By Thomas J. Stipanowich  
Professor of Law,  
University of Kentucky College of Law  
Counsel, Stites & Harbison

**New Horizons in Dispute Resolution:**

**Mediation of Construction Disputes**

It was an all too familiar scenario. The contractor had just completed construction of a culvert using precast elements when state inspectors observed signs of stress in the installation. Ultimately, the contractor was required to cast-in-place another culvert to correct the problem—spending several hundred thousand dollars in the process. The contractor sued the supplier of the precast units, the designer of the units and the public owner (whose contract documents specified the culvert). As the case was prepared for trial, it became apparent that there were a number of issues regarding the precise cause of the problems, including questions relating to the culvert design, the compaction of backfill abutting the culvert and compaction testing procedures. Like many construction disputes, it was not an open and shut case.

Traditionally, such disputes have been handled by unassisted negotiation (you call me, or your lawyer calls mine) or adjudication. For most construction cases, arbitration tends to offer advantages; it’s quicker, less costly, and less public dispute resolution by people chosen for their expertise, not their ignorance, of construction matters. As with court litigation, however, arbitration leaves one’s destiny in someone else’s hands. As in court, there are typically winners and losers and sometimes—due to the financial and human burdens of trying a case—only losers.

Recently, therefore, many people have begun examining the advantages of approaches which assist disputants in resolving their own problems without the need of adjudication. Some of these approaches—such as dispute review boards, mini-trials and summary jury trials—involves non-binding findings by third parties after formal presentations by both sides. A more popular alternative is mediation, a process in which a neutral facilitator, or mediator, meets informally with the parties in an effort to help them arrive at a mutually satisfactory solution.

Mediation helped settle our culvert case. After several months of discovery in preparation of trial, the parties agreed to employ the services of a knowledgeable and experienced construction attorney not as an advocate, judge or arbitrator, but as an impartial mediator. After meeting jointly with the parties to ascertain the issues involved, the mediator met privately with each of the disputants to discuss their individual agendas. As time went on, the mediator used these confidential sessions—known as caucuses—to discuss with each party the realities of the case, the weaknesses of their respective positions and the relative advantages of a negotiated settlement. Although the mediation ended without a settlement, the parties reached an agreement shortly thereafter; and all credited the mediation process with having broken the logjam which stymied earlier negotiations. Mediation helped the parties style their own solution and avoid a lengthy and expensive trial.

**Disputes — cont’d on page 71**
Advantages of Mediation

The process which resolved the culvert case has been successfully employed in all kinds of disputes involving building design and construction. In addition to the obvious potential for great cost and time savings, mediation offers a number of clear advantages to participants.

Mediation is among the most flexible and informal processes. Joint sessions can be conducted at any mutually agreeable location; the mediator can literally come to the parties. If necessary, caucuses with individual parties may be conducted at their respective places of business. (In the interest of encouraging serious negotiations, however, many mediators prefer to avoid “shuttle diplomacy” in favor of working with the parties at a single, convenient location.) Mediation is much less formal than legal hearings and can be as private as the parties wish to make it.

The flexibility of mediation extends to mediated agreements. Unlike adjudicators, parties in mediation can tailor any arrangement which suits their mutual needs. Although this will often involve an exchange of money, less obvious remedies may suit the parties as well. The author is familiar with a recent mediated agreement in which, in exchange for a release of claims, a defendant promised to issue a public apology for his past actions. Experienced mediators know this and assist in the search for creative solutions. Since the parties have a voice in dispute resolutions, moreover, they are more likely to have a sense of ownership in the outcome. Arguably, this makes it more likely that they will live up to the agreement.

An effective mediator can have a substantial positive impact on negotiations. By effectively supervising discussions, the mediator may permit the parties to get beyond the
shouting and hear the other side of the argument. The mediator may also serve as an agent of reality who helps disputants see the sense or nonsense of their positions. Moreover, a good mediator seeks to put the focus not on the rights or wrongs of the past, but on future needs and goals. Even where mediation does not result in full settlement, it may go a long way toward focussing the parties on the true issues dividing them and their respective requirements.

For the same reason that mediation is a natural approach for preserving or enhancing communications between divorced parents, the process is a good way of maintaining relationships between businesspersons. The process may be most valuable in keeping a construction project going or saving a longstanding course of dealing. A successful mediation may establish channels of communication for the future and avoid the need for formal intervention.

While mediation offers no guarantees of success, the risk of non-settlement usually is outweighed by the foregoing possible advantages. Moreover, the open-endedness of mediation may be seen as an additional advantage. Mediation only ends controversy in the event of mutual agreement. If mediation is unsuccessful, the parties are free to explore other solutions.

Lawyers’ Views of Mediation

Because mediation has only recently gained popularity as a tool for resolving construction conflicts, there is little hard data on people’s experiences with and perceptions of the process. Last year, however, the American Bar Association Forum on the Construction Industry, a nationwide organization of more than 5,400 attorneys, concluded a survey on the use of mediation and other alternatives to litigation. The 552 responses contained some interesting and occasionally surprising information on lawyers’ views.

DISPUTES — cont’d from page 71
DISPUTES - cont’d from page 72
and use of mediation.

Although binding arbitration remains by far the most widely used alternative to the courtroom (other than negotiation) in construction cases, nearly two-thirds of those responding to the ABA survey had participated in at least one mediation. A small minority (11 percent) had mediated 10 or more times. Over half said they would recommend mediation to their clients in most or all construction disputes; very few (1.5 percent) would never recommend the process.

One abiding bit of hearsay is that proposing mediation might be interpreted by the opposition as a sign that one lacked confidence in his case. This concern should be forever laid to rest by the response of ABA attorneys, 86 percent of whom disagreed that proposing mediation was a sign of weakness.

A more frequently voiced concern is that some participants, rather than seriously negotiating, use mediation as a vehicle forgetting additional information about their opponent’s case in preparation of trial. Again, however, the survey group had a very different view; only 13.5 percent saw revelation of trial strategy as a problem in mediation; a mere seven percent believed revelation of confidential information was a drawback in mediation. Indeed, contrary attitudes seem inconsistent with modern rules of trial practice, under which wideranging information exchange is the norm. At the same time, however, if a party truly wishes to preserve confidences, these can be shared privately with the mediator in caucus.

Respondents regarded mediation as most appropriate where the parties wished to preserve an ongoing commercial relationship, where they desired privacy and confidentiality, and where speed or economy in dispute resolution was essential. Mediation was regarded as least appropriate in cases involving novel questions of law, where the credibility of witnesses was at stake, and where a party or its attorney were considered untrustworthy or unlikely to compromise.

Survey participants thought the attributes usually of most importance in a mediator were impartiality, managerial skills, personal discretion, listening ability and the ability to understand complex issues. Interestingly, design or construction experience and legal expertise were much less likely to be important in a mediator.

Respondents were also asked to describe up to three actual experiences with mediation. The response, which included descriptions of 459 mediations, reflected the adaptability and diversity of the process. Although a third of reported cases involved two parties, the remainder involved three or more parties. Amounts in controversy ranged from $600 to half a billion dollars. Four out of five mediations were concluded in three days; nearly half were completed in a day or less. Two out of three of the reported cases resulted in full or partial settlement.

The interest sparked by the ABA survey has set the stage for a new, industry-wide, international survey which will be conducted in 1993 and 1994.

Other Current Developments

There are currently a number of avenues to mediation of disputes. The American Arbitration Association encourages the use of mediation prior to arbitration under its construction rules which are widely used in construction industry contracts. More and more, construction contracts are incorporating provisions requiring the parties to mediate prior to arbitration or litigation. In addition, construction attorneys and their clients are more likely to be aware of such approaches; organizations such as the Center for Public Resources and the new Dispute Avoidance and Resolution Task Force encourage law firms and businesses to “take the pledge” to use mediation and other alternatives to litigation wherever possible.

Recent developments in my own state, the Commonwealth of Kentucky, reflect the “quiet revolution” occurring throughout the industry. Several professional and industry groups (representing contractors, design professionals and construct-
DISPUTES — cont’d from page 79

...tion attorneys) are jointly developing a regional construction mediation program which will train and use a network of volunteer mediators from the construction industry. The program will be jointly sponsored by the Mediation Center of Kentucky, a nonprofit organization which currently handles court-referred disputes as well as privately-referred civil cases of all kinds.

The construction industry has always been a laboratory for experimenting with new processes for resolving disputes out of court. Never has this been more true than the present. The last decade has witnessed an unprecedented rethinking of the way we handle job claims and controversies. Approaches such as mediation offer new, more sophisticated tools for dealing with old problems.

About the Author:

Tom Stipanowich is Alumni Professor of Law at the University of Kentucky, where he teaches courses in construction law and alternative dispute resolution. He is also counsel to the regional law firm of Stites & Harbison, where he participates in a construction law practice. A graduate architect as well as a lawyer, Tom is an internationally recognized expert on dispute resolution in the construction industry. He recently co-founded a regional mediation center and co-authored a book for Little, Brown on arbitration of commercial disputes (to be published next year). He is currently writing a book on preventing and resolving construction disputes outside the courtroom.

Mr. Stipanowich will be making a presentation on the subject of mediation at AWCI’s 76th Annual Convention in Phoenix, AZ on Friday, April 1, 1993. For further information, contact AWCI at (703) 684-2924.

Tom Stipanowich