MEDIATION:

PEACEFUL SOLUTIONS TO CLIENT DISPUTES

BY LARRY HAYDEN AND HERB SCHWARTZ

A THIRD-PARTY MEDIATOR CAN HELP YOU KEEP SMALL CONFLICTS FROM GROWING INTO MAJOR LAWSUITS

Building and remodeling breed strong emotions, and strong emotions breed disputes. As consultant Linda Case says in her remodeling seminars, "There will come a time in every remodeling project when the client will be very, very angry with you."

Construction disputes may be inevitable. But if you plan for conflict, rather than hope to avoid it, it can strengthen rather than threaten the owner-contractor relationship. Mediation is perhaps the best way to plan for conflict, by providing an amicable way to resolve it. Unfortunately, few contractors know how mediation works and what it offers.

Mediator Larry Hayden, at rear, helps client and contractor hash things out with minimal cost and distress. The mediator can only suggest solutions, not dictate them. Nevertheless, 90% of mediated cases end with both parties agreeing on a settlement.

Maintaining Focus

Mediation means asking a neutral third party to intervene between two conflicting parties to help them settle a dispute. The mediator does not dictate the solution; he or she simply helps the two parties find a mutually agreeable settlement.

As a nonconfrontational, voluntary means to resolve a dispute, mediation offers great advantages over arbitration or court. The mediator improves communication, keeps things focused, and helps the owner and contractor address the root questions of why there is a dispute and how it can be settled. This helps them avoid getting sidetracked into other disputes and constantly raising the stakes, as so often happens when lawyers run the show in the arenas of arbitration and court. In mediation, it is the two parties, not a third party, who control things.

Perhaps most importantly, mediation is the only dispute-resolution method that requires a mutually satisfactory result. And it works: According to the American Arbitration Association, 90% of all cases submitted to mediation are successfully resolved.

The beauty of the mediation process is that both sides receive positive affirmation of the results. Without the neutral mediator, almost any resolution will leave one party feeling victorious and the other itching to get even. This residual negative feeling causes subsequent disputes to get off track and moves the parties in the direction of lawyers.

Excising the Cancer

If you intervene early with something like skin cancer, it's an in-and-out office procedure. But if you wait, it may require major surgery or even kill you. Disputes are the same: Intervene early and you can be in and out quickly. But if you wait, you may end up in arbitration or court.

We feel that arbitration and litigation are surgical solutions for disputes that have been too long ignored. To operate requires two or more lawyers, their paralegals, investigators and experts, three arbitrators or a judge, etc. It also means long delays, hours of painful hearings, and incredible expense. The process leaves personal scars and can kill a business by bankruptcy.

Of course, some situations do require the use of lawyers and a judge or arbitrators. *But these are exceptions.* In our opinion, you make a big mistake when you take any construction dispute to arbitration or court without first going to mediation. Construction disputes are too complex to settle efficiently in court. Going through the rules of evidence in court or the battle of expert witnesses in arbitration is at best a zero-sum game. But if you intervene early with mediation, you can address the gut issues and resolve the dispute quickly and to everyone's satisfaction (see "Getting to Mediation: Some Essential Tools," next page).

Our personal experience suggests that 95% of disputes involve honest people who believe their opponents are crazy, malicious, stupid, or all of the above. It is these unreasonable assumptions that some lawyers prey on, and on which they base their approach.

In reality, all contractors want a profit and a referral out of every project. Every homeowner wants the job done well with minimum hassle and no legal entanglements. Contractors and owners frustrated with their inability to communicate often go to arbitration or court hoping to make things right again, only to be disappointed. In doing so, they lose any chance of getting what they started out wanting, which is a fair settlement that leaves everyone satisfied, if not exactly happy. Mediation, on the other hand, because it requires a mutually satisfactory result, offers a way of resolving a dispute where a positive relationship after the dispute is a likely outcome.

Two Approaches

To get an idea of the difference between a mediated dispute and one that goes to arbitration, consider the following two cases that we handled.

GETTING TO MEDIATION: SOME ESSENTIAL TOOLS

Mediation is a tool, much as a hammer or a change order is, but you need to know how to use it — how to actually get a client into mediation. To do so, we recommend you use two documents as part of doing business: a Mediation Clause in your contract, and a Mediation Agreement that allows you to set aside disputes during the course of construction (if their size doesn't warrant mediation at the time they occur, but you want to keep the job moving) so that they can be mediated later.

Put It in Writing: Mediation Contract Language

Although the Mediation Clause (above right) draws on 57 combined years of legal, business, and construction experience, it may not be appropriate for your construction contract. For example, we have intentionally omitted an "attorney fee" provision — a common provision stating that the loser has to pay attorney fees resulting from any disputes. We feel that requiring each side to pay its own legal and arbitration costs encourages mediation of disputes. Others might rather have the "protection." You should check with your attorney before including these clauses in your own contract.

You may also want to include a standard arbitration clause, such as that supplied by the American Arbitration Association, specifying that any disputes not settled by mediation will be submitted to binding arbitration.

Agreeing to Disagree: The Mediation Agreement

The Mediation Agreement is a form that can be used to begin the mediation process. It also lets you "sign up" for mediation but set aside until later any small disputes than "settling" a disagreement unsatisfactorily and causing resentment that can sabotage the relationship. This is usually the result when even a minor dispute is settled unsatisfactorily; at least one party will feel like a loser and want to "get even" later on, so that even a minor problem can assume epic proportions. When each party gets validation from a neutral third party that they have reached a fair settlement, this resentment doesn't crop up.

The Mediation Agreement does not in itself settle disputes; it merely lists the things on which you agree to disagree. This keeps the project moving forward while setting up an amicable way to settle things at the end. It also gets everyone thinking mediation from the beginning.

The Mediation Agreement, at right, is one offered by our mediation company, Damage Control Mediation Service. Other agreements could appoint predetermined mediators (as does this one) or specify that the parties would later choose a mediator together.

— L. H. & H. S.

Mediation Clause

The parties to this construction agreement establish this dispute resolution section to resolve any misunderstanding, concern, dispute, or question about this agreement and/or the related construction work, in a prompt, efficient, and cost-effective framework.

***Mediation:** In the event either party desires an independent, neutral third party to act as a mediator, they may call any independent mediator or mediation organization mutually acceptable to both parties to request a nonbinding, confidential mediation.*

MEDIATION AGREEMENT

This Agreement Is Between:

Owner: _____

Contractor: _____

Owner: _____

Contractor and Owner hereby appoint Damage Control Mediation Service as mediator of their dispute. Both parties have read, understood, and agree to be bound by the Mediation Rules appearing on page 2.

The Issues To Be Resolved Are As Follows:

Contractor: _____ Owner _____

Owner _____

By _____ Date: _____

Mediation Fee Deposited: $ _____

MEDIATION AGREEMENT, page 2

Nonbinding Mediation Rules

1. **Nature of Mediation**

Damage Control Mediation Service (DCMS) is the mediator appointed by the parties to facilitate negotiations between them. Mediation is an agreement-reaching process in which DCMS assists the parties in reaching an agreement in an informed manner. DCMS has no power to decide disputed issues. (This is not binding arbitration.) DCMS acts solely as a facilitator between parties who choose to preserve their relationship. DCMS may communicate separately with an individual party, but DCMS shall remain impartial and shall not champion the interest of either party.

The objective of this mediation is to assist each party in quickly and inexpensively reaching their own best agreement. DCMS has an equal obligation to work on behalf of each party. DCMS will not give legal advice.

2. **Absolute Confidentiality**

DCMS and the parties shall conduct the mediation as a strictly confidential exchange of information including records, reports, statements, or other documents. None of the statements made, opinions expressed, admissions of responsibility, agreements to pay, and/or unsigned mediated agreements are admissible in any subsequent dispute-resolution process. The parties shall sign a state law-required confidentiality agreement which will establish confidentiality of this document and all other communications related to this mediation or to provide any materials in any other dispute resolution process. The mediation process is a settlement negotiation that is intended to result in a signed agreement.

DCMS shall not be called to testify concerning this mediation or to provide any material

3. **Fee Schedule**

a. Filing/administration (nonrefundable) .....

b. Mediation sessions (per hour/per party) .....$100.00 ($50 per party)

.....$100.00 (per party per hour)

When the parties execute their Agreement to Nonbinding Mediation, they shall each send a deposit of $250.00 to cover filing/administration, and the first two hours of mediation. If the mediation is completed in less than two hours, a pro rata refund of the initial deposit shall be returned to the parties. After completion of the first two hours of mediation, DCMS and the parties will estimate the remaining time to complete the process. The parties shall deposit the estimated fee with DCMS at that time subject to a pro rata adjustment at the conclusion of the mediation.

In one case, Larry Hayden served as one of three arbitrators, in the other he acted as sole mediator. In both cases, the amount in controversy at the outset was $7,000. The names and some of the facts have been changed for the usual reasons.

The arbitration approach. In one case, a contractor named Bill asked Larry to arbitrate a case that had been pending 18 months. The client was upset because of some problems with the stucco finish. Bill had proposed ways to fix the problem, but was frustrated because the client would not give him a final punch list so he could finish the job and deliver the final bill, which was for $7,000. Bill wanted a written punch list, because he feared he would have to go back repeatedly to fix an ever-increasing list of problems he felt he wasn't responsible for, or that he would be asked to meet unrealistic expectations.

For months, Bill and his attorney had been unsuccessfully trying to get the homeowner to arbitration. So Bill finally decided to exercise his arbitration clause. He knew he had made mistakes on the job, but he thought arbitration would settle things quickly and fairly and get the irrational homeowner off his back.

Unfortunately, once arbitration papers were served, the homeowner counterclaimed for $158,000. (The original contract was for $135,000.) Once the client received his summons to arbitration, he contacted a lawyer, who recommended that he have an engineer "expert witness" look the place over. The engineer drafted a long list of code violations and work that didn't precisely meet the specs. Suddenly Bill, instead of seeking a final $7,000 payment, was fighting for the life of his company.

So what happened? The arbitrators had a prehearing to gather basic information and then made a site visit. At the visit, the homeowner's engineer expert pointed out construction defects and code violations *ad nauseum*.

At the arbitration hearing itself, the contractor, being the plaintiff, went first. He presented his case in about half an hour. The homeowner's rebuttal took eight hours, during which he cited documents filling four 3-inch binders.

After many hours of debate, the arbitrators awarded $40,000 to the homeowner, with each side to bear its own attorney fees and half of the arbitration costs. For the homeowner, these fees added up to $34,000, leaving a net award of $6,000. The contractor, meanwhile, is today pursuing his subcontractors and his own insurance company for approximately one third to one half of the $40,000 award against him.

Who won here? Clearly, the lawyers, the expert witnesses, and the arbitrators, who were all paid fees and costs.

The mediated approach. Once again, the amount in dispute was $7,000. At issue was the cost of shoring up foundation diggings when unseasonably heavy rains threatened to collapse them. The contractor felt justified in asking for the money because in California, where this took place, it wasn't reasonable to expect rainfall at that time of year. However, the owner didn't feel he should have to pay for it.

The parties met with Larry for a total of three and a half hours. It was understood that nothing said would be used anywhere else, and that the mediator could not be called as a witness by either party in any subsequent litigation if the parties couldn't reach an agreement.

The parties met together in joint sessions, and then each met with Larry in private. Discussions focused on the diggings and on the key point that emerged during the mediation — the time factor involved. The contract had called for the job to be completed by a certain date so that a special event could be held at the home. The contractor felt "under the gun" to get the job done on time, and so spent the $7,000 to keep things moving. The contractor never felt he had the option to stop the project to save the money. As it turned out, the owner felt the contractor should have given him the option of slowing the job to save the money; but he never told the contractor that, so the contractor did what he had to do to stick to the schedule.

When these misunderstandings came out, the two sides began to see what had happened and moved toward a mutual understanding. Subsequent joint sessions showed a resolution was possible. They finally settled, agreeing that the client would pay the contractor $5,000. The mediation cost each side $350.

Conclusion

The homeowner hires the contractor to make an intangible idea — a new house or remodel — a three-dimensional reality. Often, the reality fails to meet expectations. Disputes arise. The smart contractor anticipates these and uses them as constructively as possible. Mediation, used as a tool in the construction project, is the state of the art when it comes to dealing with disputes. If successful, it can actually turn a dispute into a referral. ■

Contractor Larry Hayden and attorney Herb Schwartz jointly operate Damage Control Mediation Service in Oakland, California, which resolve construction disputes.