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## Taming the Multi-Party Construction Dispute in Mediation



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# TAMING THE MULTI-PARTY CONSTRUCTION DISPUTE IN MEDIATION

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## TAMING THE MULTI-PARTY CONSTRUCTION DISPUTE IN MEDIATION<sup>1</sup>

The suggestions in this paper apply to almost any dispute, of any kind, with multiple parties. We will use multi-defendant construction defect litigation as an example, primarily because it is the type of mediation with which most construction companies and construction law practitioners are familiar. It also happens to be the type of case that we spend our time mediating. Most construction defect cases tend to be high dollar, multi-party, insurance driven, fact intensive, and expensive.<sup>2</sup> They also are case management nightmares and

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<sup>1</sup> An early version of this paper was first prepared by Steve Nelson for presentation to a Joint Session of the Atlanta Bar Association's Construction Law and ADR Sections in 2013. It has been revised several times and updated several times, but now benefits (well, that is subjective) from Lee's insights, both as insurance coverage counsel and a construction mediator in his own right. Steve and Lee have mediated for, against, with, and around each other for twenty plus years and have developed similar styles of mediation.

<sup>2</sup> See if this sounds familiar:

*A plaintiff, perhaps a cash-poor school district, condo or homeowners' association, or vulture fund that bought a distressed property "as is" but wants to improve the value of its investment... or a very legitimately damaged innocent property owner or public owner has a problem with the project that was built eight years ago for \$10 million. The original architect has already been deemed free of any blame, primarily because it had only \$434,000 in an eroding Professional Liability insurance policy left. The owner might or might not have put in new landscaping two years after substantial completion that put torrents of water on the footprint of the building, The owner might or might not have deferred all maintenance for eight years. The owner sues the general contractor for \$13 million... because its expert says the building must be gutted and started over. The general contractor brings in fifteen subs, the geotech, the testing lab, and tries to third party back in the architect and its sub-consultants There is really only \$200,000 in real honest to goodness insured property damage, but the goal is to blame that same \$200,000 on as many insured parties as possible to get the pot up enough to settle the dispute. There is only one expert report in existence. It was prepared in 1992 and gets a new cover and accompanying PowerPoint for each case. The content is always the same. The flashing was put in wrong. The mason didn't leave weep holes or must have clogged them up with mortar or Coke cans. Someone forgot to design or put in a control joint, and the windows were installed backwards. The roof may or may not keep out water. In thousands of years of construction history, nobody is still quite certain when and where to use a vapor barrier. Occasionally, the foundation cracks because the geotechnical testing company, whose number of test holes was reduced by value engineering from a recommended eighty bores to only three, missed a seam of very expansive clay. There are leaks. In the early 90's, these were called "mold cases," but the mold organism cannot exist without three things: water, a food source, and insurance. With mold exclusions common in modern insurance policies, the mold died, and these are now just called "water intrusion cases." These cases take a long time to settle because the fifteen defense lawyers have kids in college and daughters getting married and get accustomed to billing other clients and reading the sports page while the other fourteen lawyers ask questions at the deposition of the poor weep hole installer guy who has no insurance. The cases are apparently never resolved by motions for summary judgment before mediation, even though everyone has a limitation defense and is convinced their client's indemnity agreement doesn't meet the "express negligence" test, but everyone in attendance reports that they are "aggressively poised" to file a case-dispositive motion if the case does not settle at mediation. They don't expect to be in the case much longer, but are there in "good faith," and might have a little "gap closer" money if the mediator needs it at the end of the day. The general contractor takes the position that he doesn't do any real*

harder to get to mediation than other cases. Yet, they tend to be settled, usually at mediation or through the mediation process, at just about the same rate as other cases. Indeed, a higher percentage may settle at mediation than of other cases, simply because the alternative . . . trial or arbitration . . . is so unpredictable, unmanageable, and expensive.

With over forty years of *combined* experience mediating construction disputes and dealing with insurance coverage issues that arise in those disputes, we've seen some trends. Parties and counsel tend to be less prepared these days. Maybe they know that there is such a high chance of settlement that they don't need to prepare. Insurance companies have become more reluctant to offer any meaningful sums unless they know the offer will settle the case . . . so just passing the hat to increase the pot doesn't work like it used to. More attorneys have received formal training in negotiation and mediation in law school, but they also have less experience with courtroom practice and, thus, less ability to advise clients of the real likelihood of an outcome at trial if settlement is not reached. The rats have gotten smarter going through the mediation maze. All our fellow construction mediator acquaintances around the country agree that these cases have gotten harder to settle . . . but are still ultimately settling at about the same rate. We all just have to be smarter about how we approach them.<sup>3</sup>

What follows are some observations and suggestions on a variety of issues. Some will appeal to parties and their advocates. Some will appeal to mediators. Some you will discard out of hand. Others you may find valuable. If we impart one good idea, we'll be happy,<sup>4</sup> and hope you will be too.

### ***A Few Thoughts on "Zoom" Mediation***

Like most lawyers, parties, and mediators, we spent the first few weeks of Covid lockdown wondering if we were about to go on a long-forced vacation. But necessity is the mother of invention and we soon learned how to use the "breakout" room feature on Zoom to handle virtual mediations. We spent the first

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*work, and it must be the fault of the subcontractors, who might or might not have obtained the appropriate insurance or named the general as an Additional Insured. And then, there is always contractual indemnity—although we have never met a defense counsel that has admitted an indemnity agreement was enforceable. Oh . . . and let's not forget about the evolution of anti-indemnity acts—some of which apply to additional insured status as well.*

Are we biased toward either the plaintiffs or the defendants in these cases? Heck no! It's easy to make fun of both of them! And if you can't laugh about some of these cases, you will go crazy.

<sup>3</sup> Although the pandemic did not substantially lower the overall percentage of cases that settled via mediation or the mediation process, one reason that settlement has become less likely is that the threat of a jury trial right around the corner or even an arbitration date somewhat dissipated due to lockdowns. It is a reality—whether we like it or not—that cases were easier to settle when the "trial date" or "arbitration date" was looming.

<sup>4</sup> Actually, we'll be happy no matter what. Florida in January, telling war stories, and surrounded by friends. Doesn't get much better than that.

two weeks of March 2020 doing “Zoom” conferences with each other and took turns putting our respective wives, kids, siblings, etc. into breakout rooms. Having now done several hundred mediations since, and invested in enough monitors, cameras and audio equipment that our home offices resemble a small studio, we wonder if we’ll ever go back, full scale, to in-person mediations.<sup>5</sup> With few exceptions, we have found that cases that didn’t settle in Zoom mediation would not have settled in an in-person mediation. And there has been one definite upside to Zoom—we both found that we were getting better participation from key decision makers and insurance adjusters who would have otherwise just “appeared by phone” as needed. Mediations became easier to schedule. We didn’t miss the downtime at airports, sitting on congested highways, and eating bad mediation food.<sup>6</sup> We were all more efficient.

We offer this advice to make Zoom mediation more effective:

- Hybrid Zoom mediation, where some folks are in person and some virtual, doesn’t work, especially if the mediator is physically present with the in-person parties. Those participating virtually seem to fear that the parties in person have some sort of advantage because of their proximity to the mediator.
- When the mediation is conducted by Zoom, some parties will participate by Zoom, but congregate with their counsel in a conference room with a single camera. It’s great for collaboration but awful for reading body language and determining who is talking. Everyone in the conference room looks like ants. If you are going to gather in conference rooms for a Zoom mediation, consider having everyone on their own laptop. It requires that you turn off some of the microphones and speakers to avoid feedback, but it helps us out. It also makes it easier for a sidebar conference with counsel, or an opportunity for one or more executives to meet privately if each can take its laptop into another room, instead of asking everyone in the conference room to leave.
- Practice and do a trial run to make sure all your team knows how to log on, use their camera, and share a screen if necessary.
- Use your camera and be attentive. Turning off your camera just signals you aren’t paying attention. Anything you say on camera is going to be given more weight than if your voice is heard but your face can’t be seen.

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<sup>5</sup> We both have fielded numerous calls from senior-level management at insurance companies asking our thoughts about virtual mediation and whether we believe it is a sustainable model in a post-pandemic environment. It seems clear to us that insurance companies are saving an enormous sum on travel expense, and it is very likely that virtual mediations are here to stay for multi-party construction defect cases.

<sup>6</sup> We might lament the degrading of status at our favorite airline or hotel. Such is life.

- Use the share screen function. Consider this: In an in-person conference room setting, a presentation by a scheduling expert at one end of the conference room can hardly be read. With share screen used, it's right up there front and center and hard to ignore. Master the process. Many an expensive PowerPoint presentation never got used because the lawyer couldn't figure out how to use the share screen function on Zoom.
- Bring a sandwich. No more bad mediation lunches served by the mediator in in-person sessions.
- While the days of catching the mediator on the way to the coffee bar may be over, the same can be accomplished through chat or text. We both find these features very helpful and oftentimes can provide a guide to the mediator of what buttons to push.
- Consider cameo appearances by folks you might not otherwise bring to an in-person mediation. You might not fly an expensive expert to a mediation and incur a full day's fee, but with virtual mediation, they can efficiently participate briefly from afar.
- You are no longer compelled to look for a mediator who works in your same city. If you are looking for a mediator with a particular expertise, the chosen mediator could office anywhere in the world and you won't incur travel expenses.
- Scheduling is easier. For a full day of in-person mediation, lawyers and mediators are going to have to find a mediation day with no mediations the day before or after if any are traveling from out of town. Virtual mediation makes for more available days for your favorite mediator.
- Let the mediator help you determine whether in-person or virtual mediation is appropriate.

We spent the first months of the pandemic in virtual mediation, deathly afraid of Chinese and Russian eavesdroppers, Zoom Bombing, and keeping order in the breakout rooms. By God, nobody was getting in the session or moving to any room that we didn't put them in. Over time, we realized that the lack of fraternization that usually went on in a multi-party case, where lots of folks are killing time waiting for the mediator, hanging out at the coffee bar, chatting over lunch, etc., was depriving the process of some of those good ideas that come about when a couple of lawyers or business executives meet in the hall, talk about an idea or compromise, and then tracked us down in a conference room to tell us about it. Participants were bored, felt neglected, and tired easily without the human interaction that a conference room setting offered.

We had been thinking about how to improve the process when necessity became the mother of invention. Steve was mediating a 120 homeowners' case vs. 42 party defendant construction dispute in New Mexico. He had more than 200 participants on the Zoom platform at one point. Every party had more than one attorney . . . and each of those attorneys had more than one client . . . but those were different clients than the one they shared with that first party. And some of the adjusters had four or five different insureds in the case. So, every breakout required Steve or his co-mediator to track down the right adjusters and right lawyers and move them to a breakout room. It slowed down the process and it kept some of the lawyers and adjusters from collaborating. He finally gave up on trying to move people himself and gave everyone co-host privileges on Zoom. They had to promise not to barge into rooms they didn't belong in, but otherwise could move themselves and everyone in their room to any other breakout room they wanted. They could see who was in which breakout rooms and where the mediator was. It worked like a charm. Suddenly, we were mediating and not directing traffic. Deals were being made on their own. Thirty-seven of the defendants and 120 plaintiffs settled that day, and the rest settled on a mediator's proposal within a week.

Since then, on most cases, we've often been giving all of the attorneys co-host privileges and creating extra breakout rooms where they can mingle and collaborate. We have breakout rooms named "The Kitchen," the "Hallway," and the "Defense Attorney Lounge," and we encourage them to mix and mingle when we are not with them. And, when we need them, we just zap them unannounced into whatever room we need them in. You wouldn't likely try this in a family law, sexual harassment, or any number of other cases where face-to-face confrontations could be detrimental to the process, but it certainly seems to work well on large commercial cases.

It is not only the attorneys that can benefit from co-host privileges. Lee recently had a mediation where one insurer had issued the policies for several parties and there were five or six different adjusters for that one insurer sitting in different breakout rooms. Lee gave the adjusters co-host privileges as opposed to the lawyers. Practicality took over, and the adjusters, all of whom probably answered to the same supervisor, made the settlement happen.

Giving co-host privileges is not always a good idea. As mediators, we must judge whether the participants are going to be productive or polarizing. But, when it works, it is a beautiful thing.

### **Choosing the Mediator or Mediators**

It is probably self-evident that you are going to pick someone to mediate a construction defect case who not only is a skilled mediator but also has a good knowledge of the construction process. Yes, we've met some mediators whose

pure mediation skills were so good that they didn't have to know a thing about the subject. Those individuals are rare. Conversely, we've run into a number of brilliant construction lawyers . . . highly acclaimed as great construction lawyers . . . who did not have the people skills or listening skills to mediate out of a paper bag. Most of us want subject matter knowledge when we are advocates in mediation, but we also want someone with a command of the mediation process and the sensitivities of the parties. What we are usually looking for in most multi-party cases is someone with a proven track record of having the parties take a serious look at risk and expense and who can manage the process.

Some multi-party cases can benefit from co-mediators. We've done that with increasing frequency. With 15 or 20 parties sitting around on the day of mediation, waiting to visit with the mediator, it speeds things up and keeps the parties from thinking they have been forgotten. Idle lawyers' hands are often the devil's workshop. Let the chosen mediator suggest the process and pick the second mediator. Shotgun marriages of co-mediators, because warring factions could not decide on one, often do not work. In some cases, the co-mediator may need to be a specialist in some aspect of the case . . . insurance coverage, a non-lawyer familiar with the defects at hand, or a scheduling expert. The cost of a mediator is usually insignificant in the relative scheme of things. Doubling the cost, when divided twenty ways, still doesn't become significant in most multi-party cases.

**How many days? "Aren't we going to need several days with all these folks?"**

Scheduling a one-day mediation for 25 parties in a complex construction defect case doesn't scare us at all. If it can be settled, it will be settled in one day, or things will get put in motion to get it settled without everyone having to be assembled together again. Scheduling a two-day mediation does scare us. All too often, day two is filled with undoing buyer's remorse. Or, even worse, nothing at all gets accomplished on day one because everyone waits to get serious until day two.

Most mediators don't mind setting aside two days for a mediation, so that everyone has the flexibility to go over to a second day, but we always refer to it as "one day mediation with a backup day to tie up loose ends." We admonish the parties that we will not be returning for day two unless we are getting close to a resolution.

Very often, day one reveals that a lot of folks don't have proper reserves or authority in place, need to go back and visit with adjusters, coverage counsel, or personal counsel or just need to re-evaluate their cases with a little breathing room. That usually can't happen overnight. Rather than come back for day two,



the parties are better to schedule the resumed or adjourned mediation a month later.

Allow the mediator to help you design a process and schedule that best suits the dispute. For those who are interested in the growing movement to involve the mediator earlier in the process in complex cases, you may be interested in a movement called Guided Choice. Chicago Mediator, Paul Lurie, coined the name to describe a process of early mediator selection, early diagnosis of impediments to settlement, and continued use of the mediator after a mediation session. He has tried to give a name to something many of this do anyway, but the name, and the process it describes are certainly catching on in construction dispute resolution circles. Check it out at [Contact | Guided Choice Mediation \(gcdisputeresolution.com\)](http://Contact | Guided Choice Mediation (gcdisputeresolution.com)).

### **Don't Make the Mediator Play Authority Cop**

Everyone knows what it takes to settle cases . . . decisionmakers front and center to consider the issues that come up in a day of mediation, as they come up. There are certainly some attorneys who have so much respect from their clients that the attorneys come prepared with all the authority they will ever need. There also are clients who simply cannot easily travel. Most mediators try not to have a hard and fast rule about who must show up unless the court orders everyone to show up. We certainly prefer decisionmakers to be physically present. Likewise, it is preferred that adjusters be present in person as opposed to “available” by phone. As discussed above, one outcome of the Covid pandemic is increased use of virtual platforms (e.g., Zoom, Microsoft Teams, WebEX) for mediation. We tend to get more decisionmakers in attendance than would have been for a case that involved travel. For some reason, this topic takes up an inordinate amount of pre-mediation energy. Some folks don't want to show up unless the other side brings the right person. Some like to leave decisionmakers at home or off camera to intentionally slow the process. Some don't bring the perceived right players just to aggravate the other side. Some really haven't thought it out very carefully and don't realize the value of having the right people at mediation. It is really quite amusing, and sometimes sad, to watch, but wasteful of everyone's time and energy. Here is our advice on the subject:

- If another party thinks you don't have the right person in attendance, it may impact what they will offer or accept. Take the excuse away and get the person they think you need in attendance, whether you think or know you need them or not.
- Participation by telephone might work in an intimate two-party mediation, but most facilities for large mediations don't allow anyone to listen in, or participate, very effectively. “Participation by phone” in these cases usually

means, “We tried to call them, but there’s a two-hour time difference and he’s/she’s at lunch, on the train, or whatever.” Again, Zoom-style mediations have made this less of a problem, but we see it resuming as we begin to move back to in-person mediations.

- If there is someone whom others believe should be participating, but who simply cannot participate, disarm their notions that the person is staying away to thwart the process by having the absent person communicate directly with the mediator in advance of the mediation. It can be very effective when we are able to say, “I spoke to the adjuster myself last week. He or she cannot be here today, but I was able to determine that he does, indeed, understand the issues, that his counsel has kept them up to date, etc . . . and I have discussed a range of settlement with the adjuster that suggests that the adjuster is fully engaged and will be able to participate effectively remotely.”
- Additional Insurance (“AI”) coverage issues are present in most commercial construction defects cases—although its continued importance has been impacted by the increase in anti-indemnity legislation (some of which also include certain prohibitions on additional insured status). Nevertheless, let’s say your client is only liable for maybe \$100,000 of the \$3,000,000 it is probably going to take to settle the case, but your client is one of five parties whose additional insurance coverage is in dispute. The additional insured has spent \$1,000,000 in defense costs and the additional insured’s carrier is looking for the five additional insurers to share in that cost. In many jurisdictions, that is paid by the head, not by exposure, such that a subcontractor’s carrier is starting out with a \$200,000 exposure for the general contractor’s legal fees on top of the \$100,000 liability exposure. That exposure is usually . . . or is supposed to be . . . handled by a separate AI adjuster, who needs to be engaged and present to deal with that exposure. Yes, we know defense counsel and primary adjusters aren’t ethically supposed to get involved in that . . . that defense counsel don’t know and can’t know anything about those issues, etc., etc. Well, if your attorney’s obligation is to zealously represent you and protect your interests, counsel better be doing what they can to get that AI adjuster or coverage counsel front and center for the mediation.
- We continue to be appalled at the number of insureds who show up without personal counsel or coverage counsel, thinking that defense counsel is going to take care of all those issues for them.<sup>7</sup> If you believe there are coverage issues . . . or you think there might be coverage issues, let the mediator know in advance.

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<sup>7</sup> This can be particularly problematic in that, more times than not, the insurance companies will have coverage counsel present.

Stated simply . . . bring the right people to mediation or have them participate virtually.

### **The Opening Session**

What Defense Counsel says: *“We’ve been dealing with this case for three years. We’ve all exchanged expert reports. We’ve taken twenty-five depositions. I think everyone knows the issues. Besides, my guy can’t be in the same room with the plaintiff. We’ve all talked and believe we should go straight to caucuses.”*

What the Mediator Hears: *“My associate handled most of the discovery, or I’ve been reading the sports page at most of the depositions, because my guy is a bit player. I don’t have a PowerPoint, don’t know how to make one, and I don’t want to be embarrassed by having to show that I don’t have much of a command of the facts.”*

We’re going to have an opening session of some kind. In a construction defect case, the norm lately has been to allow the plaintiff to do their “dog and pony show” of defects, water, bad construction, etc., and then to have, perhaps, one or two spokespersons respond on behalf of all defendants. If the contractors, subcontractors, and design professionals want to beat each other up, that can be done in their own opening session without the plaintiff present.

We’ve seen very few PowerPoint presentations or expert presentations that made a dramatic impact on outcome. There are certainly times when they educate, but they tend to focus far more on proving fault or liability than furthering a settlement. Remember, the person whose work you are denigrating is the same person you want to write a check. Oh . . . and please send the experts home after the opening session. They tend to thwart any settlement movement that tends not to be in line with what they said the case was worth. They already have charged more than the lawyers and want to prove they are at least as valuable. Our apologies to any consultants and experts in the room today, but you know we are right.

Lee and Steve disagree a bit on the efficacy of opening sessions. Lee discourages parties from having opening presentations because, as noted above, very few PowerPoint presentations or expert presentations move the needle. Instead, Lee has been asking the Plaintiff (and sometimes the General Contractor or Architect) to provide a public mediation statement in advance of the mediation. There can still be a separate “private” mediation statement to the mediator. If done well, the public mediation statement can save a lot of time and make sure that everyone is operating off the same damage model—even if the parties disagree as to the merits of the damage model.

## Position Statements

Less and less time is being spent on educating the mediator on your client's position. That's a shame. What statements we are getting are also less and less useful. Trial Briefs are great ways to tell a judge why you are supposed to win and he/she/the jury should rule in your favor. Mediation Position Statements (which ought to be called Mediation "Interest" Statements), on the other hand, are what we mediators like to receive to help us help you settle the case . . . the dirt, the intrigue, the personalities, the impediments to settlement, the interests at stake, what you think the others will do, what you will do, sex, drama, the untold story, etc. It can be an email, phone call, letter, stack of reports (less helpful and highly discouraged), or whatever you want it to be. We'd rather have a Mediation Interest Statement than a Trial Brief. Really . . . these don't have to be treatises that cost the client or insurer a lot of money to prepare. An e-mail with your thoughts on how this ought to end would often be just fine. In fact, an e-mail with your honest assessment of the liability and evaluation of damages is often more helpful to the mediator than a stack of expert reports. Even if you are blameless (we get that a lot), that probably means the pressure has been off you, and you've had the time to pay extra special attention to everyone else's issues. Tell us what you think.

Tell the mediator who you think ought to be paying what to get this resolved. We don't have to have all the deposition transcripts that discuss the intricacies of the flashing details or how the weep holes got stopped up, or the latest developments on the definition of "occurrence" in a CGL policy to help you settle your case. We do need to know who wants and needs what, and who has what to contribute, and how we get all those folks moving in a direction where the amounts on the checks equal the amounts on the deposit slips.

Lee's typical mediation confirmation, by way of example, asks for the following information:

- (a) Summary of your client's position;
- (b) Your client's role (*i.e.*, what they did, didn't do, what they are alleged to have done or not to have done . . .);
- (c) Amounts owed to your client and/or amounts claimed against your client, damage models, etc.;
- (d) Any prior settlement negotiations;
- (e) Insurance information for your client if applicable, including RORs, denial letters, etc.;
- (f) Any relevant briefing on file if it will assist in the review of the issues;
- (g) **Summary** of expert reports; and
- (h) Any other issues that the mediator needs to know from your client's perspective that would impact settlement.

The e-mail goes on to ask for mediation statements to be turned in at least one week prior to the mediation. If you all wait until 5 PM the day before to send something to the mediator, don't be surprised if the mediator hasn't had a chance to read and digest it. In contrast, if you get your mediation statement in early, it oftentimes will provide us with the ability to identify potential issues and perhaps set up a phone conference or two to prevent those issues from tanking the mediation.

There is no such thing as prohibited *ex parte* communication with a mediator. Communicate all you want. If you don't think you can convey what you need to convey with a short, written presentation, suggest a pre-mediation conference or phone conference or Zoom call with the mediator. Most mediators will be glad to do it. We find it very helpful to have met (or at least had a phone or virtual conference) with at least some of the key players prior to a major mediation.

The bottom line. Don't make the mediators "guess" at your position. Provide a statement or, at the very least, have a phone conference where your position is made clear. The more educated we are when we walk into a mediation (or virtually appear), the better we can nudge the case toward settlement.

### **Getting Down to Business: With Ten Caucus Rooms to Visit, Idle Minds/Hands are the Devil's Workshop**

Steve's real job is being the Chief Claims Officer for a surety company, although he spends 80% of his time mediating other companies' disputes. Lee's real job is as an insurance coverage lawyer, but he now spends over 80% of his time mediating. We both have experience being the party or party advocate in mediation. Steve hates being a party, by the way. He much prefers watching other people pay money than paying any of his own.<sup>8</sup> So, we have a lot of empathy for mediation advocates and parties. When the opening presentations are over in cases where we aren't the mediators, we are ready to get back to our room, high five with counsel about how we have the other side on the run. We want the mediator to come see us first, so we can tell him/her how this whole thing needs to be settled. But that's not what happens. We sit there. We see the mediator going from room to room to visit one of the other ten less enlightened parties. He or she pops in for a few minutes, asks a few questions, and then is gone again. We can't believe he or she didn't want to hear our ideas. We can't believe he or she hasn't asked us for an offer/given us a response to the offer we made, etc. If the mediator is going to spend just fifteen minutes with each of ten parties, it usually is midafternoon before he/she is making the next round. By then, the parties are very frustrated. Here's what we have started doing to let everyone let off some steam early and not be too concerned about when the

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<sup>8</sup> Lee enjoys mediating cases where Steve is the party. One would think that an experienced mediator would behave in mediation. Not so.

mediator will come by. Often, it eliminates the need for early caucuses altogether.

After we have excused the plaintiff, we ask all the defendants to stick around. We ask them, as a group, what they think the case will (or should) settle for. There's usually a few who say, "They should apologize and release us all now." And there are a few alarmists who think it will take a fortune. Eventually, we are usually able to steer the group to a consensus of what they think it might take (whether or not any of us have any sense that the plaintiff would accept it). Let's say that they have all agreed that the plaintiff wants \$15 million, probably is legitimately entitled to a little over \$2 million, but has so much invested in lawyers and experts . . . and home court advantage . . . that it is likely that the plaintiff would walk away at any number less than \$4 million. Hopefully, the assembled defendants agree that we have all the defendants in the room or on the Zoom that need to raise that pot. It's just a question of how we will raise it. Before we send them off to their separate rooms . . . or call them one at a time into the "principal's office" . . . we ask them to take out a piece of paper and tear it into thirds. This is an amazingly hard assignment for lawyers, who want to know if it is acceptable to use three pieces of paper, or if it must be from one piece of paper . . . of if they can fold one piece twice and discard the fourth piece. In any event, it gives them something to do to take their minds off the fact that they won't see us for another couple of hours if we start visiting with everyone. We ask them to write the numbers 1, 2, and 3 on the pieces . . . and their client's name on pieces 1 and 2. By this point, about a third have gotten lost or need more instructions. They eventually all catch up.

On paper 1, which has their client's name, we ask them to give us an "opening offer" that expresses their clients' righteous indignation at being sued. It can be as low as they want. This is the "f\*ck you" offer that we're usually compelled to spend the first round of visits putting together. Having done that, we ask them to wad those sheets of paper up and throw them at us as hard as they can. They like that. It relieves a little tension and gets that first offer out of the way (although a bit less effective on Zoom, as noted below). We don't even look at the wadded-up papers. They get the message.

On paper 2, which also has their client's name, we ask them to give us a very serious . . . "3:30PM'ish" offer that recognizes that they are here to get the case settled but is still not their best offer.

On paper 3, which has no name, we ask them to give us . . . anonymously . . . the absolute highest number they could possibly imagine their client contributing to a settlement today . . . even if they don't have authority for it, aren't sure they would offer it, etc.

Whereupon most of the room of people who told us they have "complete authority to settle the case and all decision makers physically present" have to get up and

make phone calls to someone with even more complete authority to figure out what they can put on papers #2 and #3. Some even need to leave and make calls to fill out paper #1.

Once collected, we announce that the total of the #2 offers is \$175,000. And the totally anonymous ones . . . #3 . . . where they could have put any number at all . . . is \$1.2 million. This information settles in. “We don’t have enough here to raise even what we thought it would take to settle.” Followed closely by, “Somebody else isn’t being realistic.” They realize we have work to do. There are a couple of additional benefits to this exercise. First of all, between matching paper types, putting the torn pieces back together, and looking at the handwriting, we can usually figure out just about everyone’s #3 number.<sup>9</sup> Even if we can’t, most admit it to us at our first session . . . thus, saving a lot of time “getting serious.”<sup>10</sup> Secondly, this is great information to show the plaintiff, “With complete anonymity . . . the ability to put huge numbers down that we couldn’t possibly trace . . . these defendants don’t expect, collectively, to pay more than \$1.2 million. We have a lot of work to do. “

We struggled with how to do this on Zoom. We’ve never quite mastered the Zoom polling feature. But Bruce Alexander, a fine mediator in Florida, shared with us his concept of “anonymous rounds.” That is just his version of what we had been doing on paper. For the first two rounds, where names are disclosed, he has the lawyers text him the numbers. For the third round, with anonymous numbers, he gets all of the parties back in the main Zoom room (where they can all use the chat feature with the mediator), have the attorneys change their screen names to “Anonymous” and send the numbers to him through the chat feature.

There is a different method that works in the right kind of case. If there are very distinct issues (*e.g.*, HVAC, masonry, flatwork, etc.), a phased schedule for mediation may be appropriate where the parties implicated in the distinct issues log on for a period of time. It usually requires the general contractor to stay on the entire time, but it helps to alleviate attorneys and adjusters sitting around for

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<sup>9</sup> After twenty or thirty mediations, some of the smarter lawyers catch on. Some won’t sign the sign in sheet for fear that we’re using it for handwriting comparisons. Some use their other hand to write or disguise their writing. Most have gone to using different sheets of paper instead of tearing them. The craftiest ones borrow another party’s distinctive sheets of paper during idle conversation before the mediation gets started. At least ten percent will almost always get confused and put their client’s name on all three papers . . . or none of them.

<sup>10</sup> We seldom ask anyone to give us their “bottom line.” Once they do, they have a hard time saving face and moving beyond that. Most parties don’t even know what their bottom line is until an alternative is presented. While we make light of this process of trying to move quickly to gain insight into everyone’s bottom lines through this semi-anonymous process, seldom do the parties or the mediator really believe that those numbers on paper #3 are truly the final numbers that are possible. If we thought so, we’d have to call an impasse at 10:30 AM at most mediations.

hours waiting for the mediator.<sup>11</sup> It also allows for smaller caucus sessions where the parties can focus in on their specific issues.

Give everyone something to do early. We know we are going to have to accelerate the process with many parties or we will lose them.

### **The Theory of Relativity**

Steve first learned the “theory of relativity” by serving on a large law firm’s compensation committee. Lawyer Smith would thank the Committee profusely for the recommendation that she make \$275,000 in the coming year. She would tell us we were wise beyond our years, that the Committee had obviously worked hard and made hard decisions in dividing up the pie until she found out that Lawyer Baker was going to make \$276,000 in the coming year. At that point, we were ignorant fools who obviously could not discern the value of her billable hours, extensive firm management obligations and valuable time spent with the summer clerks, or whatever it was that Lawyer Smith thought she could do better than Lawyer Baker. Alas, this phenomenon has popped up in spades in construction defect litigation.

Defendant Able thinks the case is worth about \$150,000 and predicts it will cost them at least \$50,000 to defend.<sup>12</sup> We are told they will pay “X” but, “We’re not paying more than Defendant Charlie, and we better not find out that Defendant Delta is paying any less than 3 times what we are paying.” So, our only authorized offer is  $A \leq C \leq 3(D)$ . Neither of us was never good in high school at solving for X in double quadratic equations and haven’t gotten any better since. So...we are big fans of “double blind” offers...having everyone pay attention to their own BATNA<sup>13</sup> without knowledge of what anyone else is receiving or paying. It seems to be the only way that these cases have any chance of settling. If you are focused on what someone else is getting or paying, please be prepared for the very real possibility that the mediator is going to keep all those numbers confidential. What each party really needs to focus on is this: “Is settlement at this amount better, or at least as good, for me than the alternative of no settlement at all?”

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<sup>11</sup> One thing that we have noticed with virtual mediations is attorneys and adjusters sometimes wonder where the mediator is and what he or she is doing. Unlike live mediations, they can’t see the mediator moving from room to room. We have found that providing updates via text or e-mail helps to keep everyone engaged in the process.

<sup>12</sup> For some unexplainable reason this usually produces an offer of “\$7,500 and come back to me if you need a little to close the gap.”

<sup>13</sup> An acronym described by Roger Fisher and William Ury in “Getting To Yes,” which means “Best Alternative to a Negotiated Agreement.” It is the alternative action that will be taken should your proposed agreement with another party result in an unsatisfactory agreement or when an agreement fails to materialize. If the potential results of your current negotiation only offers a value that is less than your BATNA, there is no point in proceeding with the negotiation, and one should use their best available alternative option instead. Prior to the start of negotiations, each party should have ascertained their own individual BATNA.



In recent years, we've taken this another step. With 10, 15, 20 parties, it is very difficult to leave a mediation with a settlement 100% signed, sealed, and delivered. If there is even the slightest chance that someone is going to try to re-trade the deal when they find out what some other party is paying or receiving, the numbers should not be fully revealed until much later. And, because some participants never want to know if they got a better or worse deal than their neighbor, we routinely settle cases now where all the money is paid into a trust account or an escrow account, and nobody ever knows who paid what, or how much the plaintiff got. It solves a whole lot of ego and second-guessing issues. Steve and Lee learned this the hard way years ago. We spent all day mediating a construction defect case for a "religious" institution that turned out to really be a tax haven (a story for a different day) for some unscrupulous folks. Steve was the mediator and Lee was coverage counsel for one of the target defendants. Steve employed the double-blind method throughout the day. At the end of the mediation, which was about 9:30 p.m., Steve put the numbers on an overhead projector (that should tell you how long ago this was). Well, that proved to be more disastrous than Steve's decision to order BBQ for lunch (let's just say that the religious institution consisted solely of vegetarians). Suddenly, some parties realized that they may have overpaid—at least in comparison to others. Attorneys and adjusters got upset. The moral of the story is simple. If you mediate double blind, keep it double blind through the end by closing the mediation in escrow.

### **Your "Two Minute Drill"— Preparing to Settle**

Football teams know what to do when the clock is about to run out. They plan for it. They practice. They practice some more. When the final seconds are ticking, the players don't have to waste precious energy and brain cells thinking about what to do next. They know. All their mental and physical resources are brought to bear effectively on the task at hand...executing on plays in their two-minute drill...not in thinking about what that those plays might be.<sup>14</sup>

Mediation is time sensitive. Everyone who ever went into a mediation session has watched the clock. They count the minutes that the mediator is with them and with the other side. They know everyone else's plane schedules. They start posturing early in the day as to when they are planning/threatening to pack up and go home. Everyone knows that the serious movement in mediation usually starts late in the process and with the clock ticking.

Why, then, don't more parties work on their two-minute drills? You should:

### ***Plan Your Own Two-Minute Drill***

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<sup>14</sup> This example may or may not apply if you are a fan of the New York Jets.

A high percentage of construction cases ...probably 85% or better...are going to settle at mediation or at least through the mediation "process." We all know that. Yet, we constantly are amazed and perplexed at the parties and their lawyers who seem not to have given one nanosecond of attention to the terms of the settlement their clients would like to achieve. They know there are critical deal points, besides the amounts of the checks, that will have to be covered in any settlement, but they bring them up (if they ever thought of all of them in the first place) for the first time in the last two minutes of the game. It is during those last two minutes of the game that everyone on the field is worn out. If you know you and your adversary are both going to be worn out, doesn't it make sense to have your plays ready to make the most advantage of that situation? Of course, it does.

- Know when to call time out. If you are worn out and not making your best decisions because of it, put on the brakes. Call time out. Others, including the mediator, may urge you on. Don't negotiate when you cannot do your best work.
- Keep in mind what all coaches know. It's much easier to win the game in the first half than in the last two minutes. If you are behind 64-7 with two minutes to go, no two-minute drill is going to help you. Careful pre-mediation preparation, thoughtful compromise, and a focus on your interests, not your positions, all day long will keep you from having to use your two-minute drill.
- Even if it has become obvious that you can't "win" or the case won't settle, make the most of the playing time you have and think about the next game. If you can't bring about a complete settlement, are there some issues that can be resolved? Are there procedural hurdles that can be overcome? Can the mediator help fashion an alternative dispute resolution strategy...arbitration? Neutral evaluation? Further facilitated negotiations? Even the production of that one insurance policy or expert report that you've been stonewalled on for the past nine months may help.

Many advocates have gotten lazy and expect the mediator and the mediation process to do all their work for them. The parties who are successful at mediation know better. They are the ones who plan well, work hard, and have a two-minute drill ready if needed.

***Think About Closure from the Beginning and Put Your Idea of Closure in Writing—Have the Settlement Agreement Ready for the Two-Minute Drill***

One of our mediation heroes is Professor Roger Fisher, co-author of the classic, **GETTING TO YES**. Professor Fisher offers this advice, and we couldn't have said it better:

*Think about closure from the beginning. Before you even begin to negotiate, it makes sense to envision what a successful agreement might look like. This will help you figure out what issues will need to be dealt with in the negotiation and what it might take to resolve them. Imagine what it might be like to implement an agreement. What issues would need to be resolved? Then work backwards. Ask yourself how the other side might successfully explain and justify an agreement to their constituents. . . . In negotiations that will produce a written agreement, it is usually a good idea to sketch the outlines of what an agreement might look like as a part of your preparation. Such a "framework agreement" is a document in the form of an agreement, but with blank space for each term to be resolved by negotiation.*

Just the process of envisioning a settlement . . . concentrating on what life would be like with the dispute behind you . . . seems to be therapeutic and constructive for most litigants. For many advocates, who have been mired in months of discovery, drafting a settlement agreement can be downright refreshing. For this reason, we often ask all parties to submit a draft settlement agreement to us in advance of the mediation. We ask them to think about all those pesky issues that become the deal killers after everyone has come to grips with the dollars. Often, this process flushes out more issues than any position paper.

We ask that draft settlement agreements not include dollar amounts but do include issues like timing of payment, scope of releases, reserved issues, like latent defects . . . and a good definition of same . . . not to be settled, confidentiality, non-disparagement, language that preserves rights of contribution or indemnity with respect to non-settling parties, AI issues . . . issues that are often overlooked in late night memoranda of settlement or that simply can't be drafted on the fly after 10 hours of negotiation. Construction litigation inevitably involves a number of issues that don't lend themselves to last-minute drafting. Examples:

- Scope of release—full project release or everything but latent defects?
- Definition of latent defects
- Release of liens and bonds claims
- Preservation of claims against non-settling parties
- Release or preservation of Additional Insured obligations by the carriers
- Unpaid contract balances owed to the contractor or design professional
- Confidentiality and non-disparagement
- Preservation of the rights of a settling surety against its indemnitors

Sometimes, the parties don't even agree on the identity of the parties to the agreement, much less the deal points of a settlement. Sometimes, their drafts provide an insight into their thinking that lets us know what interests they have in common and where they disagree. If we come away from that initial pre-mediation drafting process with nothing more than the parties correctly named and pre-printed signature blocks, we have more to work with than most mediators and parties when, at 6:30 PM . . . an hour before the general counsel's last flight for the day will depart . . . we sit down with a legal pad and try to sketch out the terms that have been agreed upon.

With technology advances, a laptop and a portable printer, we can often have the guts of a settlement agreement ready to go and can update it during the mediation session. With Zoom, we are often using the "Share Screen" feature to work on an agreement with each party as we go. If you want to get the best dollars out of your adversaries, you need to increase the certainty of a settlement. Having a final agreement that has some chance of being just that . . . a final agreement and not a memorandum of settlement terms that will have to be negotiated for six more weeks . . . adds that certainty.

At some point during the day, we may share a draft of the agreement with one or more parties, seeking to obtain buy-in to as many of the terms as possible, and identifying the sticking points.

When, at the end of the day, and a settlement appears close, we may add all the numbers and determine whether one party may wish to sign the agreement, initial the agreement, or just allow us to present the agreement as a proposal to the other side. There is something very powerful about an offer that is printed, signed by the opposing party, has terms that the offeree has already had time to comment on, and is more than just a framework of settlement, but possibly a final formal agreement. Counteroffers may ensue, but usually in the form of interlineations and edits to the draft agreement.

Roger Fisher calls the use of document in this fashion the "one-text procedure." In *GETTING TO YES*, Dr. Fisher describes the most famous use of the one-text procedure in 1978 at Camp David when the US was mediating between Egypt and Israel. The United States listened to both sides, prepared a draft to which no one was committed, asked for criticism, and improved the draft again and again until the parties and mediators felt they could improve it no further. When President Carter did recommend it, Israel and Egypt accepted.

As a mechanical technique, this one-text procedure addresses the need to reduce uncertainty. By increasing the certainty of the outcome . . . *i.e.*, knowing that the agreement covers all the points and that none are left open for later discussion and re-negotiation, the impact of an offer is increased.

Preparing a settlement draft is a good tool for any advocate and a great aid to the mediator. The mediator's use and refinement of a full-blown settlement document is one of the tools that can help close the negotiations. It is an excellent play to have in your two-minute drill.<sup>15</sup>

***Understand the Concept of a Mediator's Proposal  
and Have Your Client Prepared for It***<sup>16</sup>

With increasing frequency, we find that parties in mediation aren't trying as hard as they used to. Whether they are letting the mediator do more of the work, whether the rats have gotten smarter running through the maze, or whether or not mediators are losing patience with facilitative processes and are quicker to

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<sup>15</sup> The mediators in the audience are now going . . . "Really? You've had luck getting the parties to prepare settlement agreements in advance? Heck No . . . most are still so confident that the case won't settle that they don't even try. But we keep hoping. Those who have brought well thought out draft documents that ended up being used, in their favor, late in the day have learned the value of this tip and will continue to bring draft agreements with them. General contractors in the room . . . if you had your subcontractors submit the first draft of their subcontract with you, how many of the protections of your subcontract would have been lost as you negotiated those terms back to something you could live with? A lot. He or she who creates the first draft of anything has an advantage.

<sup>16</sup> While Steve's mediation practice is limited to construction disputes, he occasionally finds himself in academic circles and among family law, public policy, and collaborative law practitioners. His colleagues in those circles are into "transforming," "empowering," "facilitating," "collaborating," "preserving relationships," and "achieving world harmony." They speak of "fostering a more humane, relation-based social system." They can describe with very large words the psychology of bargaining behavior. The two of us? We just help people extricate themselves from nasty fights over construction projects gone wrong. And two of the plays in our own two-minute drill are settlement agreement first drafts that we often prepare before, and update during, the mediation, and the "Mediator's Proposal."

We used to *just* mediate. We didn't have to know whether we were "facilitative" mediators or "evaluative" mediators. We didn't have to explain the process. We just did it. The cases settled. The parties seemed happy. Then, Steve was asked to teach a course at the University of Texas on "Construction Industry Dispute Resolution." That required him to stand up in front of some very smart young people and try to tell them what he does and why it works. He knew what he did but not how to describe it to others. That sent him back to the books. He figured he'd better read up on available literature on the subject. He wasn't having much luck finding anyone who quite saw the practice of mediation the same way he did. With all the big vocabulary words he picked up in his quest, he learned that he was yearning to be "validated." Then, he came across an article by Professor Dwight Golann. Dwight's his man! He's a law professor at Suffolk University Law School. (That's in Boston.) He uses a lot of big words too, but Dwight asks the question "Is the purpose of mediation to settle disputes or to empower and transform the parties?" And he gets it right! Finally, somebody at a mediation conference who Steve could hang out with while the rest are singing Kumbayah and practicing group hugs. Somehow, Steve rose through the ranks of a mediator organization to become its Central Texas president. Naively equating the fact that nobody else would take the job with a belief that he had been accepted as an equal, he boldly asked, at one planning meeting, whether they ought to address the issue of "Mediator's Proposals Following Impasse" at an upcoming CLE function. You'd have thought he had suggested having Hillary Clinton sing at Donald Trump's Inauguration. They looked at him with pity and explained that such a technique was rarely used in ethical and professionally conducted mediations. It was something to be used only as a last resort. One mediator, who probably has mediated 3,000 cases, mentioned that she had tried it one time with limited success, but she felt "unclean." Steve kept to himself that about 48 of his last 50 mediations had been resolved by using a mediator's proposal after impasse. He felt like it was time to take his moral compass in to have it checked. He also hated it that Dwight was out there on a limb all alone. He had to create some learned authority to self-validate what he and I do. We also thought others might benefit by having their own two-minute drills, whether along his style or theirs. And thus, this paper—now in a slightly revised and updated version.

offer their own opinions, we don't know. But our polling of experienced construction mediators suggests that more and more cases are reaching impasse but are still being settled at about the same rate because of the use of Mediator's Proposals.

It may be a misnomer to suggest that a Mediator's Proposal is a play for the two-minute drill. It is really a play for overtime after the clock has run out . . . but you get the idea.

A good mediator is not likely to let the parties simply walk away at what would otherwise be an impasse without trying to come up with some alternatives. At the point of a potential impasse, if the mediator has not suggested it on his or her own, you might suggest that the mediator make a proposal to settle the case. The proposal would be presented confidentially as a double-blind offer to each side and only the mediator would know whether it has been accepted by all parties. That way, no party is punished for making a big move at the end. The other side will only know they made the move if the case settles.

A mediator's proposal addresses the issue of "reactive devaluation." It is common for a party to reject a proposal made by an adversary if for no other reason that the fact that it was proposed by the adversary. Parties are often unable to assess the accuracy of information or accept a settlement proposal as made in good faith because they distrust the source. This phenomenon is known as "reactive devaluation." A skilled mediator can overcome this phenomenon by presenting proposals as her or her own or by simply floating hypothetical proposals. After learning the disputant's general settlement parameters (by floating the draft during the day), a mediator can prepare a proposal that all have bought into, but which appears to come from the mediator and is not devalued.

Having been made by the mediator, the offer does not suffer from reactive devaluation. If it is made in the form of a comprehensive settlement proposal, it has certainty. All "yesses" puts an end to the dispute right then and there. The Mediator's Proposal technique works. But it is not without its dangers. For your two-minute drill, you want to have considered those dangers, and discussed them with your client, in advance . . . not as the mediator has grabbed you and your client at the elevator on the way out.

Let's start with the notion of whether a proposal by the mediator is appropriate in the first instance. After all, the mediator is not an arbitrator or decisionmaker. They are not retained as such. There are many times when our relationships with one or more parties or their counsel would have instantly disqualified us as an arbitrator in a case, but the parties were comfortable having us mediate. Is it appropriate for the mediator to step out of one role and into another?

Take, for example, the **TEXAS ALTERNATIVE DISPUTE RESOLUTION ACT** (Chapter 154 Texas Civil Practice and Remedies Code). It provides:

### **Sec. 154.053. Standards and Duties of Impartial Third Parties.**

- (a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.

It is clear that the mediator cannot unilaterally become an arbitrator and issue an award or opinion. But consider whether the mere making of a proposal may coerce an agreement. Consider the downsides:

- No matter how many ways the mediator may couch the proposal, it is often seen as the mediator's opinion on the merits. From that point forward, the mediator may be seen as having lost his or her impartiality. You may not be able to use the mediator for any further negotiations.
- The Mediator's Proposal becomes a new artificial barrier to settlement if not accepted. While one party may not wish to move as far as the other's party's position, they take the view that they are darn sure not going to go beyond what the mediator had proposed. This is one of the most significant dangers. If the Mediator's Proposal misses the mark, the mediator may have done more harm than good.
- There is a real danger that one party or another will attempt to use the Mediator's Proposal as evidence of a neutral opinion on the merits. While the statements of parties in mediation are always treated as confidential, some parties and their counsel are of the opinion of what the mediator was said to them is not. Thus, the possibility of a party, in an unsuccessful Mediator's Proposal situation, possibly attempting to introduce the Mediator's Proposal in evidence in a subsequent proceeding . . . or influencing another mediator in a subsequent mediation.

For your two-minute drill, consider having done some or all the following:

- The Mediator's Proposal, in our opinion, is not something that can be made without the consent of all the parties. If any party does not want the mediator to make a proposal, one should not be made. Stick to your guns if you are concerned that the mediator may make a proposal that you will find not only unacceptable but also may hurt further negotiations. Yes, you can agree to see the proposal and say "No," but the numbers are on the table and will have an impact on further negotiations.
- The Mediator should very carefully describe his or her proposal as being something other than a decision on the merits. For our own two-minute drills, we've rehearsed how we will characterize our proposals. It might go something like this:

*“The proposal may have an element of what I think is the “correct” outcome of the case but is heavily weighted toward what I think the matter can be resolved at, which is frequently not the same number.”*

A fine construction mediator friend of ours says something along these lines:

*“My knowledge of the case is ‘vener.’ I haven’t seen the witnesses, studied the documents, read the depositions, etc. I try to give a rational explanation of the proposal but always pointing out the fact that they know the case better than I do. I also remind them, however, that the trier of fact may never understand the case as well as I do and that my proposal might be closer to the verdict than they might expect.”*

- While mediators preach, “Never make a take it or leave it offer,” the Mediator’s Proposal is about as close to one as you will ever see. When one party struggles to meet the Mediator’s Proposal, often going far beyond any concession they ever thought possible, you can imagine their reaction to hearing that the other side said, “Yes, we will accept the Mediator’s Proposal, but only if you increase the \$500,000 number he used to \$600,000.” We’re talking reactive devaluation on steroids now . . . not pretty. The parties must be clear on this. If they think they want to continue to negotiate, the negotiations should continue without a Mediator’s Proposal. Any attempt to counter the Mediator’s Proposal may do great harm to the process and polarize the parties further.

For your two-minute drill, understand how the Mediator’s Proposal works. Recognize that such a proposal might be suggested or made at impasse. Also, it is oftentimes important to have the settlement agreement worked out in advance of the Mediator’s Proposal. That way, all parties know exactly what they are saying “yes” or “no” to.

### **So you didn’t have a Kumbayah Moment at Mediation. What next?**

As we have noted, cases are getting more and more difficult to settle at mediation. It has become more of a “process.” We are not sure if this is a pandemic-related phenomena or just the nature of the multi-party beast. Still, most cases eventually settle via the mediation process. Sometimes the mediation is just too early. Sometimes there are insurance coverage issues that need to be overcome. And sometimes the parties are just not ready on that day to make the necessary moves. Don’t walk out in a huff before allowing the mediator and the party to consider additional steps that might put the dispute back on the track to resolution, or speed up or make more economical the process. For example:

- We’ve had good luck recommending neutral evaluators to deal with some or all factual disputes. Perhaps, it’s a third-party contractor working with the mediator to come up with an independent estimate of damages, or a retired



judge issuing a binding or non-binding ruling on some issue of law, a summary jury trial, or something similar.

- So, your contractual dispute resolution clause is silent on how the dispute is to be resolved . . . which leaves litigation as the default. Perhaps, the parties can agree to arbitrate instead.
- Or your agreement specifies arbitration by three arbitrators under American Arbitration Association Rules . . . but the dispute has become smaller, and it would be wise to agree on a single arbitrator, perhaps privately administered and without administrative fees.
- Reschedule and come back later and try again.
- Maybe, a defense-only mediation to sort out the never-ending issues of insurance coverage, additional Insurance obligations, and allocations of responsibility among and between defendants.
- And, maybe the case just needs to bake a bit more through some “key” depositions or motion practice.

### **Final Thoughts**

Multi-party mediation is more of an art than a science. Of course, for the most part, art has a subjective quality and whether a certain technique is applauded or criticized comes down to the subjective views of the participants. And while the concept of mediation is changing into a “process” that begins with the mediation statement, the day of mediation, and oftentimes a barrage of post-mediation e-mail exchanges that culminates in a Mediator’s Proposal, it is still—in our humble opinion—the best way to settle a construction case.

From time to time, you are going to come across a technique, a tool, or a process that helped settle a construction defect case. We mediators need all the help we can get staying ahead of the curve as cases get harder to settle. This paper reflects some of ours. We would like to hear from you on techniques and tools that you have found useful.

### ***About the Authors***

**Steve Nelson** practiced construction and surety law in Dallas, Texas for 19 years as the head of a large law firm’s Construction Practice Group. He was the Chief Executive Officer of one of the largest commercial building contractors headquartered in Texas. He has been in the surety business as Executive Vice President & General Counsel of SureTec Insurance Company, and Chief Executive Officer of its sister company, SureTec Information Systems, Inc., since 2001. He has served as the Chair of the Construction Law Section of the Dallas Bar Association, the Construction Law Section of the Austin Bar Association, and the Construction Law Section of the State Bar of Texas. He is a Fellow of the American College of Construction Lawyers, a Fellow of the Center for Public Policy Dispute Resolution at the University of Texas, a Distinguished Fellow of the International Academy of Mediators, a Distinguished Credentialed Mediator by the Texas Mediator Credentialing Association, Past-Chairman of the Central Texas Chapter of the Association of Attorney-Mediators, and an Adjunct Professor at the University of Texas at Austin

School of Civil Engineering, where he teaches a graduate course in construction industry dispute avoidance and resolution. He served for nearly twenty years as the Legislative Chairman and member of the Executive Committee of the Texas Building Branch-AGC. Most of his mediation skills were developed by hunkering down with his son in a house with a wife and three daughters.

**Lee Shidlofsky** is the founding member of Shidlofsky Law Firm PLLC. His practice is devoted to representing and counseling corporate policyholders in the area of insurance coverage, insurance-related litigation, and risk management. Although he handles a wide variety of insurance coverage cases (e.g., D&O, E&O, "personal and advertising injury liability," commercial property, business interruption, pollution, and commercial auto), his practice has a particular emphasis on insurance coverage issues arising from construction defect and product liability claims. Lee mediates multi-party construction defect cases as well as insurance coverage matters. Lee is a former Chair of the Insurance Law Section and a former council member of the Construction Law Section of the State Bar of Texas. Lee is a Fellow to the American College of Construction Lawyers and also currently serves on the AGC-TBB Legal Affairs Committee. He previously served as the Insurance Liaison to the Construction Law Section of the State Bar of Texas. He has been named a Super Lawyer by Texas Monthly Magazine since 2004, including a ranking as a Top 50 lawyer for the Central & West Texas Region since 2007 and a Top 100 Lawyer in the State of Texas since 2012, and is ranked as a top insurance coverage lawyer by Chambers USA, Best Lawyers®, and Who's Who Legal. Lee graduated cum laude from Southern Methodist University School of Law and was an assistant editor on the SMU Law Review. Most of his mediation skills were developed by following Steve around mediations even when he was supposed to be sitting quietly in his breakout room. This is how Lee got the nickname, "The Weasel." It's better than it sounds.