MEDIATION: AVOIDING THE RABBIT HOLE

PRESENTED BY:
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Firestop Contractors International Association
Education & Committee Action Conference
April 25, 2019
Chicago
Overview . . .

• **Business Lawsuits are a Rabbit Hole: Strange, Costly and Futile**

• **Mediation Before Litigation or Arbitration Can Resolve Most Business Conflict**

• **Introducing FCIA Business Conflict Forum® - Fast, Convenient Access To Mediation Services (Printed Handout)**

• **Q & A**
Why Is Mediation Important To FCIA Members?

• Have you ever had:
  ➢ Conflict over inconsistent or inadequate specifications?
  ➢ Issues due to owner, architect, general contractor or other contractors not understanding proper firestopping performance?
  ➢ Payment / collection problems?
  ➢ Been pulled into disputes that did not involve you but everyone was sued? Negative PR?
  ➢ Problems with employees, partners, lenders?
  ➢ Sensitive negotiations regarding succession, buy-outs, valuation of your business?
3 Ways to Resolve Business Disputes

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

- **Arbitration** – Private litigation, Arbitrator makes a Binding decision

- **Mediation** -
  - Private, Facilitated Negotiation
  - Conference with Neutral Mediator
  - Voluntary Resolutions
Litigation is the Usual Choice. . .
Over 8 Million Business Related Cases Each Year

Over 15 Million Civil Cases Filed Each Year

- Contract*: 64%
- Small Claims: 16%
- Tort/PI: 7%
- Real Property: 1%
- Other: 12%

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

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FCIA Academy Awards . . .
Pick Your Favorite Movie Trial Lawyer

Vote for your favorite movie trial lawyer:

1. **Harrison Ford** – *Presumed Innocent*

2. **Gregory Peck** – *To Kill A Mocking Bird*

3. **Tom Cruise** – *A Few Good Men*

4. **Matthew McConaughey** – *A Time To Kill*

5. **Joe Pesci** – *My Cousin Vinny*
Movie Fantasy Meets Reality . . .
Business Cases Slow, Winners Rare

Business Cases Last About 3 years – 5-6 in Major Cities

Federal Civil Trials

Less than 1% of Business Cases Go To Trial
Litigation Model . . .
Uncontrolled, Indirect, Slow, Costly

- Risk
- Appeals
- Collection Efforts
- Damaged Relationships

- Motions
- Depositions
- Document Production
- Electronic Discovery
Estimate: $250 Billion Spent in Business Litigation

- 2018 Chamber of Commerce Report: Litigation Spend is 2.3% of U.S. GDP

Business Litigation

A Good-Size Industry in Itself
Electronic Discovery . . .
The Fastest Growing Sport

• With a 13% Annual Growth Rate, the 15 year old Litigation Sub-Industry Adds Huge Costs to Lawsuits

2017-18 Revenues - $ Billions

- NFL
- MLB
- E-Discovery
- NBA
- NHL

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"You Would Have to Be Half Mad To Dream Me Up"

... Mad Hatter, Alice in Wonderland
Traditional Arbitration Model . . .
Private Trial, Semi-controlled, Indirect

- Risk of Loss
- Court Enforce/Vacate
- Collection Efforts
- Damaged Relationships

- Document Production
- Depositions
- Adversarial Hearing

Company

Dispute

Arbitration

Award

GC Supplier
Employee

Lawyer

Lawyer

Possible Outcomes

Average Time 7 - 14 months
Mediation Model . . .
Controlled, Direct, Efficient, Business Focused

Mediation Conference: 1-2 days

Settlement 80%

Litigation/Arbitration 20%

Company

CG Supplier Employee

Lawyer

Mediation
Mediation/Facilitated Negotiation... Why it Works When Direct Negotiations Fail

- **Confidential** – mediation communications are protected from use in later litigation
- **Productive** – attendance by authorized persons
- **Mediator - Neutral, Chosen by Parties:**
  - Meet Separately, Caucus
  - Collaborative, Not Adversarial
  - Emotional Filter, Venting
  - Communications Bridge
  - Reflective – Helps Focus on Interests, Future
FCIA Business Conflict Forum® . . .
Introducing Mediation Program for FCIA Members, Referrals

• **Program May Be Used for Any Business Dispute or to Facilitate Sensitive Negotiations**

• **Convenient Process for Initiating Mediation**
  - Submission Form – Process, Fee Splitting
  - Online Mediator Selection
  - Conference Scheduling

• **Printed Handout - Download**
Mediators with business experience are better able to help solve business disputes:

- Owners, CEOs, CFOs, CPAs, HR – Operations – Sales Managers
- No Learning Curve – familiar with business setting, problems
- Deal-Makers – facilitate rather than evaluate legal positions

Mediator Training for FCIA Business Conflict Forum®:

- June 11-12, 2019
- Faegre Baker Daniels Conference Center
  311 S. Wacker Drive, Suite 4300
  Chicago, IL 60606
- Firestop Industry Veterans: Active, Transition, Retired
Business Conflict is Inevitable. . .

Plan to Use Mediation

Temptation to do nothing when nearly any business interaction can lead to dispute and litigation
Planning Ahead... Controlled and Uncontrolled Interactions

Employees
General Contractor
Owner
Other Contractors
Lenders
Suppliers
Partners
Succession

Government
Competitors

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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 Mediation before Litigation or Arbitration
- **Stay In Control** – Avoid surprise suit, negative PR – 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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RECAP:

1. Use Mediation to Avoid the Rabbit Hole (litigation) if possible – Fast, Efficient, Preserve Relationships
2. Put a Mediate1st® in contracts, employee manuals, partnership agreements, loan documents
3. Submit conflict early to FCIA Business Conflict Forum® mediation program for convenient access to mediators who know your business

Q & A

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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!