

Writing Effective Case Management Orders in Construction Defect Cases

Published in Daily Journal Magazine in February 2001

[Lee Jay Berman](#)

How litigators draft a Case Management Order (CMO) may be the most critical factor in their success at resolving a construction defect case short of trial. There are important distinctions that must be respected with regard to the Neutral, the process(es) contemplated, the treatment of the proceedings by the court, and confidentiality.

The purpose of a CMO is to manage and expedite, and attempt to control the costs of resolving complex litigation. A CMO is typically put in place by the parties and signed as an order by the court to govern the case. Generally, it appoints one or more agreed-upon neutrals to serve in various capacities in overseeing the case through its discovery, pre-trial motions and settlement stages. In construction defect cases the CMO can be used to organize discovery, provide for a document depository, and provide for how discovery disputes will be resolved. The CMO generally includes a description of documents to be produced, a statement of work, destructive testing requests and a master schedule detailing performance deadlines and scheduling meetings. Among the matters scheduled are site visits, destructive testing, mediations or settlement conferences, and hearings. Perhaps the most important item a CMO contains is the description of the Neutral's role in the process.

While CMO's can be extremely effective, and have done their part to help ease the burden of complex litigation, like any tool their effectiveness can be enhanced as the users learn more about their options. The following are tips offered to litigators by a professional Neutral:

Determine the desired level of court involvement. Given that the Evidence Code sections that cover mediation confidentiality (§§ 703.5, 1115-1128) are relatively new, and that the Code of Civil Procedure is little help in defining the role of a Special Master, there has been some confusion between the two. In construction defect cases, the Special Master is essentially a Discovery Referee and Settlement Officer who acts as the court's agent in adjudicating discovery disputes, ruling on many or all pretrial motions, and assisting the parties in their settlement efforts. This role needs to be clearly defined. Part of this role is to keep the court informed by reporting to the court on the progress of the case and the behavior of the parties. A Mediator, by contrast, is explicitly forbidden from reporting to the court under Evidence Code sections 1121 and 703.5. Therefore, the first decision to make is whether the parties feel the need for the court to remain involved.

While keeping the court involved is not usually as necessary as is expected, the decision to do so by appointing a Special Master or Discovery Referee is not inconsistent with the goal of protecting the confidentiality of settlement efforts. However, it is important to know that a process called a mediation that is performed by a person called or defined as a Special Master may not be confidential. That matter is presently before the California Supreme Court in the case of Foxgate Homeowners' Association v. Bramalea California, Inc. In Foxgate, the judge required the Mediator /Special Master (who was also a court employee) to testify about what went on in

the mediation. A CMO must clearly define the role(s) of each Neutral and should reinforce the parties' expectations as to confidentiality.

Clearly define the Neutral's Role(s). As a Neutral, there is nothing worse than reading a CMO where the parties have crafted the language to read, "The parties designate Mr. Joe Neutral as the Settlement Conference Referee ("Mediator") in this lawsuit. The Mediator shall preside over settlement conferences and shall make any orders governing discovery and attendance at the settlement conferences. All mediations shall be deemed mandatory by order of the court. The Mediator shall recommend to the court sanctions in the event of non-compliance." In reading this language, it is not clear what the parties expect of the Neutral. It is not clear what they expect regarding confidentiality. The time to make these decisions is at the drafting stage, not after the process is completed and one party is seeking to compel testimony about something the other said in a settlement conference that was called a "mediation" but that looked, smelled and acted like a "settlement conference".

While there are other complexities with Foxgate, the lesson to be learned is that if the parties fail to draft a clear CMO, the court may have unintended access to every aspect of a case, even its out-of-court dealings if a Special Master is involved in that aspect of the case. This issue demonstrates the importance of the clear understanding and defining of the Neutral's role(s). Presently, the only way to be assured of the confidentiality afforded by the Evidence Code is to use different individuals to serve as the Mediator and Special Master, and to call the process a mediation, not a settlement conference. On the other hand, a Mediator will have no teeth or authority to force the parties to bring experts or compel them to spend money. This requires either agreement and buy-in by the parties or that a Special Master hold any mandatory settlement conferences. The intent is to have separate tracks by which to proceed.

The other role that Neutrals are sometime asked to play is that of the Neutral Evaluator. In that role, the parties ask the Neutral to consider all of the evidence as presented and provide an opinion on the value of the case and each party's relative financial obligation. A Neutral Evaluation is an informal evidentiary hearing and should not be confused with a mediation. While some mediators may offer a Mediator's proposal as a last resort if the mediation hits impasse, such a proposal typically represents the Mediator's view of where the case would probably settle given the dynamics present at the mediation, rather than an opinion of the value if the case were tried. The problem is that in a mediation, the parties are not sworn in, leaving the mediator's opinion based only on the facts as they were presented in the context of the mediation. Neutral Evaluations in a construction setting can end up serving as a neutral expert's opinion, if that Neutral Evaluator is accepted by the parties as an expert in construction, and can move the parties toward agreement by supplying an opinion that all can respect.

Consider a Neutral Expert. In addition to enlisting the services of a Mediator, the parties can sometimes save money by agreeing upon an expert that all parties will use solely for the purposes of mediation. That expert's opinion and any papers prepared by the Neutral Expert can be protected by the mediation's confidentiality (Evidence Code §§ 1119 & 1121), so that in the rare event of an unsuccessful mediation, that opinion will not be used to influence the court. This process can be especially effective early in discovery.

Consult the Neutral while formulating the roles. It is generally best to bring the Neutral(s) into the discussions early in order to avoid conflicting ideas about the contemplated process. A Mediator may want no decision-making responsibilities in order to maintain neutrality. Imagine a Neutral who adjudicates discovery disputes, repeatedly grants defendants' requests to continue the mediation date over the objections of the plaintiffs who have not yet repaired their property, and recommends sanctions against one or more parties for failing to "negotiate in good faith" or failing to bring their experts to a meeting as ordered (the latter of which was the case in Foxgate). Then, imagine that Neutral serving as a neutral called "Mediator". Most participants are not comfortable with such an arrangement, and most experienced Mediators will not serve as both Mediator and Special Master or Discovery Referee in the same case. Clarifying these roles with the desired Neutral(s) will serve the parties better throughout the process than designing an inherently flawed process and then searching for a Neutral to do the impossible.

Mediate the Process Design. Designing and customizing a process to work for everyone can be a mediation in itself. The mediation process actually begins with writing the CMO and formulating the process. Like other types of product liability cases, there are often opposing interests even in process design. While all may agree that it is better to remove the case from the busy court system, there may be differing interests on how best to do that. Some parties may want to retain confidentiality; others may seek publicity. Some may want "teeth" in the process to force participation; others may want it to be voluntary and consensual, fearing coercion. These problems are the very reasons parties consider enlisting the help of one or more Neutrals to manage their case and bring about resolution and closure. It is entirely consistent with this practice to enlist the Mediator to assist in this design. After all, if there is buy-in missing from the outset, the process is less likely to succeed and more likely to waste time and forge even more opposition between the parties. These reasons are why it is smart to have a neutral facilitator on board from the start of the process as counsel begin to "negotiate the negotiation process."

Retain Control of the Process. The reason counsel take the case out of the court's hands and attempt to resolve it with the help of a private neutral is so that they can retain control over the process. By carefully designing a process that meets the needs of all parties and by clearly defining the role(s) of the Neutral(s), the parties retain total control over the process and stand the best chance of reaching an out-of-court resolution. Resolution, after all, is the ultimate goal.