Mediation:
A Lean Approach to Resolving Disputes Without Litigation

FCIA Webinar
June 20, 2018

Presenters:
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www.BusinessMediationNetwork.com

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INTRODUCTION...

• Presenters:

  *Blase Reardon – FCIA Founder & Former President, Lean Coach, Mediator*
  
  *Paul Simon – President/CEO, Business Mediation Network*

• Q & A – Anytime

• Links, Feedback, Contact & Survey:

  https://businessmediationnetwork.com/resources/presentations/fcia/
Webinar Summary...

• **Mediation Uses Lean Principles to Resolve Construction Conflict**

• **Lean Principles:**
  • Collaboration of All Parties (Owners, Designers, Contractors, etc.)
  • Deliver Value
  • Eliminate Waste

• **Mediation:**
  • Neutral Mediator Facilitates Negotiation
  • Voluntary Settlement of Conflict
  • Avoid Lengthy, Expensive Litigation/Arbitration
Resolving Disputes . . .
3 Basic Choices

- **Litigation** – Court filing, discovery, motions, adversarial hearings, Judge/Jury decision

- **Arbitration** – private litigation, Arbitrator makes a **BINDING** decision

- **Mediation** –
  - Private, Facilitated Negotiation
  - Neutral Mediator
  - Voluntary Written Settlements
Litigation is the Usual Choice. . .
Over 8 Million New Business Cases Each Year

Over 15 Million Civil Cases Filed Each Year

- Contract*: 61%
- Small Claims: 9%
- Probate: 11%
- Tort: 11%
- Real Property: 11%
- Other: 2%

*Includes: Contract, Mortgage Foreclosure, Fraud, Lease, Employment, Interference, Partnership

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Trials Are Rare . . .
Less Than 1% of Business Cases Go to Trial

Federal Civil Trials
Business Litigation . . .
A Good-Size Industry in Itself

• **Over $250 Billion Spent by Business in Litigation** – 1.66% of U.S. GDP

![Annual Spending Chart]

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The Litigation Tax . . .
Cost of Discovery, Pre-Trial Preparation, Etc.

- **High Transactional Costs of Litigation:**
  - Tort / PI Claims

  ![Pie chart showing 40% Fees/Costs and 60% Client]

- **Up to 90% of Litigation Costs are for Discovery**
- **Electronic Discovery: MetaData = MegaBucks**
  - New York employee lawsuit 2003
  - Now: Lawyers, CPAs, Software, Public Co’s, Office 365

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Electronic Discovery . . .
The Fastest Growing Sport

- With a 15.3% Annual Growth Rate, the 15 year old Litigation Sub-Industry Adds Huge Costs to Lawsuits

2017 Annual Revenues – $ Billions

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Litigation Model . . .
Uncontrolled, Indirect, Slow, Costly

- Business
- Customer Employee Partner
- Litigation
- Lawyer
- Lawyer
Litigation Model . . .
Uncontrolled, Indirect, Slow, Costly

- Business
- Dispute
- Customer Employee Partner
- Lawyer

Average Time 3+ Years

- Motions
- Document Production
- Depositions
- Electronic Discovery

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Litigation Model . . .
Uncontrolled, Indirect, Slow, Costly

- Risk of Loss
- Appeals
- Collection Efforts
- Damaged Relationships

- Motions
- Depositions
- Document Production
- Electronic Discovery

Settlement Dismissals 99%
Trial 1%
Average Time 3+ Years
Possible Outcomes

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Mediation Model . . .
Controlled, Direct, Efficient, Business Focused

Mediation

Business Party

Dispute

Customer Employee Partner

Lawyer

Lawyer
Mediation Model . . .
Controlled, Direct, Efficient, Business Focused

- Business Party
- Customer Employee Partner
- Mediation
- Litigation/Arbitration <20%
- Settlement >80%

1 – 4 weeks (Conference: 1-2 days)

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Mediation... Why it Works When Direct Negotiations Fail

- **Confidential** – mediation communications are protected from use in later litigation
- **Focused** – only purpose is to find solution
- **Productive** – authorized persons required
- **Mediator Chosen by Parties:**
  - Includes Private Caucus
  - Not Adversarial
  - Emotional Filter
  - Communications Bridge
Mediation Is A Lean Approach... 
Applies Lean Fundamentals to Resolving Conflict

**Lean Fundamentals:**

- Intense focus on understanding *value* from the customer’s perspective
- Delivering value & eliminating *waste* in the process
- Shift in *thinking* and *behaving* supported by *tools*
- Continuous *improvement* of processes
- *Respect* for people
Resolve Conflict Quickly... Preserve Continuous Flow of Construction
Anticipation, Prevention, Solution . . .
Sources of Conflicts in Construction

• **Contracting** – Scope Creep, Inadequate Bids
• **Planning** – Final Design Documents, Specifications, Changes
• **Execution** – Permits Inspections, Interference, Unforeseen Conditions, Crew Cramming, Vendor Reliability, Delays
• **Completion** – Delivery, Collection, Warranty Claims
• **General Business Issues:**
  - Employees
  - Lenders
  - Partnership / Corporate
  - Succession Planning
Example: Hand Off Delays... Percentage of Promises Completed

Ballard & Howell Study:

**PPC = 54%**

*Why? Prerequisite Task Not Completed*
1. Use Mediator to Facilitate Negotiation of Disputes During Performance:

- Establish Conflict Management Process to Keep Continuous Flow
- Commit to Resolving Disputes Before They Cause Delays & Losses
- Preserve Working Relationships
- Mediation > Arbitration (Med-Arb) Possible
Resolution Outweighs a “Good Case”... Uses of Mediation in Lean Construction

2. Agree to Mediation Before Litigation/Arbitration:

- Save Money and Time Preparing, Filing Lawsuits
- Private – Keep Business Info Confidential, No Negative PR
- Encourage Vendors, Others to Mediate > Avoid Getting Pulled In To Third-Party Discovery
- Mediate All Disputes: Collection, Employees, Contracts, Lenders, Partnership / Corporate, General Business
Planning To Use Mediation . . .
Agree To Talk While You Are Still Talking

One Mediation Conference
Before Filing Claim

www.MEDIATE1ST.com

• **Use Dispute Resolution Contract Clause** – Choose the forum
  – Mediation before Litigation or Arbitration
• **Stay In Control** – Reduce chance of surprise lawsuit – Without 
  Mediate1st® clause, most difficult party chooses the forum
• **Mediation’s Worst Case = More Info** – Opportunity to meet
  decision-maker from other party, gauge motivation and
  commitment, see interaction between other party, lawyer

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Mediators with business experience are better able to help solve business disputes:

- **No Learning Curve** – familiarity with business setting helps understand parties’ interests and motivations
- **Problem-Solving Skills** – *win/win* NOT *win/lose*
- **Deal-Makers** – facilitate negotiations rather than evaluate legal positions to predict winners / losers
- **Successful Business Attributes** – persistence, consensus building, reconciling stakeholder interests, listening, probing, creative problem-solving
Two-Thirds of FCIA Members Responding Have been involved in a Dispute that Could Not be Resolved Between the Parties

Most of those were Contract Disputes, also Disputes over Collection, Employee Claims and Government Regulation

25% of those Claims resulted in a Lawsuit, 75% were Abandoned; In One-Half of Abandoned Claims, Parties Ceased Doing Business with Each Other

Ranking of Most Important Goals in Resolving Disputes:

1. Finding Mutual Benefit
2. Preserving Relationships
3. Getting It Over With
4. Winning
5. Money

**Results Consistent with Other Business Dispute Surveys**
• How Many Business–Related Lawsuits Filed in US Annually?

  ➢ Correct Answer: Over 8 Million (27%)

• How Long Does a Business Lawsuit Last?

  ➢ Correct Answer: 3 Years or More (36%)

• What % of Business Lawsuits Go To Trial?

  ➢ Correct Answer: 1% or Less (9%)

• Overall Score: 24% Correct Responses
Consensus Among FCIA Members. . .
Overwhelming Approval of Mediation

• Would the Knowledge that 80% of Disputes Resolved in Mediation Encourage Your Use?
  ➢ Yes – 100%

• Would You Use Mediation If Access to Convenient and Affordable Program with Online Mediator Selection?
  ➢ Yes – 100%

• BMN Offers Preferred Mediation Program for FCIA Members – Contact for Details
Why is a Business Lawsuit Like a Hockey Fight? . . .

- You can fight for a while if you follow the rules
- The fight ends when you are exhausted (or your opponent pulls your jersey over your head)
- Usually neither party wins
- Only the parties are penalized
- While you are in the penalty box, the game goes on without you
- AVOID THE LAWSUIT PENALTY BOX!
• Questions / Comments
• Survey Participation / Updates
• Mediator Training Information
• Webinar Evaluation & Feedback

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