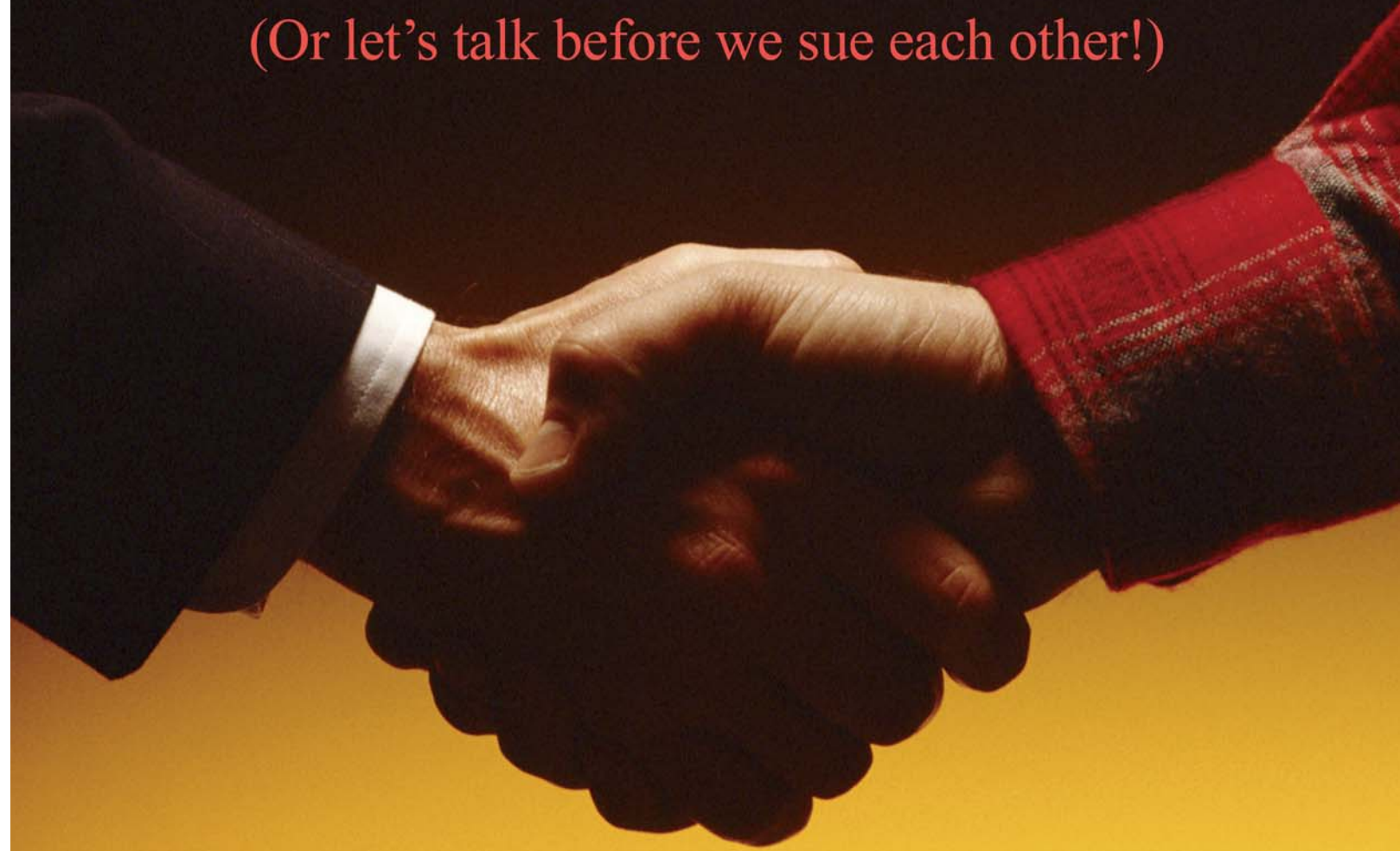




Business of Building

MEDIATION

The First Best Chance to Resolve Disputes
(Or let's talk before we sue each other!)



by James A. Vlasicak J.D., M.A.

What Is Mediation?

It depends on who you ask — it can be helping busy contractors and customers resolve disputes before the problems spiral out of control. Mediation is becoming a very popular process for the resolution of construction disputes. Mediation has become popular, because it is a way to better manage the financial cost and emotional stress to contractors, owners, developers, design professionals and others who resort or have agreed to resort to arbitration or litigation to resolve their disputes.

When to Mediate?

My experience has been — and I highly recommend this approach and this is the strategy that I use — a mediator should be engaged and the process should be conducted as soon as possible. A party's attorney can be involved at this stage of dispute resolution, but I highly recommend that mediation should commence before litigation begins. And I strongly recommend that a mediator in construction disputes should have knowledge of the construction process, the industry and construction and contract law. I feel as though I am very successful in my pre-litigation mediation practice, because I have credentials in all three areas.

Depending on the nature of the dispute, independent investigation or expert analysis may be required and completed before the commencement of the mediation process. I generally try to establish the facts in the pre-mediation interviews, which may include recommending expert analysis. In any event, the sooner the process begins, the sooner the anger and hostility fade into the background.

In the final analysis, mediation is negotiation rather than compromise, because compromise is more like settling rather than getting what you want. Negotiation is more win-win — both parties walk away satisfied.

How Does Mediation Work?

Two models: facilitation and shuttle. Often times, facilitation gives me a chance to look at everyone's face, after I've had one-on-one meetings with the parties. There's some ground rules and each has a chance to state their case, focusing on the facts.

Shuttle method requires two different rooms and often involves more than two people. The mediator goes back and forth until it's time for settlement. The shuttle method makes best sense when I feel as though there's a high risk

of emotional outbursts, violent tempers or just plain "I don't like the other guy no matter what he says, and I'm going to let him know it!"

Once I have managed to help the parties lower defenses and put the slingshots away, I tend to be more assertive, almost aggressive, and address the respective legal strengths and weaknesses of each side's position — then I address the monetary issues. I try to marshal the process to resolution rather than let the process float along. The construction industry seems to be reflective of candid, hardworking and assertive personalities and my style works well with that culture.

How Long Does a Mediation Project Take?

Depending on the party's mindset, mediation can be completed in two to six hours, or, in more complicated situations, it could last eight to 12 hours over the course of a number of days. Motivation to settle, willingness to engage in discussion and recognition of strengths and weaknesses of the respective sides are the variables that drive the length of the mediation. That's why a mediator with skills and experience in dealing with people and the law is the critical component to bring a dispute to resolution.

It's easy to maintain a conflict when you are not talking. And some people have actually not spoken in front of a prospective spouse or business partner because, usually, an attorney recommends it, which of course is part of the attorney's training and advice to a client. Always keep in mind this rule of evidence (see Michigan and Federal Rules of Evidence 408): nothing that you say in the mediation process creates liability against you in a subsequent legal proceeding.

How Does Mediation Differ From Arbitration?

I have presented well over 30 arbitration cases (construction, commercial & employment), and I am an outspoken advocate of that process as an effective alternative resolution process. However, I see mediation as the dispute resolution process that makes best sense. But it is important to be aware of a couple of crucial points.

First of all, both litigation and arbitration are final and binding legal formal procedures. Mediation is not. The parties retain control of

the details, including the amount of the resolution of the claim. Also, since mediation can be non-binding, the familiar ex-parte rules do not apply. Rather, all parties are encouraged to make contact with the mediator as often and with any method that creates confidence in the mediator and the process. It has been observed that experienced advocates encourage their opposition's regular contact with the mediator. The more confidence in the neutral, the quicker and better the solution.

What Attracted You to the Mediation Field?

I've been mediating conflict all of my life. I was the second oldest of seven kids, and my parents relied on me to mediate everything in the household from kids fighting to Mom and Dad trying to figure out their marriage, life and all of its challenges. I then earned my master's degree in counseling psychology and worked in the field of labor and employee relations for a couple of fortune 500 companies before and after I earned my law degree. I trained managers in the law and ethics in dealing with employees and each other.

As a business owner, which included a commercial construction enterprise, I came to realize that rarely everything is black and white, and win-win situations are always the goal to every transaction for my business and my employees. For me, mediation is as natural as the New York Yankees competing in post-season play (I happen to be a fan as Derek Jeter, and my son attended the same high school in Kalamazoo).

The Home Builder's Association of Greater Kalamazoo's executive director, Dale Shugars, and Shaun Willis, of Willis & Willis PLC, have both been inspirations and have been incredibly instrumental in helping me launch and grow a mediation practice that seems to have substantial demand.

How Do You See Your Role as Mediator?

Well, my role is really one of support to the legal system and the attorneys that protect their client's interests. I can also do work with people in distress that lawyers can't or won't do because of the nature of their profession. And at the end of the day, that's the challenge — helping people and business owners in the construction industry get on with their lives as stress free as possible. The combination of a

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law degree from the University of Denver's School of Law, a master's degree in counseling psychology from Western Michigan University, over 30 years of business experience, many of those in the construction industry, provide me and my clients with skills and experience that few professionals offer.

Do You Enjoy What You Do?

Without a doubt! I love what I do. I've helped contractors, subcontractors, nurses, employers, married couples, business owners and homeowners. It's nice because I get to work on my own, and people seek my services because they need help. America, what a great country!

For more than 27 years, Jim has been helping people resolve their differences — it is still his life's work. Over that spectrum of time, Jim has been bringing people to common ground to air grievances, settle their differences and reach closure. For more information, visit Jim's Web site at www.Themediator.biz, or phone him at (269) 217-4056. ●



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