

Alternatives to Litigation

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Construction Defects:
How to Evaluate if Your Claims Are Objective

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- ▶ Construction and Real Estate Attorney – focused practice on construction, land use, development, community associations, and sustainability.
- ▶ Represent owners, developers, associations, design professionals, contractors, and subcontractors.
- ▶ International construction dispute resolution experience – few thousand to hundreds of millions.

- ▶ Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses, and waste of time. As a peacemaker, the lawyer has superior opportunity of being a good man. There will still be business enough.

▶ Abraham Lincoln

Alternative Dispute Resolution (ADR)

- ▶ Alternative Dispute Resolution (“ADR”) is the process of resolving disputes outside of the litigation and court process.
- ▶ ADR includes, *inter alia*:
 - ▶ Negotiation
 - ▶ Early Neutral Evaluation
 - ▶ Mediation
 - ▶ Conciliation & Med-Rec
 - ▶ Arbitration
- ▶ BATNA & Decision Analysis Tools

Negotiation

- ▶ Parties attempt to negotiate the claim or dispute between themselves, unassisted by a third party neutral.
- ▶ Possible contract clause: “As a condition precedent to any other dispute resolution procedures, within fifteen (15) days after a dispute arises between the Parties, the Parties’ representatives with authority to settle the dispute shall meet to attempt to settle the claim.”

Early Neutral Evaluation

- ▶ Expert evaluation of the strength and weaknesses of the technical and legal case.
- ▶ No binding effect.
- ▶ Confidential.
- ▶ Best and worst case alternatives to facilitate a negotiated agreement.

Mediation

- ▶ Mediation is defined as a non-binding negotiation carried out with the assistance of a neutral third party who helps bring about agreement.
- ▶ Agreement to mediation; selection of the mediator; pre-mediation conference; submissions/exchange; mediation.

Benefits of Mediation

- ▶ When un-assisted negotiations fail, bringing in an expert facilitator often yields a settlement.
- ▶ Quick and cost effective.
- ▶ Allows for creative solutions, including non-legal solutions.
- ▶ Non-binding. Retaining control over the outcome.
- ▶ Confidential.
- ▶ Forum for emotional venting.
- ▶ If mediation fails, the dispute may proceed to arbitration or litigation. Very little is lost from an attempt to mediate beyond a relatively small amount of time and money and regardless, the preparations for mediation often save valuable time when preparing to arbitrate or litigate.

Conciliation & Med-Rec

- ▶ Conciliation - a process whereby parties attempt to settle their dispute with the assistances of a facilitative third-party neutral; if the parties fail to resolve their disputes after such facilitated negotiation, the parties submit the dispute for evaluation by the conciliator for a “recommendation.” Under most conciliation rules, the recommendation is binding on the parties, unless rejected by either party within a specified time-period. If the recommendation is rejected by either party, no binding contract is formed and the parties can resort to arbitration or litigation.
- ▶ Med-Rec – similar to conciliation except it is the parties' decision as to whether the recommendation has the potential to bind the parties. Often in Med-Rec, parties choose that the recommendation only serve to help the parties evaluate the case themselves. In these cases the recommendation has no contractual status and only serves as a reality check for the parties.

Arbitration

- ▶ “Court without the wigs.”
- ▶ Benefits of Arbitration over Litigation:
 - ▶ Cheaper.*
 - ▶ Faster.*
 - ▶ Reduced discovery.
 - ▶ More knowledgeable decision-maker. Choose experts in the construction field.

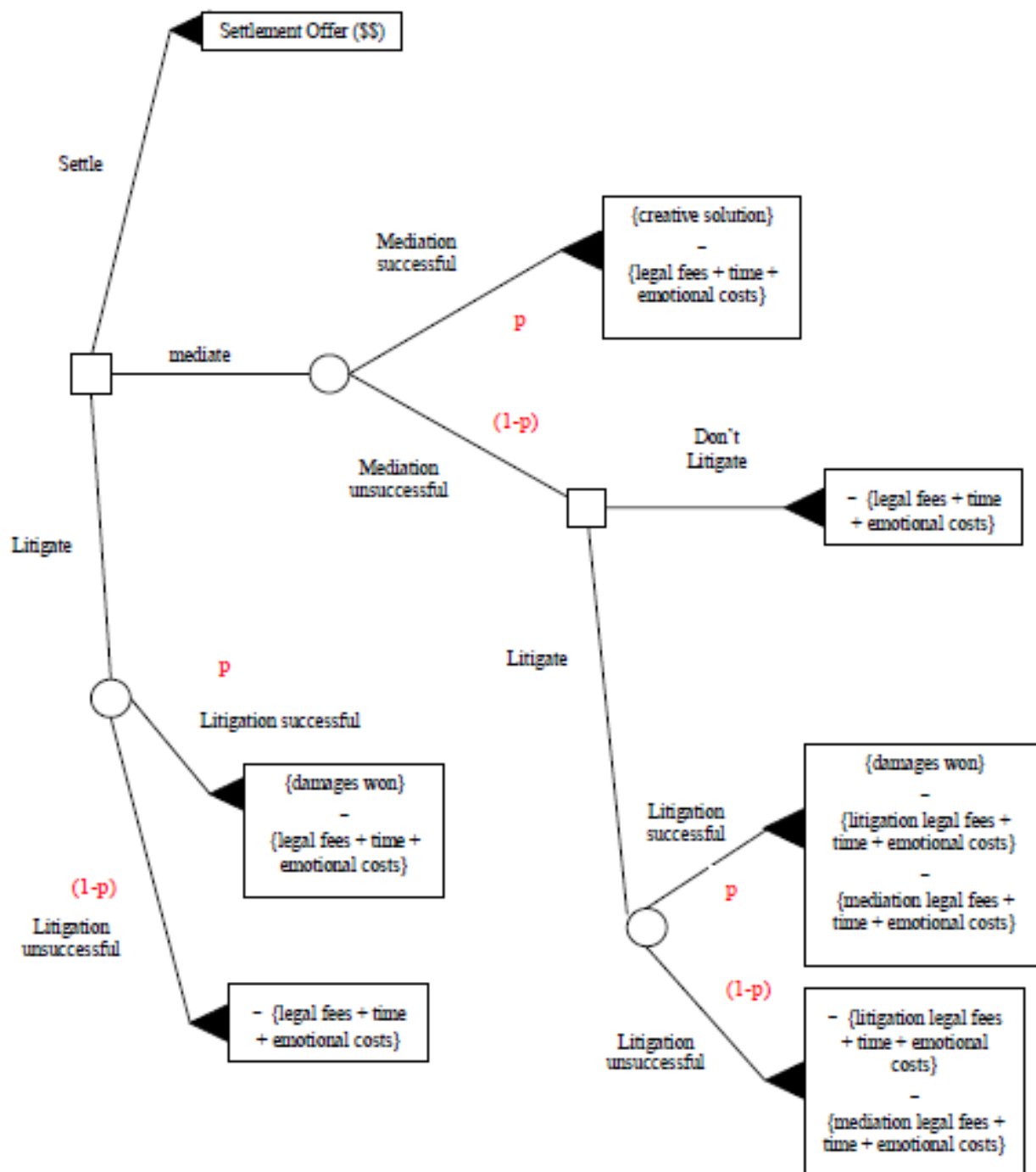
*in theory

Evaluating Your Claims

- ▶ Information, information, information – gather what really happened from the people that know. Abandoning the institutional knowledge.
- ▶ Documentation of the claims.
- ▶ Evaluating your Best Alternative to a Negotiated Settlement (“BATNA”) – private and public.
- ▶ Legal, Expert, and Time Costs.
- ▶ Evaluating risk – liquidity, “Two in the hand,” etc.

Decision Tree Analysis

- ▶ Lawyers and mediators can use a decision tree as a framework to provide reality checks on the clients with proposed hypothetical scenarios.
- ▶ Provides a framework for straightforward communication regarding the realities of paths taken.



Questions & Comments

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