

Construction Mediation can be Exhausting, But Worth It



At Construction Law Musings, we have discussed mediation from numerous angles. From a great Guest Post from Vickie Pynchon (@vpynchon) on [Ways Your Construction Mediation will Fail](#) to my own [personal musings](#) on the subject.

All of the thoughts from these posts flooded to mind during one long mediation experience recently. The parties had already tried a court sponsored mediation that lasted maybe an hour and, a few months later, were ready to charge into the void of trial (a result that would have lead to an interesting case with some cool construction issues, I might add),

but the lawyers decided to take one more shot with a private mediator. As is true in almost all commercial and construction disputes, the parties each had strong feelings and reasonable arguments from a legal perspective. In my latest case (as in most cases where a good mediator is used) a deal got struck.

Also, and as always happens, I learned something during the process and left it even more committed to the possibility of voluntary (as opposed to [contract or court mandated](#)) mediation at the proper point in time between parties who are poised and ready to go to battle in the courtroom. I say this as a [litigator](#) by trade and training that truly enjoys the courtroom battle. However, I need to remind myself that "Counselor at Law" often follows "Attorney" after my name and I take that second designation seriously.

I saw the reasons that mediation works to resolve even the thorniest of construction disputes, from the ability of businessmen to make business decisions to the possibility of a creative solution unavailable in a pure litigation context. I also saw how a mediation might not work, from the desire to just shut it down to a mediator that did not take the time and twist the arms. Mere shuttle diplomacy never seems to do anything to move the parties toward resolution any more than a settlement conference without a mediator would have.

I also saw that mediation can move the ball forward even after a day of hard-fought negotiation results in everyone going home. Even when parties are at the end of their

ropes and all hope seems lost, sometimes a break can lead to a breakthrough. When all seems lost and a break is the difference between "no" and "maybe," "maybe" is always better. This last needs to be remembered late in the day when the parties are in from out of town or seemingly at their final offers and ready to dig in their heels. This is true even though most mediators with whom I have worked seem to cling to the thought that once the parties leave the office or conference room the deal is lost. Sometimes (though far from always), the fresh perspective of a good nights sleep can relieve tension and lead to a bit more rope.

The takeaway? In even the most difficult and contentious of construction disputes, once business people get into a room with the mindset to fight for a compromise, a deal generally results. In most cases the parties' bottom lines minutes before the mediation starts turn out to be a lot more fluid than even they thought by the end of the day. The ability to vent as well as be a part of a process (mediation) as opposed to a passenger on a careening train (litigation) almost always results in a more satisfactory resolution. The parties can leave the mediation exhausted, psychically bruised, but firm in the knowledge that they worked hard to solve a problem and that they came to an imperfect but palatable resolution instead of a decision by a third-party sitting in judgment.

In short, mediation works and, in my opinion, should always be a tool in a litigator's tool belt.

Please check out my [Construction Law Musings Blog](#) for more on Virginia construction law and other topics.