Scribbles Squibs #55[1] (March 27, 2017):

RESOLVING CONSTRUCTION DISPUTES THROUGH MEDIATION

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I. INTRODUCTION

One doesn't have to be involved with construction for very long before finding oneself in a position of having a dispute, typically over payment or claimed breach of contract issues.

Traditionally, the two primary methods of resolving disputes have been through arbitration and litigation. They both tend to be expensive and take a matter of years – especially with litigation - to reach resolution.

The purpose of this Squib is to discuss a third option – mediation – and the role it can play in quickly and relatively economically solving disputes. An additional benefit of mediation is that of the three options of dispute resolution, this is the one that is most likely to preserve the possibility of future work between the participants.

II. WHAT IS MEDIATION?

Mediation is a more-or-less non-adversarial (or, at least, less adversarial) process whereby the parties go in front of a non-judicial neutral (meaning, not a judge or arbitrator), whom they pick, for a hearing of anywhere from between three and four hours - on the low end - to one day or more on the high end. This is nothing but a controlled settlement meeting, typically taking place in a conference room. The mediator does not determine who is right or who is wrong. His/her sole purpose is to assist the parties in resolving themselves the issue in dispute.

Each side pays for one-half of the mediator's compensation, which is typically somewhere between three hundred to four hundred dollars per hour. Various organizations, such as the American Arbitration Association, offer mediation services. There is a mediation service in Boston where the mediators are mostly retired judges. Many experienced construction lawyers instead agree on a mediator from a group of about five to ten very experienced construction attorneys who are good at mediation, which procedure is generally cheaper and one over which the parties have more control.

Through a controlled series of meetings, the parties try to work out a solution to their problem. There is no written decision rendered. No one either 'wins' or 'loses'. And, by statute, whatever happens in mediation is specifically exempted and kept out of any subsequent trial. This is to keep the mediation process confidential and to encourage the parties to deal with each other earnestly, not concerned that whatever is said can be used later in subsequent litigation as evidence.[2]

What normally happens is that the mediator will require each party to prepare before the meeting a mediation memorandum explaining the case and its position, which is submitted before the hearing, exchanging copies with the other side. This can be in the nature of a legal brief and, certainly, any legal principle any party thinks applies to the issues in the mediation may be stated. However, in the main, that's the last real discussion of the law. Then, the parties get together in a room, typically the conference room of the mediator. Each side may make an 'opening', explaining its claim or defense, which is usually done by your attorney. Then, the parties are separated for the rest of the day in separate rooms. The mediator goes from one room to the other. Only if a settlement is reached will the parties be put in the same conference room again, this to write up and sign a settlement memorandum.

What each party tells the mediator is privileged in that the mediator cannot reveal this information to the other side without the party's permission. The mediator points out to each side the strengths of the other side's position and the weaknesses in its position. The party who is going to pay, after meeting with the mediator, will make an offer.

I had a mediation fairly recently where the paying party ultimately ended up paying three hundred thousand dollars. But, that party's first offer was that the party seeking payment owed it money!

I had another mediation where I represented a general contractor against a subcontractor's performance bond. The subcontractor's performance bond surety really pushed hard for the matter to go to mediation. Once the mediation started, the surety made an initial offer of zero! However, the mediator continued to discuss the matter with the surety over a period of the next two or three weeks – which is unusual – and the surety ended up paying essentially the full claim. The demands, offers, counter offers continue, conveyed by the mediator to each party. Parties and their attorneys generally shouldn't pick up and leave because they keep hearing numbers that are ridiculous. It's the nature of the process! Compared with the adversarial nature of many litigations, a mediation day is like a day at the beach. Without the, uh, beach![3]

It is especially important to have a mediator well versed in Massachusetts construction law. While all cases do not settle 'in the middle' a number of them will. At such time as there is a settlement, both sides will get together and the attorneys will prepare right then and there a hand-written memorandum of what the deal is and everyone will sign it, attorneys and clients alike. This prevents the lawyers and clients from going back to their offices and deciding that they now don't like the deal they agreed to.[4]

The majority of the cases I have been involved with in mediation have settled. Part of what makes this work is that spending four to six hours in a conference room is very tiring. People get more reasonable as they get bored and tired and even hungry. With the first of my mediations referred to above, it started at ten am and didn't conclude until around eight pm: a long day. However, that compares favorably with one of my recent trials where my client and I and the witnesses met for three weekends before the trial and then every day of trial at five am. If the mediation does not work, this ordinarily has no effect whatsoever on your existing court case. Mediations tend to take place fairly late in the court process: around the time that the pretrial conference takes place.

This statute from the Massachusetts General Laws provides as follows with regard to the confidentiality associated with mediation:

C. 233§ 23C. Work product of mediator confidential; confidential communications; exception; mediator defined

> "All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding . . . ."

Mediation is non-binding. If this doesn't work, then the parties can go to arbitration or sue without suffering any prejudice for having participated in the mediation process.

There is no 'testimony' or 'exhibits' *per se*, although some important documents might be attached to the briefs. There are no witnesses and the rules of evidence do not apply. As with bid protests, even if a contractor employee or principal is there, he or she doesn't have to open his/her mouth unless there is a desire to do so.

The cost to mediate is significantly less than arbitration or court. Moreover, the settlement agreement in mediation can be more complicated and complex than what might be achieved in court. It might be something like this: i.e. "you do this work, I'll pay you this money". This is a result not generally capable of being reached in true litigation where usually one party is declared to be completely right and the other party is found to be completely wrong. Moreover, as long as both parties are acting in good faith and *want* to attempt to settle the dispute, this is usually a worthwhile exercise, even if there is no settlement and the case goes on to litigation. For, the issues in the case are identified for each party and the process itself can act as 'free discovery', removing or limiting from future litigation extraneous issues. This is all the more so with more complicated claims, such as claims involving claimed construction defects.

Two other advantages to mediation. Occasionally, the impediment to a settlement might be a difficult attorney. More on this later. This process allows the parties, to some extent, to work around this.

A big advantage of mediation is a client may have heard their lawyer giving them an analysis of their chances in a certain case or situation, which the client really didn't want to hear or believe. Hearing the same thing from an experienced attorney with no horse in the race – the mediator – can sometimes cause that client to re-evaluate its position, which quite often can work to its benefit.

III. POTENTIAL PROBLEMS AND STRATEGIES IN RESOLVING DISPUTES

The following are three typical problems that can occur in litigation. In appropriate cases, mediation can be effective in helping to deal with them.

A. PROBLEM ONE: Courts don't seem to schedule settlement conferences to the extent they used to.

Many years ago, courts seemed to be more inclined to involve themselves in settlement discussions. So, as an example, for Norfolk Superior Court, cases would be set down for 'conciliation'. I've attended something similar in a case I had at the Stoughton District Court.

A conciliation was a kind of conference, which might be conducted by a senior attorney in the county where the court is who might volunteer a day a month to hear them. While there wouldn't be 'pressure' *per se* exerted on the parties to settle, at the same time, some degree of preparation would be required and the conciliator would ask each party for some presentation as to the merits of the claim (for the plaintiff) or of the defense (for the defendant.) The conciliator would inquire as to settlement prospects.

The conciliation was a non-voluntary meeting which everyone knew was oriented towards resolving cases. But, I haven't seen these in recent years.

In Middlesex Superior Court, there was a colorful judge in years gone by who might call his cases in every month or so for a 'status'. Essentially, he would 'strongly suggest' that the parties go out into the hall to discuss resolution. And, if sufficient progress wasn't achieved, he would bring them in the next month for such a further conference.

Currently, and, generally speaking, prior to the pre-trial conference, where the basic business is picking a trial date, the only preliminary meetings a court might schedule are 'litigation control conferences' (superior court) and 'case management conferences' (district court). These are not settlement conferences by nature and are really procedural in terms of reviewing any problems or issues that might slow the case down, such as one party attempting to thwart the discovery process.

Even when there were more wide-spread conciliation requirements, these tended to occur late in the litigation, often years down the road from when the dispute originated.

A. A POTENTIAL ANSWER TO PROBLEM ONE: Mediation can be scheduled at any time during a dispute, from when the dispute first occurs up to the parties waiting to receive a decision on the dispute from the Appeals Court seven years down the road.

If I had a dispute that I wanted to mediate, assuming the parties were reasonably flexible as to the scheduling, I could almost certainly arrange for a mediation in less than sixty days. In most cases, it would probably be somewhere between thirty and sixty days, and that would include the period of time during which the parties would submit mediation memoranda.

Now, most of our readers have seen contracts which have included a term stating that the parties had to continue with the performance of the contract work pending resolution of a dispute. But, that almost certainly means that the resolution of the dispute would be unlikely in less than four to six months (with arbitration) or up to five years with the superior court. Particularly with litigation, the contract would be concluded, one way or another, by the time the matter reached some form of trial or hearing.

There are several problems with this.

One problem with this is that in many situations, one party to the dispute could have increased costs to perform the contract work as modified by the dispute beyond what had been originally estimated. An owner or a general contractor might say: "Do XYZ work, because it is in your contract." That general contractor or subcontractor might vehemently disagree. But, a failure to perform the disputed item of work without compensation could cause that party to be liable for a material breach of contract, even if ultimately an arbitrator or judge agreed with the general contractor or subcontractor as to its position.

We all know that life is often unfair, even cruel. This type of situation is only a further example of that unfortunate rule.

Another problem is that the resolution of the dispute is necessary for a performing party under a contract to properly perform the contract work. This is particularly so with performance specifications and design-build contracts.[5] Does this emergency generator meet the contract requirements? Do these replacement windows for an historical building meet the contract requirements? Does this boiler suffer from flame impingement? The list of potential questions and issues is endless.

By pursuing potential answers to these questions *right now,* the answer has a better chance of being reached during contract performance, which might save one or both of the parties to a contract some real money. Because, by pursuing an answer through mediation, it is possible that the ‘does this comply’ question can be resolved before one or both of the parties performs unilaterally and/or incorrectly performs work which may have to be redone or corrected because that party guessed wrong.

B. PROBLEM TWO: For a variety of reasons, many lawyers aren’t good at settling cases and become stumbling blocks along the path of possible case resolution.

Sometimes cases are hard to settle because there is an unreasonable attorney situated between two parties who otherwise could have settled the matter more quickly and inexpensively.

We use an ‘adversarial process’ in the court system which essentially requires – to some extent – a confrontational style between lawyers. In some instances, the better a lawyer might be as a ‘trial’ lawyer, the less able that person might be as someone who has the interest – and disposition – for trying to settle a case. The attitudes of the trial lawyer as compared with the reasonable and fair compromiser are often antithetical. With litigation, the premise is that one side is all right and the other side is all wrong. The resolution of issues, therefore, becomes an all black or all white proposition. A lawyer good at settling cases has to be more attuned to dealing in grays. In almost all human interactions, it is seldom that one side is completely right, the other completely wrong. But, that often seems to be the inadequate result of litigation or arbitration.

Settling cases, in many instances, is counter-intuitive for the lawyer’s own business. Much as a taxi driver makes out better on longer rides than on shorter rides, the same can be said for some lawyers, particularly for those who work by the hour and particularly for those who don’t see the speedy resolution of their clients’ interests as being paramount.[6]

Here is a horror story from our files and two horror stories told to me by a contractor as to two cases I was not involved with.

Many years ago, issues arose between a subcontractor, my client, and a sub-subcontractor, whose contract work required it to install my client’s materials at a Massachusetts public project.[7] It was indisputable that the sub-subcontractor installed the materials incorrectly in that certain materials were left out of the installation. There was an issue as to whether or not this affected the acceptability and durability of the finished product. In addition, there was some question as to whether or not the sub-subcontract had an enforceable pay-when-paid clause. The subcontractor didn’t pay the bill of about one hundred ten or fifteen thousand dollars and the sub-subcontractor sued the subcontractor and the general contractor and its payment bond surety.

It took years to settle this case. Both the general contractor’s lawyer, a very good and well-experienced lawyer, and myself tried to settle this case offering any number of possible resolutions. None of these were acceptable to the sub-subcontractor’s attorney. At one point, the sub-subcontractor actually approached my client and asked if they could settle the dispute between themselves, not involving the sub-subcontractor’s attorney, because the sub-

subcontractor stated that it was afraid of its own attorney, who could be very strident and, depending on different opinions, somewhere between being only very aggressive and being a blowhard.

The case ended up settling for about one hundred and twenty-five grand against the general contractor's payment bond. The sub-subcontractor's attorney claimed to have incurred an attorney's fee north of one hundred forty thousand dollars but 'only' sought an attorneys' fee award from the court of a little less than one hundred thousand dollars. The court awarded a fee of forty some odd thousand.

That meant that the sub-subcontractor might have netted as little as twenty-five thousand dollars on the settlement. Whatever relationship there might have been between the subcontractor and the sub-subcontractor was all but destroyed. And, because of indemnification claims between the general contractor and the subcontractor, the subcontractor ended up paying not only its own attorney, but had to reimburse the general contractor for the court-ordered attorneys' fee and for the general contractor's attorneys' fee to boot.

The point is that this attorney kept this case going for much longer than was necessary, causing all three parties to the dispute to incur much larger attorneys' fees than was necessary and causing the sub-subcontractor to have to wait for its money longer than it should have had to.

At the time, mediation did not have the visibility and industry acceptance that it has now. Had this dispute gone to mediation, the parties might have been able to work around this difficult attorney, reaching a settlement much more quickly, saving everyone a lot of money and aggravation and the *agita*.

Another case, not my own, but told to me by a client.[8] It had a construction claim against another party for about two hundred fifty thousand dollars. After substantial, very contentious litigation, the case settled for two hundred fifty-two thousand dollars. Doesn't that sound like a good result? The only problem is that the attorneys' fee for the claimant was two hundred and forty-eight thousand dollars and the claimant netted four thousand dollars.

Another claim along these lines is that on a successful claim for twenty-two thousand dollars, the attorneys' fee was twenty-one thousand dollars.[9]

B. A POTENTIAL ANSWER TO PROBLEM TWO: In certain cases, mediation can assist in working around a difficult or inexperienced attorney and give a contractor a dose of reality that he or she might benefit from.

I don't see it as my job to be an apologist for my profession. There are difficult cases that are hard to handle. There are simply bad results that may not be anyone's fault. Some of this happens due to the nature of the adversarial process and/or due to how long cases take to come to trial. And, just as there are both good and bad contractors, there are good and bad attorneys. Not all of even the best attorney's cases are successful in resolution in the same way that not all of any contractor's jobs are profitable. But, as to these stories of apparently excessive legal fees, I suspect, unfortunately, that many readers have had somewhat similar experiences, although, hopefully, not quite this bad.

It takes five years to come to trial in the superior court. But, being able to have a mediation within sixty days or less at least offers the possibility of resolving the dispute more quickly and inexpensively. And, because a good mediator is not shy about speaking directly to each party, to the extent that an attorney is a road block to a solution rather than a conduit might be more easily evident to everyone, including to his/her client. And, where some attorneys might filter what information a client might get concerning the progress of the case and the personalities and positions of the opposing attorney and party, such filtering might be less effective during a mediation where pretty much everything comes out on the table.

Also, an attorney might either exaggerate or simply through inexperience may be telling his or her client that a certain unrealistic result might be achieved in litigation. The obvious ability and experience of a good mediator will at least offer the client a different opinion and perspective.

And, to be fair, sometimes it is the client itself who has the unrealistic expectation as to the possible result that can be achieved in the litigation, even when its attorney has tried to convince them that such is not likely the case. It seems to be a dynamic of mediation that hearing the same thing from an obviously knowledgeable and experienced mediator, who has no stake in the dispute, may help to move the contractor off of the dime. And, after all, chances are that it is his dime that everyone is talking about.

C. PROBLEM THREE: Too much litigation can be a millstone around a contractor's neck.

Litigating too many cases too long works against the interests of most contractors. One well-known general contractor was involved with two hundred and seventy cases when it went out of business some years back. There isn't enough money in construction to afford that, particularly for those, such as this general contractor, who worked predominantly in public construction where the margins seem to be getting more and more narrow.

So, while some 'tough' contractors have a reputation for litigating a good deal, that doesn't necessarily make them 'smart' contractors. Over time and over a number of cases, this has been proved time after time as not being an overall effective strategy. They say that it's the beginning of the end for an athlete when he or she begins to believe their press clippings. A contractor who feels that it is always right – or *has* to be right or vindicated too often – is flirting with disaster. I could give you off the top of my head a half dozen or more contractors who had that attitude. While they were still in business. That being in the past tense.

Millstones before the days of electric motors used to be used to grind corn. But, they also had/have less productive and sanguine connotations.

In the Bible, Jesus gave this warning as to leading His children astray. He said: "If anyone causes one of these little ones—those who believe in me—to stumble, it would be better for them if a large millstone were hung around their neck and they were thrown into the sea." (Mark 9:42)

Admittedly, the following may be a somewhat forced or obvious metaphor. But, here goes! Reducing litigation to its bare minimum can lessen a contractor's chances of drowning in attorneys' fees and court costs. Litigation should be similar to scheduling in this regard. Namely, the contractor should always own the float![10]

C. A POTENTIAL ANSWER TO PROBLEM THREE: Try to get rid of at least *some* of your cases.

Look. Mediation isn't perfect. Nothing in life is.[11] It will not resolve every case. But, taking any group of cases, it is likely to settle at least *some* of them, assuming good faith and a reasonable attitude on the part of all of the attorneys and parties.

One must also keep in mind that other than the monetary aspects of litigation, there is necessarily participation in litigation by your project managers and corporate officers and LLC members in answering interrogatories and preparing for being witnesses in depositions and trials.

Contractors make money through good estimating and good project management. Reducing the amount of time your important people can use in conducting your business due to their necessary involvement in litigation works against a contractor's interests, particularly when more litigation than is absolutely necessary takes place.

IV. CONCLUSION

There is no harm in seeking (or contractually requiring) non-binding mediation. It either is going to work or it isn't going to work. Whether the mediation process is going to work or not is usually clear after a matter of hours, rather than after a number of months or even years that other litigation models require. And, since one can arbitrate or litigate to one's heart's content after an unsuccessful mediation, no rights are lost by trying this process first.

In addition, even when unsuccessful, mediation can often provide some effective 'free' discovery. The mediation process seems to encourage both sides to identify all of their claims and all of their defenses, which might not be as obvious in the litigation process, where only a trial really provides this information when it might be too late to be useful.

Effective mediations lead to settlements. And, settlements usually involve one party paying another some amount of money.[12] In some regards, the longer a case is pending, the harder it may be to settle it as it may have used up too much money or the parties' positions may have become too ingrained.

The fact that a case may not settle on its first try doesn't mean that going through the mediation wasn't useful. It might be that it is the second try that is the charm![13]

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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] Here's a tip you might be able to use and it doesn't refer to mediation. Whenever you are discussing with the other side a possible resolution of a dispute, label your letters and emails as 'settlement discussions'. For any meetings that you have discussing settlement, make sure that all parties agree that these are 'settlement discussions', hopefully confirming this agreement in writing before any meeting. As such, whatever is said or written generally can't be used later in a litigation or arbitration as evidence. Without having this caveat, out-of-court statements between the parties to a dispute are exceptions to the hearsay evidence rule and can be used as admissions with regard to whatever is written or said, often very effectively in favor of one party and against the interests of the other.

[3] However unpleasant litigation can be – and it can be very unpleasant – some of the methods used prior to English jurisprudence to resolve disputes were nothing but a load of laughs, a bucket of chuckles and, certainly, not for the faint at heart. As reported by Wikipedia: "Ordeal by fire was also used for judiciary purposes in ancient Iran. Persons accused of cheating in contracts or lying might be asked to prove their innocence by ordeal of fire as an ultimate test. Two examples of such an ordeal include the accused having to pass through fire, or having molten metal poured on his chest. There were about 30 of these kinds of fiery tests in all. If the accused died, he was held to have been guilty; if (he) survived, he was innocent, having been protected by Mithra and the other gods. The most simple form of such ordeals required the accused to take an oath, then drink a potion of sulphur. . . . .they thought that fire has an association with truth . . ." As per the Salem Times of 1693 with regard to the witch trials: " Rocks are strapped to the accused witch and the accused witch is put into a body of water. If she floats or survives, she is a witch, and if the accused witch truly drowns, she is innocent." Charitably speaking, this, at best, kind of a Pyrrhic victory. Seen in the way of the macabre, knowing how to swim could get you killed as a witch. So much for the usefulness of swimming lessons at the Y! Per salemtimewitchtrials.com, the trials resulted in nineteen people being hanged, one person being pressed to death, and as many as thirteen people may have died in prison. Given the prominence (notoriety?) of the Salem Witch Trials in American culture – especially to be found in Salem in late October, whose streets might nightly look like the zombies are coming alive - the 'butcher's bill' might be somewhat less than one might have anticipated.

[4] Generally speaking, signed 'settlement agreements' are specifically enforceable in Massachusetts courts, meaning that once they are proved, a court will issue a judgment incorporating the terms of the settlement agreement as part of the judgment. At such time as there is a signed settlement agreement, any possible disputes over the facts and the law concerning the dispute in question are no longer relevant because the issues affected by those facts and by that law have been settled, which settlement is final.

[5] For those not completely familiar with the meaning of these terms, see our last Squib, Squib 54, entitled "FIVE MASSACHUSETTS PUBLIC CONTRACT DELIVERY SYSTEMS", which explains and defines these and other construction procurement methodologies.

[6] In being 'before the bar' for more than forty years, I would say the majority of lawyers I have dealt with have been concerned with their clients' interests before their own and are able to practice the art of law in a reasonably moral, ethical and professional manner. One should keep in mind that the phrase 'completely honest lawyer' is, in some cases, an oxymoron, an unfortunate result of the job requirements. Unfortunately, there are more exceptions to the rule than there should be.

[7] Some of the facts have been changed somewhat to protect the innocent. Or, possibly, to disguise the guilty?

[8] I am not able to verify this. And, as we all know, sometimes stories get better with the retelling. Being in the vicinity of St. Patrick's Day, could be a bit of the blarney, don't you know! But, this is the story as told to me.

[9] Ditto the endnote immediately above.

[10] Right! As if all of your jokes *always* work! I used to send jokes and gags unsolicited to Jay Leno and he actually used a number of them on air. That, a story possibly for another day. Apropos of possibly nothing, did you know he has/had a motorcycle with a jet engine? It used to melt parts in the front of cars not keeping their proper distance at stoplights. *Es verdad.*

[11] It seems to me that I read somewhere that the only time an individual is perfect is when he or she is perfectly dead! If that is true, long live imperfection!

[12] The definition of a good settlement is one where the party paying feels it paid too much and the party receiving feels that it received too little. By analogy, it is said that the design of an airplane begins with a compromise. Maybe not a thought to make a body super comfy when one is getting ready to fly over the Pond. Why do you think they do these flights only at night? That's so you won't have to see all of that water. Which is just kind of sitting there, cold, dark and alien. Seven miles below you. Surely, even Sully must have his limitations! By the way, did anybody else notice how old Tom Hanks seems to be getting? Thank God it is not happening to us!

[13] Think there were too many endnotes with this Squib? If that is so, then why did you read all of them? Besides, I needed this one to have a baker's dozen.