

Guided Choice: Early Mediated Settlements and/or Customized Arbitrations

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Introduction

Most commercial disputes settle before a court judgment or arbitration award. But mediation cannot fulfill its potential to create efficient settlements if it is not used prior to parties incurring costs for experts, discovery, or court motions. In addition, mediation should begin before the deterioration of relationships prevents a win-win negotiated solution.

Guided Choice practitioners advocate an approach that involves a neutral process designer, also known as a mediator, as early as possible to guide the parties through a mediated negotiation. Under this approach, impasse should not lead to termination of negotiations. Rather, the parties may overcome impasse by cooperative exchanges of information or by obtaining substantive binding decisions from a separate arbitrator or court, within a proceeding running parallel to the mediation.

Clients complain that the cost and unpredictability of resolving construction disputes—whether by court or arbitration—is too high and that the process takes too long.¹ The culture of litigation includes both court and arbitral processes, and assumes that disputes in court and arbitration will go to verdict or award. This assumption pushes lawyers to pursue expensive means to increase the odds of winning and reduce the chance of losing.

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¹Litigation or Arbitration: View From the Trenches,” Gardner, Winston (“Bud”), *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, ASCE May 2011. The median settlement period for civil cases in United States federal District Courts is 699 days.

These include discovery, motion practice and appeals² that may or may not resolve the dispute. The combination of a legal services market principally based on hourly billing rates,³ nearly limitless discovery, and the delay parties face in many courts, results in dispute resolution outcomes that are increasingly of questionable value to clients.

Moreover, the overwhelming statistics show that most commercial construction cases settle before verdict or award.⁴ This is because as parties get close to trial, their attitude about risk changes—especially the risk of losing and not recovering their legal and expert expenses. Also, most judges prefer not to devote court time to fact-intensive cases such as those involving construction and intellectual property cases. Trial judges therefore often attempt to “force” a settlement that may not be attractive to the parties.

If a case is likely to settle, why spend so much money on a process that assumes it will not? Many would agree with one experienced observer’s opinion about the cost and delay of construction litigation: “We start off knowing 80–90% of the facts; we then spend 80–90% of the costs trying to find the other 10–20%—and then learn nothing really important.”⁵

Lawyers think they know how mediation works and that mediation can help settle cases. Yet they often come up with reasons why mediation is not appropriate early in a dispute. Those reasons include the following:

1. “The other side is unreasonable and mediation is a waste of time.” At the early stages of litigation, parties are often angry at their opponents, and their lawyers may give them unrealistic evaluations of the cost, time and probable

²Even arbitration can be a victim of the cost and delay of appeals. Arbitral appeals involve disputes about the scope of arbitration clauses and attacks on awards because of the arbitrator’s failure to disclose a conflict.

³Billing by the hour without limitation has not always been the norm. It began around 1958 when lawyers discovered that hours were a product they could sell. Before the 1970s, lawyers were not under economic pressure to bill large number of hours at high rates. See Michael Philippi of Ungaretti and Harris, “Beyond the Billable Hour,” *Illinois Bar Journal* February 2012, 80.

⁴Galanter, Cahill Most Cases Settle: Judicial Promotion and Regulation of Settlements, 46 *Stan. L. Rev.* 1339 (1993–1994). Michael, *The Vanishing Trial: As Court Battles Become More Rare, Some Experts Fear the Effects on the Law*, *Bus. Week*. April 30, 2007 at 38.

⁵Unknown source quote in an IBA Listserv email received by the author.

outcome of the litigation.⁶ How many lawyers would have accurately predicted the outcome of the *Obamacare* case⁷ in the U.S. Supreme Court? Also, clients early on often do not fully understand their true interests in settlement because they cannot predict the risk of winning battles and losing wars.

2. Suggesting mediation to my opponent is a sign of weakness.
3. We don't know if the case will settle and therefore we must leave "no stone unturned" to protect the client—and the lawyers. We will consider mediation after we better understand the case through discovery.

John Bickerman, former chair of the ADR Section of the American Bar Association, recently wrote:⁸

There is no clarity in what mediators do, and so [mediation users] have no idea what style of mediation they are buying and whether it is what they want for their dispute. In the past, some in the field have tried to define mediation as one style and ban the rest. All of the models of mediation have merit in the right circumstances.

As a result of lawyer and client uncertainty about what mediation entails, its use, if at all, is frequently delayed until the parties have already incurred considerable pre-mediation expenses. This expense and the animosity that develops after years of litigation often dull a client's interest in settlement.

Guided Choice requires lawyers *and* mediators to reconceive of the role of mediators to not only settle, but to do so at the earliest possible time. Guided Choice emphasizes the use of the neutral as a "Mediator-Guide" to help the parties gather facts necessary to gauge the probability of litigation success at the earliest possible time and without relying on formal discovery.⁹ Guided Choice also involves a commitment by the parties and the mediator to work through impasses until settlement is achieved. The goal is not only to settle the dispute, but also to avoid the expense involved in postponing the settlement until late in the litigation. Guided Choice includes the following basic elements:

⁶Goodman-Delahunty, Jane, Granhag, Par, Hartwig, Maria, Loftus, Elizabeth, "Insightful or Wishful: Lawyers Ability to Predict Case Outcomes", *Psychology, Public Policy, and Law*, 2010, Vol. 16, No. 2, 133–157.

⁷*Thomas More Law Center v. Obama*, 133 S. Ct. 61, 183 L. Ed. 2d 710 (2012)

⁸Bickerman, John, "Adapting Mediation to What Users Want," *Maryland Bar Journal*, March 2012 pp. 55 et seq.

⁹Parties need less information to evaluate settlement opportunities than they do to litigate a case. See note 14.

1. A mediator, as an expert process-design consultant,¹⁰ becomes involved at the earliest possible time, regardless of whether litigation has commenced. The mediator then diagnoses the causes of why the dispute cannot be settled, including any legal, factual or psychological attributes of the decision makers.
2. Based on a diagnosis, the mediator acts as a “guide” to help the parties design a customized dispute resolution process. That process should include the exchange of the information that the parties need to evaluate settlement options.
3. If impasse develops during negotiations, the mediator helps the parties overcome the impasse through creative techniques. These techniques include providing for additional information exchange, perhaps including depositions, and sending important motions to be decided by an arbitrator or judge.
4. The parties make a good faith commitment not to automatically terminate the mediation process because of impasse. This commitment is not inconsistent with a contractual right to terminate the process without cause if a party objectively believes that litigation or arbitration will produce a greater net benefit than settlement.
5. Having an arbitration proceeding in place, if the dispute does not settle, can be a catalyst for a successful mediation process. Also some disputes do not settle and the best method of resolving complex commercial cases is arbitration. In such a situation, the Guided Choice mediator is skilled in helping the parties facilitate a customized arbitration which can quickly and inexpensively finally resolves the matter.
6. Regardless of when an impasse occurs, and as long as the mediator has the parties’ trust, the Mediator-Guide is committed to stay involved in the negotiation process.

Retaining the Mediator as a Mediator-Guide As Early as Possible

A key element of Guided Choice is engaging the Guided Choice Mediator at the earliest possible time regardless of whether litigation has commenced. Because information exchange is critical

¹⁰See Lurie, “The Importance of Process Design to a Successful Mediation”—Chapter 18—AAA Handbook on Construction Arbitration and ADR-2nd Edition, Juris Publications, 2010. This work cites the research showing that process design is the most important factor in successful outcomes.

in early mediation, the common objection that the case is “not ready for mediation” is not an obstacle to Guided Choice.

The commercial pre-dispute contract may provide for mediation and if so, it usually provides that an agency will help the parties find a mediator.¹¹ However, even a pre-dispute mediation clause does not guarantee that all the necessary parties will in good faith use mediation in an attempt to settle. Often an appointed mediator or an agency case manager finds that s/he has to re-sell the value of the mediation process to all or some of the parties.

If there is no contractual mediator selection process in place, then any party can suggest the other side meet with a potential mediator to discuss whether a mediation process would be useful. This is not a sign of weakness. Attending an exploratory meeting is not the same as agreeing to mediation. The suggesting party may even ask the mediator to invite the other party to the meeting. If the other party resists this invitation, parties frequently ask a court’s assistance in initiating an early mediation.¹² Most courts are happy to encourage mediation.

What are the Qualifications of a Mediator for the Guided Choice Process?

In order to effectively implement Guided Choice, the mediator should have the following qualifications:

1. The mediator should be creative and prepared to play a different role than traditional mediators or traditional training programs contemplate. The traditional role views the mediator as someone who presides over a “mediation day” where the parties make presentations both orally and in writing. The traditional mediator then uses “shuttle diplomacy” to assist in the negotiations.
2. The mediator must be able to understand the subject matter of the dispute.
3. The mediator must be trained to investigate and diagnose

¹¹American Institute of Architects General Conditions form A-201 (2007) Sec.15.3 incorporates the American Arbitration Association Construction Rules. Other AIA documents also include mediation. See for example AIA B-101 2007, Sec. 8.2. ConsensusDocs agreements also incorporate the AAA Rules. For examples see ConsensusDocs form 240 Standard Agreement Between Owner and Design Professional (2011) Sec.9.4 and ConsensusDocs form 200 Standard Agreement and General Conditions Between Owner and Contractor (2011) Sec. 12.4.

¹²This may be more difficult if arbitration is required.

the real causes of an impasse. This training should teach mediators to recognize psychological factors such as risk attitudes and emotions; to understand the business consequences of settlement, personal animosities, and financial difficulties; and to be sensitive to cultural and gender issues.¹³ Lawyers tend to think that settlement decisions are based on logic when in fact they often involve a large emotional component.¹⁴

4. The mediator must be a good salesperson of the process. Even the existence of a pre-dispute mediation clause does not guarantee that the lawyers who are now in charge will agree to actually mediate. The Guided Choice approach can result in a meeting with a potential mediator and a reluctant party. The purpose of meeting, which could be at a luncheon, would be to discuss whether a Guided Choice style early mediation would help resolve the dispute. Attending such a meeting would not be conditioned on any party having already agreed to mediation.
5. The mediator must have sufficient litigation and arbitration experience and with discovery in particular, to understand when and how the parties may suggest the use of arbitrators or judges to obtain certain kinds of information through subpoenas or to resolve procedural and even substantive legal issues. Using these resources is not inconsistent with continuing the mediation process.

The Commitment to Continue Mediation Notwithstanding Impasse

What happens if, despite a well-designed mediation process, the impasse preventing settlement continues? Typically, the mediator's role terminates and the parties proceed to spend money on litigation. They do not discuss settlement until the judge asks them to do so. Arbitrators do not typically discuss settlement at all. Therefore, without the continued presence of a Mediator-Guide, the subject of settlement often does not arise until the eve of trial and after substantial legal cost has been incurred. Guided Choice involves a commitment from the parties that impasse during a formal mediation should not automatically

¹³Korobkin, Russell B., "Psychological Impediments to Mediation Success: Theory and Practice," *Ohio State Journal on Dispute Resolution*, Vol. 21, pp. 281–238, 2006.

¹⁴See Kahnemann, Daniel, *Thinking Fast and Slow*, Farrar, Straus and Giroux 2011. Also see <http://www.changingminds.org>.

terminate the negotiations. The term “commitment” is used to emphasize that continuation of the parties’ negotiations does not prevent a party from later withdrawing from the mediation.

As long as the mediator continues to have the parties’ trust, there is seldom good reason why the mediator should not continue in a settlement facilitation role even if the parties are still at impasse after a traditional mediation day. Mediators using any aspect of Guided Choice only have the power of persuasion. The parties are free to retreat to their default dispute resolution process and resume battle at any time.

The Mediator as Arbitration Process Designer

The alternative dispute resolution process should anticipate that a case may not settle and a binding process may ultimately be needed. Even critics of arbitration agree that having expert deciders of complex and technical business issues is an advantage that arbitration has over the court process. Further, having an arbitration process in place can facilitate settlement by reminding parties of their risky alternatives to a settlement.

The increasingly frequent criticism of commercial arbitration is that it has become too much like court litigation and has lost its advantages of speed and cost efficiency.¹⁵ The experiences which generate this criticism are often based on the use of broad arbitration clauses contained in pre-dispute agreements. The forms of the American Arbitration Association, widely used, are designed to cover any type or size of dispute. With the exception of consumer-related disputes, the Association’s Rules leave process control up to the arbitration panel. Lawyers drafting arbitration clauses in commercial contracts often substantially follow AAA type models that place little or no process restraints that affect cost or time. Business contract negotiators are often unwilling to spend the time negotiating customized dispute resolution procedures while in the midst of making a deal.

Customization of arbitration agreements based on a specific controversy seldom occurs. This is especially true in the areas of discovery and on limiting the length of hearing time. The reasons for a lack of customization often are based on the unwillingness of case administrators and arbitrators to interfere with the business decisions of the lawyers and disputants. Also, in the “heat of

¹⁵Stipanowich, Thomas J., “Businesses and conflict: It’s all about control. Study of corporate counsel indicates they are relying less on arbitration and more on mediated negotiation and other informal approaches.” The National Law Journal, March 25, 2013.

battle,” lawyers and their clients may be unwilling to negotiate with their adversaries about process restrictions. This unwillingness is a major reason why arbitration is infrequently used when there is no pre-dispute arbitration agreement.

The Guided Choice process legitimizes the possibility of the dispute not being settled. The Guided Choice process allows the parties to have facilitated discussions about a mutually-agreeable arbitration process within the confidentiality of mediation. The timing of such discussions could be early in the mediation to convince parties skeptical of the likelihood of settlement. The discussion could also occur in anticipation of impasse, whether likely or not. The anxiety associated with obtaining an award can motivate settlement agreements which were not previously considered possible.

The Guided Choice Dispute Resolution Clause

The following clause can be used as the basis for a mediation agreement or to amend an existing pre-dispute agreement to mediate. The clause is neutral as to whether agency administration is used or which agency. It evidences a commitment by the parties to begin the mediation process as soon as practical. It also shows the parties’ commitment to continue cooperating and exchanging information notwithstanding impasse. While the terms show a good faith commitment to the mediation process, any party is free to terminate the mediation for any reason and resume their litigation or arbitration.

1. If a dispute arises out of or relates to this contract, or the breach thereof, the parties agree to try in good faith to settle the dispute as early as possible¹⁶ by using a mediator, experienced in the subject matter of the dispute, to:

- A. Diagnose the legal, technical and human factors that have caused impasse to settlement; and
- B. Design for the parties’ approval, a process to overcome obstacles to settlement whenever they occur.

2. In the event of an impasse at any stage of the process, the parties shall continue to cooperate in a good faith exchange of information, facilitated by the mediator, which information would be discoverable under applicable rules of law, and that may be useful in causing re-evaluation of settlement positions. This in-

¹⁶Optionally a pre-dispute agreement could have a requirement that the mediation must be completed within a certain period of time. Guided Choice concepts intentionally omit such a requirement, believing that timetables should be agreed to as part of the facilitated mediation agreement.

formation will be developed within the confidentiality requirements of the mediation process.

3. Without terminating the mediation process, the parties also may agree to (1) use an arbitrator or judge, having jurisdiction, to issue orders resolving substantive or procedural issues; and/or (2) customize an arbitration process, pursuant to an existing arbitration agreement or by submittal to arbitration to achieve fair resolution quickly and at minimal cost. The mediator shall facilitate those discussions, but shall not serve as an arbitrator.

4. Any party may give seven (7) days notice of termination, by fax or email, of the mediation and proceed to litigation or arbitration as otherwise applicable. Unless the parties agree otherwise, all other existing agreements for dispute resolution shall remain in effect.

Conclusion

Most disputes are settled before binding decisions by arbitrators or courts. Using mediators as trusted advisors in the Guided Choice process helps to resolve disputes at the earliest possible stage, avoiding much legal expense and the business disruption that results from prolonged litigation. Guided Choice recognizes that impasses develop during the mediation process. However it also provides mediators with a variety of tools to overcome impasse, including further information exchange, and managed formal discovery with or without the help of judges and arbitrators.

The implementation of Guided Choice will require the education of lawyers who currently have fixed ideas about the limited usefulness of mediation. Also, mediators must understand the litigation or arbitration alternatives available to the parties on issues of discovery and questions of law that could be incorporated into the mediation process. Mediators must be trained to understand how important it is to diagnose an impasse and to customize a mediation process based on that diagnosis. Mediators must also be trained to sell the notion to the parties that impasse is normal and should not be reason to terminate the mediator's role in the settlement process.