people with whom they get along. Nothing puts a damper on the mood in a mediation quicker than rude behavior. Remember what your mother taught you "treat people the way you want to be treated."

## 5. HAVE THICK SKIN

Parties will experience a wide range of emotions in a mediation. Be prepared for

this. You may hear things said about you, your employees or your company that you consider insulting and untrue. Don't allow yourself to be distracted from your goal by rude or insulting behavior from another. Don't let your pride get so wrapped up in your conflict that you allow this to cloud your judgment. Remember, it's just business. Be prepared to deal with this type of behavior.

## 6. BE PATIENT

Mediation is a process. It takes time. Mediation has even been referred to as a dance. This means it is a series of steps orchestrated or connected together. As information is exchanged and differing positions are understood, risks and rewards become more clear as demands and settlement offers are exchanged and considered positions frequently soften. There aren't many shortcuts to the process. Allow the process to work for you. Be prepared to devote the entire day or days set aside for the mediation. As the parties invest time, money and energy in the process, it becomes harder to walk away without a resolution.

## 7. TRUST YOUR ATTORNEY

You hired them for a reason. Let them do their job. They are there to assist you and help you make the best decision. It is their job to assess risks and determine probabilities of success for a hearing on the merits. Too often, we see parties not fully trusting their attorneys. This presents a non-unified front and makes it more difficult for your attorneys to do their job well. If the disagreement being mediated cannot be resolved, your attorneys are there to protect your interest through the dispute resolution process.

In conclusion, most mediators will tell you that between seven and eight mediations out of ten are successful. It is a process that works. When you do your part, you increase your chances of having a successful resolution and accomplishing your goals at the mediation.



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Bill Ratliff's law practice has been principally in the area of commercial litigation and insurance defense. He now focuses exclusively on alternative dispute resolution, both as a mediator and an arbitrator. Bill was one of the first attorneys in the state of Alabama to be approved for appellate mediation appointments. Bill is a certified mediator with the American Arbitration Association, and he is on the roster for the Alabama Center for Dispute Resolution.

A wide variety of trial experience serves Bill well as a mediator and arbitrator. He has represented individuals, financial institutions, automobile dealerships, manufacturers, construction companies, insurance companies, and other types of corporate clients, as both plaintiffs and defendants, in both state and federal court. He also has extensive experience representing creditors in workouts and in bankruptcy proceedings under Chapters 7 and 11 of the Bankruptcy Code.

Bill was born in Birmingham, Alabama, in 1956. He attended the University of Alabama, and in 1978, he received a Bachelor of Science degree in corporate finance. Bill attended Cumberland School of Law at Samford University and graduated in 1981. He worked with the Birmingham firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal until 1988. At that time, he joined Dale Wallace and Bert Jordan to practice law. They have been partners or members of the same firm for over 20 years.

Bill is admitted to practice law before all Alabama federal district courts and all Alabama state courts. He is a member of the Alabama State Bar, the Birmingham Bar Association, and the American Bar Association.

Oscar Price joined Wallace, Jordan, Ratliff & Brandt in 2004. He practices in the areas of construction and general business law and has represented owners, general contractors, subcontractors, architects, suppliers, and bonding companies. In addition, Oscar has management experience in the construction field, which gives him a unique understanding of the industry.

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A native of Birmingham, Alabama, Oscar was born in 1955. He received his B.A. in English from the University of Alabama in 1977. He received his law degree in 1980 from Vanderbilt University School of Law. Following graduation, he served one year as the law clerk for United States Magistrate Judge Edwin Nelson, United States District Court Northern District of Alabama. From 1981 to 1987, Oscar practiced law with The Rust Engineering Company and Rust International Corporation where his work included the preparation and negotiation of engineering and construction contracts and related documents. He also supervised the resolution and litigation of construction claims and disputes, as well as other matters.

From 1987 to 2000, Oscar practiced corporate and construction law, among other areas, with the Birmingham firm of Johnston, Barton, Proc-

tor & Powell. His work included reviewing, modifying, and negotiating construction documents including AIA documents. He also prosecuted and defended construction claims and litigated other construction-related and non-construction-related matters.

From 2000 to 2004, he was the president of All-South Subcontractors, Inc., a specialty contractor that provided commercial and industrial contracting and subcontracting throughout the southeastern United States. Its services included commercial roofing, lightweight concrete roof decks, and spray-applied fireproofing.

Oscar has served as a director of the National Roofing Contractors Association and the National Roofing Legal Resource Center. He is currently a director of the Associated Builders and Contractors of Alabama. Oscar is a frequent speaker on construction law at continuing education seminars and industry meetings.

Oscar has served on the boards of numerous civic, charitable, and religious organizations including: the City of Mountain Brook Board of Zoning Adjustment, Grace House, and Re-Entry Ministries. Oscar has served as an elder at Covenant Presbyterian Church, and he is currently on the board of two Christian discipleship organizations: Young Business Leaders and the Jackson Institute.

No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.

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