CUSTOMIZE THE PROCESS
GUIDED CHOICE MEDIATION

By Stephen E. Smith, Esquire

As the construction industry in our region has rebounded in recent times, so have the number of disputes related to this increase in construction. As we all are aware, the use of mediation to help resolve the disputes on a construction project continues to grow as a useful tool of business owners and attorneys alike. The costs and uncertainties of arbitration and litigation make mediation at a very early stage in the life of a dispute even more important.

Simply having a mediation session early in the process may not be the solution. In my twenty years as a construction mediator I have learned that the primary reason mediations fail is the fact that the parties are not adequately prepared to mediate and don't have all the information necessary to evaluate the risks and expense that can follow from arbitration and litigation. Both parties must have a full and complete understanding of their case as well as the case promoted by their opposition. This means that both parties must be able to adequately assess their risks and benefits including economic risk.

In the last few years a process has been developed by attorney/mediator Paul Lurie of Schiff Hardin & Waite of Chicago, with the help of industry leaders. This process, called "Guided Choice", involves a well-defined process of mediation, including a well-developed plan of issue identification; information exchange; position development; and continual facilitator involvement. If such a plan is developed and followed, the opportunity for a successful mediation is greatly increased.

<u>INFORMATION EXCHANGE</u> First, the selected mediator must be one who is knowledgeable in the construction industry and is comfortable to address such issues. One of the problems with "traditional" mediation is finding the correct level of information exchange to provide sufficient information to educate the parties on one hand, but not getting too much information so as to overload the mind with irrelevant data. Business people make business decisions daily with minimal information and understand that seeking the last fact is seldom worth it or even possible in the fast paced business world. The trial lawyer on the other hand wants to control the destiny of the case and to know and analyze every possible fact and piece of information before doing anything.

Once a mediator becomes knowledgeable of the facts of the case, and the positions taken by both parties, the mediator will be in a better position to help the parties exchange only the information that is relevant to the particular issues in the case. Each party should be

willing to meet privately with the mediator to explain their position in the case, and provide a full and complete analysis of the issues. Parties and their counsel usually see the opportunity for a private meeting as the chance to influence the mediator, but whatever the reason, these meetings are extremely valuable.

Often the mediator will learn that the parties are not yet ready for mediation; that one party or both does not have sufficient information to properly evaluate the benefits and/or the risks of the case, or that there are other relationship issues that must be addressed before the parties meet in negotiations. Discovering these things in advance, saves wasted time and money, and perhaps avoids a failed mediation.

Following the PreMediation meetings, the mediator will be in a position to help the parties develop a plan of information exchange which bests addresses the needs of the particular case. Following a predetermined plan will help avoid document exchange issues later in the process. Agreements can be reached on the amount and type of information exchanged while also agreeing on the types and amount of information to be exchanged should mediation fail. Such agreements will help pave the way for reasoned behaviors in the future, thus saving costs.

ANTICIPATE THE PROBLEMS AND THE RESULT

One of the most important facets of Guided Choice Mediation is the opportunity to discuss the result that the parties are seeking in advance of the actual mediation session. Sometimes there are opportunities for a business solution to the dispute which might not be financial in nature. Having mediation early in the construction process might mean that there are options for construction changes which might not be possible if the parties wait too long.

A mediator often learns that a party simply does not have enough information to properly respond to a position during the mediation. We have often been faced with a sudden disclosure or legal position for which the opposing party was not prepared. This often brings the mediation to a halt with no real way to convince a party of the strength of the position or of the risks involved. When faced with these problems in the course of a mediation session, the issue is generally discounted or denied, lessening the chance for proper evaluation and assessment. If the mediator has the opportunity to learn the case and prepare the parties for such contingencies, the chances of success are improved.

Despite the party's willingness to engage in mediation, there are often significant dispositive or technical issues that are so complex that no agreement can be reached until

answer are found. The mediator can also issue a binding or non-binding decision on a legal or technical issue that can assist the parties in making a better assessment of the risks involved in proceeding without a resolution. These are all valuable tools to be utilized when an impasse is encountered; thus providing an option for avoidance of the impasse.

It is also helpful to discuss the actual terms of a potential settlement prior to the mediation. By addressing such things as the ability to make cash payments; the timing of such payments; traditional terms of the settlement agreement including releases, warranties, indemnification and waiver, all can be anticipated and discussed prior to the actual mediation.

POST IMPASSE

Even in the situation where mediation was not successful, there are very good reasons for keeping the mediator involved in the subsequent arbitration or litigation. The mediator is in a unique position to assist the parties in the continued discovery that was contemplated at the outset of mediation. The mediator is also in a position to assist the parties in narrowing the potential issues prior to falling into the depths of litigation or arbitration discovery. Many arbitrators are hesitant to warn the parties about the negative elements of their case, once they realize that the case is again in need of settlement. Yet, by keeping the mediator involved even in the later stages, the mediator may still be able to encourage the parties to settle their case before a negative result is imminent.

There are many other benefits which are present in Guided Choice Mediation. All parties who find themselves in a complex or expensive dispute should seriously consider utilizing this technique for resolving those disputes.

Stephen E. Smith, Esquire is a Partner with Goldberg Simpson, LLC. He is a frequent lecturer and has been selected as Top Lawyer in Construction by the Louisville Magazine each year as well as Top Mediator and Arbitrator in Non-Domestic Disputes. He has been selected as Super Lawyer in Construction since 2007.