

# Mediation of Residential Construction Defect Cases

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## MEDIATION OF RESIDENTIAL CONSTRUCTION DEFECT CASES

Statistics and practice confirm the vast majority of residential construction defect claims settle prior to trial. The key to successful resolution of these cases, therefore, is to achieve ultimate resolution of the claim in the most efficient, least expensive manner. Mediation has proven to be a critical tool toward achieving this result. The lawyer's ability to successfully use the tool of mediation, however, requires a thorough understanding of how best to implement and execute the mediation process.

In order to successfully utilize the tool of mediation, it is critical lawyers understand three basic components. First, lawyers must understand the nature and extent of preparation required before cases are ready for the mediation process. Second, lawyers must understand the unique nature of the mediation process, particularly with regard to residential construction defect claims. Finally, lawyers must understand how to close the mediation process and accurately and thoroughly document any settlement or agreement achieved. This paper addresses each of these three critical issues.

### I. PREPARATION.

The importance of preparation for mediation cannot be overemphasized. Absence of mediation preparation is simply preparing for a failed mediation. The chances of successfully resolving claims through mediation are directly proportionate to the level and extent of preparation by a particular party. Preparation for mediation includes:

- preparation of the substantive claims and defenses;
- research and investigation of potential mediators;
- investigation and analysis of insurance coverage/financial responsibility issues;
- research and understanding of legal framework for claims and defenses;

- preparation of lawyers;
- preparation of clients.

Failure to adequately prepare for mediation in any one of these regards dramatically reduces the chances of a successful mediation.

Lawyers and their clients must prepare for mediation efficiently. Costs of preparation must be taken into account. Similarly, the cost of inadequate preparation must be taken into account. While it may cost more to secure a formal written expert witness report, that report may facilitate settlement at mediation, and avoid the cost of future legal proceedings. The cost of spray tests may be excessive in light of the amount claimed for window installation or manufacturing issues. On the other hand, the spray test may trigger a response from the window manufacturer, installer or general contractor that again facilitates the mediation process. The elements of preparation set forth below are meant to be illustrative, as opposed to exhaustive. There is not check list or formula to be followed in every case. The lawyers, clients, and insurers all need to evaluate each case on its merits to determine what elements of preparation will most efficiently serve the ultimate goal of a successful resolution of the claims. The elements of preparation set forth below, however, are most often found to positively impact the mediation process.

A. Preparation of Factual Support for Claims or Defenses.

Prior to mediation, it is vital that all parties to the mediation have sufficient factual information available to make intelligent decisions regarding claims resolution. In the absence of available information, many lawyers or clients take a very conservative approach, for fear of making erroneous decisions due to the lack of factual information. When information is conveyed, experienced lawyers, insurance claims representatives and clients can review the

