Scribbles Squibs[1]# 68 (October 15, 2018):

"THE NUTS AND BOLTS PROCEDURE OF MASSACHUSETTS CONSTRUCTION MEDIATIONS"

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I. INTRODUCTION.

Squib # 55 was titled "Resolving Construction Disputes Through Mediation". It provided a fairly short summary of what actually happens in a mediation and was primarily addressed to *why* pursuing mediation is a good idea, along with various strategies.

This Squib focuses in on the mediation *process* itself. It is hoped that if our readers understand this process better, they will feel more comfortable with using it.

I recently attended an American Arbitration Association four day seminar in Chicago teaching the basics of mediation for mediators. A series of mediation simulations gave me a somewhat different view as to mediation, seeing it through the eyes of the mediator and not only through the eyes of the advocate for one of the parties.

My recent experience – and that of many senior construction lawyers I know and have spoken with – has been that contractors are filing fewer litigations (court lawsuits and arbitrations) than they did ten years ago. But, that doesn't mean that there aren't still a significant level of contract disputes.

How does one resolve these? One very effective tool that is available is mediation.

So, this Squib is more about the nuts and bolts *procedure* of a mediation, which is a comparatively inexpensive method of dispute resolution, as compared with arbitration and litigation (hereinafter referenced as 'dispute resolution methods'). And, mediation doesn't cause its participants to lose *any* rights as to any arbitrations and litigations that are either ongoing or which might be subsequently filed. In other words, this is not an absolute alternative to arbitration and litigation because, if this is unsuccessful, all other dispute resolution methods can be fully pursued.

Unlike with arbitration and litigation, the mediator does not decide the case. The mediator does not try to determine which party is *right* and which party is *wrong*. Those concepts are irrelevant to mediation. Other than the fact that the mediator does not 'decide' the case, s/he does not issue any kind of decision or judgment or written order. If there is a settlement of the dispute, it is the *parties* who decide the terms of settlement. By statute, what

happens during mediation is completely privileged and confidential, something having no significance or preclusive effect whatsoever with regard to the pursuit of any other dispute resolution methods. The mediator's role is as a skilled neutral who helps the parties facilitate a settlement of their own making. It's simply a far less expensive and far less adversarial process where some contract disputes are resolved, making any further dispute resolution methods unnecessary.

Please keep in mind that within mediation circles, mediation is defined as a *process* and not as an *event.* This will become clearer as we get deeper into this discussion.

Yogi Berra once said: "It ain't over till it's over." With mediation, the fact that a case does not get resolved on the first day of mediation does not necessarily mean that the mediation is actually *over*. Or, that it won't be settled some time thereafter. If nothing else occurs, the 'settlement talk' ice has been broken. And, mediations can act like 'free discovery' because after going through a mediation, each side understands the other side's basic issues and strategy.

II. VARIOUS SUPPLIERS OF MEDIATION SERVICES.

There are many providers of this service. Here are three possibilities, two of them through organizations and the third being a mediator selected by the parties' attorneys.

A. THE AMERICAN ARBITRATION ASSOCIATION

Just as the American Arbitration Association (AAA) is one of the largest providers of arbitration services in the United States, they are also a significant supplier of mediation services.

These are the AAA's mediation fee schedules as posted on-line at the time of this writing. (http://info.adr.org/constructionfeeschedule)

> "A $250 non-refundable deposit, which will be applied toward the mediation fee, is required to initiate the AAA's administration of the mediation and appointment of the mediator.
>
> The mediator's fee is stated on his or her resume. The AAA administrative fee, split by the parties, is $75 per hour billed by the mediator with a minimum four hour charge for any mediation held. Expenses referenced in Section M-17 of the Mediation Procedures may also apply.
>
> If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the request to initiate mediation is filed but prior to the mediation conference, the AAA administrative fee is $250 (to which the deposit will be applied) plus any mediator time and expenses incurred. These costs shall be borne by the initiating party unless the parties agree otherwise."

As I understand this, the parties will be paying the AAA per hour an additional $150 above whatever they are paying the arbitrator with a minimum charge of four hours. I think a customary charge for the mediators used on my construction mediations has been for about ten hours. So, that means the parties are paying the AAA about $1500 for their services, above and beyond whatever they are paying the mediator.

Since the AAA charges for the use of their conference rooms for arbitrations, presumably, the parties will have to pay for the use of its conference rooms for mediations, as well. And, unlike arbitrations, the mediation process requires a minimum of *two* conference rooms. In looking through several screens on my computer, I did not see what the cost of the actual mediators' fees would be.[2]

There are currently seventeen specific mediation rules for AAA mediations, which are contained on six pages of their current handbook: "Construction Industry Arbitration Rules and Mediation Procedures.".

The AAA is fairly selective as to those who they accept as its mediators, requiring a variety of training and prior experience as a mediator. One would think that this should be a good thing.

At the same time, using the AAA will involve paying them a deposit, an administrative fee for each hour of the mediator's time and, apparently, room fees. The AAA is a non-profit organization. To the best of my knowledge, it is not funded by anyone. It has to support its overhead through the various fees charged for conducting mediations and arbitrations. So, other than paying the mediator himself/herself, the charges a party incurs with AAA mediation includes support for the AAA organization.

Now, the AAA also is very selective as to who they accept as arbitrators, requiring some training and prior experience before being included in AAA panels. Having had a number of arbitrations with the AAA, however, I have been less than satisfied with their procedures (e.g. how arbitrators are chosen and how arbitrations are administered) and, quite frankly, with several of their arbitrators.[3] I am not generally a fan of arbitration, although in certain specific situations, it has its uses, such as with smaller, less complicated matters which are relatively simple in terms of the kinds of issues involved and which don't involve a lot of money.[4] I, myself, have never participated in an AAA mediation.

B. JAMS ENDISPUTE.

According to one of their websites, they claim: "JAMS is the largest private alternative dispute resolution (ADR) provider in the world."

I have used their Boston office once before, quite a few years ago. My recollection is that compared with other mediation services available at the time, they were more expensive.

The thing that I think distinguishes JAMS as compared with other such services is that it has a high percentage of their mediators being retired judges. In some ways, having a judge for a mediator is a contradiction in terms. Judges *decide* cases. In mediations, if there is a settlement at all, it is the *parties* who decide the dispute. Judges neither decide cases nor render any kind of a verdict or judgment.

At the same time, all trial lawyers have a basic respect and deference with regard to judges.[5] I can't say that this necessarily translates into having a greater degree of success with any particular mediation. At the same time, at least for me, the difference between seeing a judge as active or retired is absolutely . . . . nothing! A judge is a judge! For attorneys, one listens and listens carefully.

The case I had with them was a claim on a subcontractor surety performance bond by a general contractor (my client). As I recall, the claim was somewhere in the eighty plus thousand dollar range, which in current dollars, would be a six figure claim.

The case had a somewhat unusual procedural history. Initially, it commenced as a litigation. Very early in the case, the surety fairly seriously pushed to have the claim mediated. When it was finally agreed to go to mediation, their initial offer on the claim was *zero*! While one expects an initial offer to be lower than a party's actual last offer, to offer zero on a case that had been strongly pushed seemed a bit unusual, even ridiculous. This was all the more so as the surety's principal was out of business and there was almost no real question as to the surety's liability for the claim.

The mediator was a retired superior court judge that I don't recall I had ever appeared before.

Most, but not all, construction mediations take place within one day. At the end of the day on the first day of the mediation, I believe that the surety was up to an offer in the high thirties. This clearly was not going to be sufficient to settle the case.

I don't recall that there were any specific plans for a scheduled second day of mediation.

Unbeknownst to me, after that day of mediation, the mediator continued having discussions with the surety's attorney.[6] Ultimately, the surety was willing to pay a sufficient amount to settle the case, which was facilitated by this mediator's *persistence*, which is one of the hallmark characteristics of a good mediator.

My on-line search identified that they have nineteen rules, which seem reasonable, and are more an explanation of the process than actual procedural rules.

In looking through several screens, I did not see any references with regard to what they charged for their fees and expenses, either as to the organization or as to the fees of their individual mediators.

C. HOW MEDIATORS ARE OFTEN CHOSEN BY EXPERIENCED MASSACHUSETTS CONSTRUCTION ATTORNEYS.

Those of us who predominantly practice construction law tend to meet up with the same attorneys from case to case. The Massachusetts construction bar is smaller than those of many other areas of the law.

What we often do is this. Generally, we are aware of who the better construction lawyers are and, of these, those who have the experience and temperament to conduct mediations. Since attorneys ordinarily participate in an adversarial process, not all such attorneys, however successful, have the mindset to be mediators. Mediation, although an adversarial process, is perhaps the least aggressive of the various adversarial processes. In litigation, with the adversarial mindset, one party is completely right and the other party is completely wrong. In mediation, 'right' and 'wrong' are not the primary or only characteristics involved with the process. So, many good trial lawyers would not be good mediators due to a difference in the mindset orientation with trial lawyers being of a more adversarial nature and with mediators being of a more cooperative and conciliatory nature as a facilitator.

So, for the construction bar, my experience has been that an informal list from which many of us choose from has fewer than a dozen names on it, with about one-half dozen of these being more frequently chosen.

From this list, I had one mediator who, notwithstanding excellent experience as a construction lawyer, I thought did not do a particularly good job as a mediator. This was a dispute involving a general contractor and a subcontractor (my client). His experience as an attorney was in representing general contractors. I felt that he was not completely neutral. This was the one and only time I would agree to use him as a mediator. My recollection is that the case did settle but I felt the settlement was in spite of him not because of him.

There is a mediator I try to use as much as possible, as I have found that he is pretty good at this and that a high percentage of my cases that he mediates gets settled.

His hourly rate was $475 per hour the last time I used him.[7] This was a good value considering his education at good schools with a lot of academic honors, his experience as a construction attorney in a well-regarded Boston law firm, his extensive experience as a construction mediator, his extensive experience both writing and teaching about mediation and because of the fact that most of my cases he has handled so far have been settled within one day. I use him with no expectation at all that because of my using him over and over, this causes him in the slightest to favor whoever my client might be. He neither favors subcontractors nor general contractors. Other than being very qualified and very experienced, I pick him because he is a true *neutral*. In the final analysis, when an attorney appears before anyone who will hear or decide a dispute, s/he is primarily looking for a fair shake. And, this guy has consistently

given me that. His mediation practice is very busy, suggesting to me that many other attorneys consider him to be pretty good and very fair.

He has a fairly simple mediation agreement. He requires an advance, usually, for ten hours of his time, split between the parties. Generally, I can get a mediation hearing date within four or five weeks of my first contacting him. The mediations are either done at his office or at the offices of one of the parties.[8]

III. THE BASIC STEPS OF A CONSTRUCTION MEDIATION.

The following are the steps that a typical construction mediation goes through from beginning to end. This is a synthesis of several different mediation styles, not reflecting any particular mediator's/organization's requirements. Some mediators may not use all of these steps or the steps might be in a different order. And, in the interest of breaking this process down into bite-sized pieces, this may look a lot more complicated than it actually is in practice. Compared with court requirements/procedures, mediations are comparatively simple.

And, to go from the filing of a complaint through the trial phase of a court litigation typically takes at least five years, longer in Worcester County. The mediation process can be commenced and concluded within two to three months from start to finish.

These steps contemplate the attorneys agreeing between them, in advance, on a specific mediator.

A. DISCUSSIONS BETWEEN COUNSEL AS TO WHO MIGHT MEDIATE THIS DISPUTE.

This requires little discussion. The parties might agree upon a mediation service, which will then present to the parties various members of its mediation panel as potential mediators.. In many cases, particularly for those lawyers who only practice construction law, they may focus in on starting with a specific individual in mind, not using a service. That way, they don't have to pay a service's overhead and can conduct the mediation with fewer procedural strictures, reaching a mediation date probably sooner. They will both know who is available and who is good. As I have mentioned elsewhere, there might be as many as twelve on this informal list, of which perhaps six are most in demand.

B. SOMEONE CONTACTS THE MEDIATOR TO CHECK AVAILABILITY.

Again, simple enough! Typically, either myself or the other attorney will send an email to the mediator identifying the general nature of the dispute and identifying who the parties are and, sometimes, who the key witnesses might be. This allows the mediator to review his/her records to ascertain if there are any possible conflicts of interest. The Massachusetts core construction bar being smaller rather than larger, it's very likely the mediator has had prior contacts with one or both of the attorneys, either within the context of a litigation or within the

context of an arbitration or mediation. Quite often, if any insurance companies are involved, the mediator has had some matters with them. If this is a mediator the attorneys have agreed upon, they will know, up front, that there will be several potential ostensible 'conflicts' but which, in the main, won't be actual conflicts that would prevent this mediator from handling this dispute. This disclosure is made, though, because it should be the parties who decide whether or not they think any particular prior involvement with an attorney or party is, in their eyes, an actual conflict of interest. This mediation, after all, will be *their* mediation.

C. RECEIPT OF THE MEDIATOR'S DISCLOSURE STATEMENT.

The mediator will disclose to the parties in writing prior contacts with the attorneys and/or with the parties. It is rare that this will cause any difficulty, particularly if the attorneys are mutually agreeing upon a mediator not provided through any third party service. After all, a 'mediator' is a 'neutral', meaning that s/he can mediate any dispute and is not by disposition or experience inclined towards one party or another or to one trade or another or to subcontractors or to general contractors. Judges also run into many of the same attorneys and parties from case to case.[9]

This is somewhat different from the selection of a lawyer as an arbitrator. Here, whether a lawyer generally represents subcontractors or general contractors or owners might be a serious factor to be taken into consideration. With mediations, this is hardly ever the case inasmuch as an arbitrator decides a case (and a dispute) and a mediator doesn't. If the mediation is successful, it will because the parties 'decided' their own case.

D. RECEIPT OF THE MEDIATION AGREEMENT.

By and large, all mediations have some form of mediation agreement. It is generally only a few pages long, including a brief description of the mediation process, specific procedural rules and the business arrangements with regard to the mediator. Generally, the parties will have to make a deposit with the mediator as to his/her anticipated fees in advance of the mediator's working on the case. So, each side will have to deposit with the mediator half of what the mediator's charges are estimated for the mediation. For a reasonably uncomplicated matter, this could be for one-half of ten hours. This allows for the mediator to read and receive the parties pre-hearing submissions, possibly do a bit of legal research and then conduct the actual hearing. Most mediators will require both the parties and the attorneys to sign such an agreement before a mediation can commence.

E. INITIAL CONFERENCE WITH THE MEDIATOR.

Usually, but not always, the mediator will have an initial telephone call with the attorneys discussing dates, witness conflicts (as to dates) and related matters. Some mediation proponents suggest that a mediator either speak with or meet with the different parties separately before the mediation to educate himself/herself as to their particular cares and concerns and issues, not all of which are intended to being shared with the other side. They say that this better assists the

mediator in his/her preparation and allows him/her to hit the ground running once the actual mediation commences.

Some states have rules for court-ordered mediations that the mediator will charge a lower hourly rate for such pre-mediation meetings. I am aware that some mediators say that they don't charge at all for such pre-mediation meetings. No one should ever be shy of inquiring about what the charges will be and for what as to any aspect of the mediation.

In the mediations I have participated in to date as an attorney, we have not had these pre-hearing meetings. I'm not opposed to them, however, and can see their potential value.

Some mediation writers/practitioners suggest that prior to the mediation, the parties identify for the mediator and for themselves what information and documents they need from the other side prior to the hearing. There is no 'discovery' *per se* with the mediations process. But, since all parties are hoping to reach some kind of settlement, an initial exchange of some information and documents seems useful and might be necessary before the mediation proceeds to hearing.

Traditionally, as I have experienced it, mediations occur very late in the pretrial phase of a case.[10] Therefore, by the time such mediations take place, the parties have had an opportunity to conduct all kinds of discovery as to the other side. As such, each party will have a pretty good idea as to what the other side's witnesses, information and documents will be for trial.

For mediations to occur much earlier in a litigation – saving the parties, potentially, years of costs and stress – the parties should understand that voluntarily providing some information and documents outside of court discovery procedures is useful, maybe necessary, particularly if this can lead to earlier mediations where there has been incomplete discovery in the underlying court case or, possibly, no discovery at all.

F. SUBMISSION OF INITIAL STATEMENTS.

These are provided for, generally through a procedural order of the mediator, in terms of when they are to be filed with the mediator and served upon the other side. They are in the nature of legal briefs but are generally less complicated than court briefs. Basically, each side will recite the facts as he/she/it understands them and then make some factual, contractual and legal arguments in favor of its position. Certain key documents might be attached to the initial submissions. Both the mediator and the other side will receive such submissions several days before the scheduled hearing date. Notwithstanding the fact that the mediator does not actually decide the case, both sides through their submissions are trying to convince the mediator as to the correctness of their respective positions.

Some mediation proponents suggest that other than making an initial submission or statement to be shared with the other side, that the parties should also file individual confidential statements intended for the mediator's eyes only.

This can be useful. Mediations aren't only about dollars and cents. First and foremost, they are about *people.* They are about issues. They are about anger. They are about hurt feelings. And, individual confidential statements might better educate the mediator as to what that party believes it *really* needs to get out of the mediation.[11]

G. THE DAY OF MEDIATION, THE MEDIATOR'S INITIAL COMMENTS.

The mediator will convene the hearing in one of his/her conference rooms or in one of the party's conference rooms. Mediations outside of Boston, when possible, are especially popular! S/he will make brief comments concerning how the mediation will be conducted and answer any questions that any party has with regard to the process. Assuming the lawyers have done their jobs, no party generally has any questions.

H. THE PARTIES' OPENING STATEMENTS.

Each side will make a brief presentation as to his/her/its claims and defenses. These are unlikely to take more than fifteen minutes per side. There are, generally, no surprises here, as the presentations will be made essentially following the prehearing submissions. There is a value in doing this because not all of the decision-makers may have read the other side's initial submission. And, of course, this is 'game day' and each side is more likely to focus in on the other side's contentions than they might been have in reviewing (or not reviewing) the other side's written initial submission before the hearing.

I. WHAT KIND OF MEDIATION WILL THE PARTIES PURSUE?

There are two different models for an initial approach. Some mediations may suggest pursuing only one style. Other mediations might require both styles. Since the distributive model of mediation is the style most associated with 'the numbers', even where a case commences under the integrative/principled mediation model, sooner or later, it is likely to lead to the distributive negotiation model.

Which model will the parties use in negotiating their dispute? Here the guidance (and experience) of the mediator will prove helpful. The attorneys are not going to defer to a mediator to the same extent that they would have to defer to a judge. But, they will allow themselves to be guided by the mediator as to his/her ideas of how the mediation should proceed. The attorneys and the parties will not only be guided by the mediator's experience as a mediator. They will also be guided by the mediator's experience as a construction lawyer. And, experienced construction lawyers will have a better idea as to what 'works' in the real world of litigation and what doesn't work. The mediator's sharing those kinds of insights with the parties is frequently helpful.

1. THE DISTRIBUTIVE MEDIATION MODEL.

This is the more common form of mediation, which depends upon the taking up and then the giving up of a sequence of difference positions and numbers. This is also known as *positional* bargaining. Basically, this is a form of mediation which contemplates that there is only a finite sum of money and the principal goal of the mediation is for the parties to agree on how they are going to divvy up 'the pie'. Obviously, each party's negotiation is oriented towards trying to get for itself as much of the pie as possible.

So, in such a model, the mediation is primarily just about numbers. The respondent (defendant) will commence making offers deliberately on the low side. And, the claimant (plaintiff) will begin with making demands on the high side. For the parties to enter into a mediation with any chance of success they will have to realize – and, *do* realize – that the numerical answer to their problem and dispute will most likely be in the middle.[12]

Here's an example of just such a mediation model. I recently had a mediation where I represented a drywall contractor against a general contractor and its surety with claims on four projects. The Claimant's best-case basis claim amount was in the five hundred to six hundred thousand dollar bracket. However, there were *a lot* of things wrong both with those numbers and with various aspects of the claims themselves.

The Respondent's first offer at about 10:30 am was that the Claimant pay *it* fifty thousand dollars! By seven-thirty pm that day, the parties had agreed upon a settlement to be paid by the Respondent to the Claimant of three hundred thousand dollars. Over the course of the day, this resulted in a swing in the subcontractor's favor of three hundred fifty thousand dollars.

This lengthy mediation was almost all about the numbers from word go.

It's tempting to commence a mediation on this basis. After all, the claimant has a money claim which it wants satisfied by the respondent. So, the mediation is almost completely about the numbers from its beginning.

There are limitations to this style. It limits the parties' thinking, as with this model, it locks the parties into various positions. And, with the parties assuming fixed positions, egos are likely to become issues. There will be the need for people to 'save face', which might have very little to do with whatever are the underlying concerns. By making ridiculous initial demands and offers, going through round after round of caucuses with small incremental changes, this delays a settlement. Stubbornness becomes too much of an element to the negotiations. This type of style can lead to discouragement and an to the abandoning of the mediation process.

2. THE PRINCIPLED BARGAINING MEDIATION MODEL.

This is a way of looking at the problem as something other than just as an issue of who owes whom how much money. This model is also sometime referred to as the integrative model of mediation. This model can be useful because in many situations involving disputes between viable businesses, there is an issue about how the people *feel*. 'I trusted you.' 'How could you have treated me like that?' It may be that these types of issues might require being addressed in some fashion before the parties can reach a settlement. It It's also a form of mediation which, particularly in the beginning of the mediation, will concentrate on the issues involved and not the amount of money attached to those issues.

So, this is a form of mediation which, at least initially, focuses in on those aspects of the dispute that are not dependent on money.

This form of negotiation separates the people from the problem. The participants in the negotiations should be seeing themselves as working together to resolve the problem, not to simply attack each other. This way of dealing with the problem focuses more on the interests of the parties, not upon the specific monetary positions of the respective parties.

This also considers options, something other than just the payment from one to the other of a certain sum of money.

For example, in negotiating a recent settlement between a subcontractor (my guy) and the general contractor, I introduced into the settlement equation the fact that this dispute was causing my guy to not be willing to quote the work of the general contractor. As my guy was well-situated in a certain geographic area some distance from where the out-of-state general contractor was situated, this resonated with the general contractor. This caused the general contractor to move from offering zero on an issue with some problems and offering half of a questionable claim, which settled the case.

Representing a general contractor, defending against a subcontractor's claim with some issues, my guy intimated that if the subcontractor would be flexible on settling this claim, some other jobs would become available for the subcontractor to bid on, which might allow the subcontractor to make up any shortfall. Again, this helped settle the case.

Did either of these things happen? Namely, did the subcontractor begin again quoting the general contractor's work? Or, did the general contractor provide the subcontractor with other opportunities to bid on different jobs, which might allow the subcontractor to make up a shortfall? Who knows?[13] Possibly, even, who cares? Neither promise, as made, constituted a legally enforceable promise. At the same time, possibly such representations allowed the parties to settle their disputes so that the party giving in kept his/her self-respect and was able to save face sufficiently so that this particular dispute could be resolved.

That type of dynamic is less available, if available at all, in positional bargaining, the scope of which is really limited mostly to one thing: the numbers. While from a theoretical standpoint in any particular dispute this model may be hard to define, nonetheless, it has various advantages that the positional model does not have, some of which are referenced above.

J. CAUCUSES.

It is in the caucuses that the real work of mediation takes place. And, this is where the good mediators really earn their money. An experienced mediator, who is also an experienced construction attorney, can point out to each side the weaknesses in its positions. The fact may be that this party already has heard these very same arguments as made by its own attorney. The fact that these very same comments/opinions are made by a third party not involved with the dispute, but who has, unquestionably, a great deal of knowledge and experience, is often that which is needed to help carry the day.

Here is why *two* conference rooms are needed. After the initial joint session, the different parties are sent to separate conference rooms and will not generally meet until the end of the day and there is either a settlement or *not* a settlement. A good portion of the day will be involved with the parties making various offers and demands, communicated by the mediator. It's important to tell the mediator which specific information you have shared with him/her that can be communicated to the other side. And, just as important, the mediator needs to know which information the party deems to be confidential and is not to be shared with the other side or, at least, not as of this point in the process. A high degree of gamesmanship and psychology is involved with the various exchanges made in this part of the mediation.

And, a party should not get angry and leave at 11am just because the last demand or offer was insulting or ridiculous. For any variety of reasons, this is just *part of the process*. It is in the nature of litigants, men especially, that the day will begin with the claimant's being full of piss and vinegar, adrenalin and testosterone. Possibly, before that party is willing to listen to some kind of reasonable basis for solution, those chemicals have to burn off. And, that takes time. Six to eight hours cooped up in a small conference room have a way of doing so for many parties to mediation.

If one hangs in there until five or six pm and, as of this point, it doesn't appear that the parties are getting anywhere, then, *maybe*, now might be the time to *begin* to think about supper as being preferable to investing additional evening hours into this process. Having said that, I have to say that very significant contributing factors to settlements are exhaustion, hunger, boredom and people getting antsy. The longer this goes on, there is a tendency for parties to say to themselves, 'what do I have to do to escape from this conference room I've been stuck in for the last six hours?' Boredom, exhaustion, getting hungry (for some, getting thirsty!) and getting antsy aren't incidental to the process. They are *part* of the process. The other side to the mediation, more likely than not, is having these very same thoughts and feelings. The longer the process goes on, the better the chance that it will result in a settlement.

They say about New England weather that if you don't like it, wait ten minutes. If you have yet to hear something more reasonable come from the other side, let some time pass and they, like you, will get more bored, exhausted, hungry and antsy. Within the context of mediation, these are *good* things! Give them a chance to work their special kind of magic!

K. GETTING PAST AN 'IMPASSE'.

First of all, it is rare that there is a *true* impasse, at least for the first one or two times that this seems to be the case. For those experienced in the process, the word 'impasse' is nothing but a four letter word.[14] There may *appear* to be an impasse at various points in the mediation. Particularly, as parties get stubborn, bored, tired or hungry.[15] We don't have to list 'angry', as probably that factored into the dispute to some extent for both parties, particularly at the mediation's beginning. But, one hopes that, ultimately, being 'angry' will give way to being 'tired'. The truth of the matter is that anger doesn't settle cases, while exhaustion does.

So, how do parties get past this real or imagined barrier?

There are several ways.

The longer the process can be reasonably extended works towards breaking impasse. After all, busy people hate wasting their time, money and energy. The greater their investment in the mediation of these things, the more likely that such an investment will work towards having this prove to be productive.[16] So, in many cases, keeping the mediation going even where the possibility of success seems doubtful may be the way to go.

One way to get by impasse is for the mediator to remind the parties as to what the alternatives are. Explaining to the parties the physical, emotional, expense and, particularly, the amount of time the principals of each party will have to spend on this dispute through five years of litigation is one way mediators can refocus the parties to the mediation.

And, along these lines, the advantages of mediation should be stressed. In a judicial/arbitrator's decision, one party is, typically, found to be *completely* in the right and the other party, typically, is found to be *completely* in the wrong. But, with few exceptions outside pure collection cases, any form of complicated dispute between the parties was caused in varying degrees by the acts and omissions of *both* sides. A mediation offers greater opportunities to be more creative. This is because of the fact that neither party has to be found to be completely right or found to be completely wrong for there to be a successful result.

Depending on the circumstances, possibly a break in the mediation might be helpful. The parties might go for a walk or leave the mediation site to get a bite to eat. While continuing the mediation to another day has both advantages and disadvantages, in any particular mediation, giving the parties some 'time off' might cause them to reflect on how the issue can be resolved. When you don't like someone, when they say something that makes sense, it is harder to see that, particularly the first time you hear it. Having a day or two's separation to reflect on what was

said – rather than on *who* said it - can help in placing less emphasis on the dislike factor and more on allowing the hearer of those words to consider their merit.

One of the students at my recent seminar gave an true-life example of how being imaginative and creative helps to settle disputes. There was a certain federal case where the two lawyers hated one another. The judge invited them both to his house to watch a baseball game, during which there was no discussion of the dispute. The judge wasn't wearing any robes and was not acting like a judge. The lawyers were not wearing suits. *Liberal* amounts of whiskey were consumed. As a result of this unusual meeting, the *temperature* of the lawyers' relationship was significantly lowered.

If disagreements arise on a certain technical issue, perhaps the mediator could explore the possibility of getting a neutral expert opinion on the issue to help settle the disagreement.

Another way around impasse is to allow the mediator to prepare a 'Mediator's Proposal'. At some point in the mediation, the mediator may understand the issues in the case better than either party. An experienced mediator has 'been there, done that' with any number of other disputes including, but not limited to, mediations. Also, because the mediator has had the benefit of learning each side's 'confidential information' – facts and concerns and information not available to *both* sides – the mediator may be in the best position to try to figure out how the matter can be resolved to meet, to the greatest extent possible, each side's secret needs, fears, desires and issues. As a trained neutral, with the benefit of his/her knowledge, experience and confidential information, the mediator can come up with something fair and reasonable, something that might have been difficult for one party to propose to the other or for the lawyers to come up with together, made even more difficult by their being in separate rooms.

A mediator's proposal shouldn't just be sprung upon the parties. This should be discussed as early as it may seem that this might be necessary or desirable. Again, it should be sold to the parties not as the mediator's 'decision' in the case, such as if it were an arbitration or litigation. Rather, it should be sold to the parties as a reasonable, workable solution to the parties' problems and issues crafted by someone well-versed in the field and as someone who knows each party's secret needs and desires and must-haves.

L. (IF THERE IS A SETTLEMENT) BOTH ATTORNEYS DRAFT A MEMORANDUM OF UNDERSTANDING OR A SETTLEMENT AGREEMENT.

First of all, perhaps we need to re-define what a 'settlement' is or what a 'good result' is. In most cases, the parties will be hoping to conclude all issues involved with the mediation, being all issues involved with the pending dispute. But, for one reason or another, this just doesn't happen in all cases. At this particular point in time, this may not be possible because of anger, lack of information, the unreasonableness of a party or of its attorney or for any number of other reasons. Settling *some* issues, while leaving others unresolved, can be a good result, as this may simplify and make less expensive the remaining issues for litigation.

The settlement could be as to some difficult procedural matter. Will a party *really* insist on arbitration? Will a party *really* insist on litigation or arbitration of a Massachusetts issue in Walla Walla, Washington just because that is what the contract says, even where the project and all of the witnesses are in Massachusetts?

Also, as I said above, mediation is a *process* not an *event.* This may be the first time the parties to this dispute have really tried to settle it. Not successful? Not *completely* successful? Not successful *at all?* Rome wasn't built in a day. And, this mediation and settlement attempt may very well lead to other, possibly more productive attempts, down the road. If nothing else, the settlement door has been opened. And, once that door has been partially opened, seldom does it then get completely closed.

Assuming that there has been a settlement, the parties should leave the mediation with one of two documents.

1. A MEMORANDUM OF UNDERSTANDING.

This is an important thing to prepare when it is impossible to settle the entire case/controversy based on the issues in the matter. There may be actions or concurrences of third parties to the mediation which are necessary to conclude the matter. It may be that there are other pieces of information/documents which are not readily available but necessary to conclude the case at this time in all regards.

The idea of a memorandum of understanding is that the parties come as close to a complete settlement agreement as is humanly possible. If there are remaining issues between the parties, they should be as narrowly and as precisely drawn up as is possible.

2. A SETTLEMENT AGREEMENT.

This is the situation where the mediation results in a settlement of all issues between the parties. In such a case, *all* the terms of the settlement should be set forth in some kind of writing, which is typically something that is drawn up by hand, often on a piece of scrap paper or a yellow sheet legal pad. All parties and their counsel should sign this. The idea behind that is that one wants to try to prevent either a party or his/her legal representative's going back to the office and then figuring out all of the ways possible that the deal can be undone!

M. (IF THERE IS A SETTLEMENT) JOINT SESSION WITH ALL PARTIES AND EXECUTION OF THE SETTLEMENT AGREEMENT.

Serendipity! The matter is settled! The mediation worked! At this point in time, the parties come together and sign whatever the settlement agreement there is, also being signed by their respective legal counsel. Inasmuch as the essential settlement document has already been drafted, by the time the parties get back together, it's a done deal. There should be nothing left to argue about!

It may be true that additional documents are necessary to completely resolve the dispute. These could include the exchanges of releases and the execution by all affected parties of some form of stipulation of dismissal, which would be necessary to close the case out with the court, if there is pending litigation. Based on the strength of the memorandum of understanding/settlement agreement, these should be minor details, not major hurdles.

It's now time to move on to something else!

IV. CONCLUSION.

Pursuing mediation at some point in a dispute is a true 'no brainer'. This is because it is comparatively inexpensive and it doesn't foreclose any other possible ways of pursuing the dispute. Nothing is lost by trying it! If it doesn't work, the parties can always continue on with an arbitration or litigation. But, approaching a mediation with a relatively calm and fair attitude often will make such further dispute resolution methods unnecessary.

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[1] A s*quib* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines *squib* as "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2] In any mediation, the parties will pay for the cost of the mediator, typically each side paying half of that cost. The mediator I have most frequently used last charged the parties $475 per hour.

[3] Under Massachusetts law, in the great majority of circumstances, there is no appeal from an adverse arbitrator's decision. Arbitrators are not required to follow the rules of evidence. And, there are Massachusetts court cases which have held that there were no grounds for appeal when the arbitrator decided the case on the wrong facts or decided the case under the wrong law or applied the wrong law to the wrong facts. Is this how you would like your dispute resolved? Arbitrators, in this regard, are nearly untouchable *and they know this.* I've found more arrogance with arbitrators than I have found with judges whose decisions, generally, can be appealed to another court. The ability to appeal the decision of a fact-finder protects each party's rights to a greater extent, in my view. No judge likes being reversed by a higher court. This is not an issue with an arbitrator.

[4] In this regard, you might like to look at Sauer Squibs # 13: THIRTEEN REASONS NOT TO AGREE TO AN ARBITRATION CLAUSE IN YOUR CONTRACT.

[5] In the Old Testament, the same basic word for 'respect' could be and, depending on the context, is translated as 'fear'!

[6] This would be a definite and very clear no-no for an arbitrator or for a judge to discuss a case with only one party, the other party not being present. This hadn't happened to me previously, as all my prior mediations had concluded within one day, one way or another.

[7] One of my competitors has an advertised rate of $600 per hour, a multiple of our firm's billing rate.

[8] If the mediation is at his office, he provides lunch! This whole procedure is a great deal less formal than court and is conducted, more or less, like a business meeting rather than as an adversarial proceeding.

[9] Except, with judges, for many of them, once they realize they will have to try a construction case, their eyes roll back into their heads! While that may sound a bit humorous, it is also more than a little bit true.

[10] The Massachusetts superior court system used to have a greatly simplified form of mediation called 'conciliations'. These would be court-ordered and mandatory and would take place in the late stages of a litigation. Since conciliations were 'forced', it often was the case that the parties didn't really want to settle their case at that point. And, the process itself – with a conciliation scheduled for only about an hour or so – was an insufficient amount of time for a mediation-type process to take place. And, the conciliators were not trained mediators. Conciliations seemed to have largely disappeared, a function of reduced court budgets occurring in the last ten years as the result of the Great Recession.

[11]This is as is distinguished from any party's 'last' or 'best' offer. When the mediator hears this, s/he usually doesn't believe it. Such a statement is ordinarily not much more than white noise. And, neither should the other party. I've heard it said that a salesman begins earning his/her money from the point forward from when the customer says 'no'. Mediations aren't much different. There are a lot of sales techniques and, perhaps more importantly, psychological techniques that are useful in resolving disputes through mediation. No one should ever prematurely leave in a huff, feeling insulted by the other side's initial or other offers. Ninety percent of mediations are settled within the last ten percent of the time allotted for the mediation. What happens in the mid-afternoon, late afternoon and early evening is much more important than what happens (or is said) earlier in the day.

[12] Having said that, I have had, as a claimant's attorney, mediations where I got essentially every cent that my guy was claiming.

[13] Perhaps only '*The Shadow'* knows! It should always be kept in mind when considering the resolution of disputes that a human being is a very *messy* animal, frequently motivated by emotion, as compared with being motivated by intellect or by pure reasoning. Emotion is what we are born with and into. Reason is what (sometimes) we aspire to and what only some of the time we achieve. An understanding of this dichotomy may be frequently necessary to conclude a dispute.

[14] That's especially true if you are not all that good at counting!

[15] Or, uh, thirsty.

[16] A few years ago, I was the foreman of a jury hearing a wrongful death case (medical malpractice) brought against a doctor and a nurse. The jury listened to three and one-half days of testimony. The attorneys made their closing arguments and the judge instructed the jury as to the law. The jury got the case on the fourth day at around two pm. A number of people wanted to go through the evidence in detail. And, there was a lot of evidence! This lasted for an hour and one-half or so. It was getting late in the day. The jury either had to vote for a verdict or come back the next day. Once this was clear, the examination of the evidence in detail came to a fairly abrupt conclusion and the jury voted on a verdict, ending the case on that late afternoon, freeing up the next day for the jurors to get back to their lives.