

How You Can Use Guided Choice to Satisfy Clients Using Both Arbitration and Mediators

By Paul M. Lurie and Mark R. Becker

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Over the past five years, the Guided Choice Dispute Resolution Interest Group and its supporters worldwide have concluded that businesspeople (1) want to use lawyers who know how to settle commercial disputes reasonably as soon as possible, minimizing business disruption and legal and expert expenses; and (2) prefer arbitration to litigation for cases that do not settle but only when arbitration is faster and saves time and expense. The Spring 2018 issue of the ABA *Dispute Resolution Magazine* is devoted to the Global Pound Conference and specifically mentions the work being done to use Guided Choice to implement the ideas coming from the Global Pound Conference.¹ Lawyers, mediators and arbitrators need to understand that arbitration and mediation need not be separate options for resolving disputes, but may actually work together to get a more efficient result whether by award or settlement.

Business people know that court litigation has a high settlement rate but may not be aware that commercial arbitration also has a high settlement rate.² Because of the high settlement rates in both litigation and arbitration, clients are asking their lawyers the following questions and making the following comments:

Why didn't you also initially discuss with us options for settlement processes that could run in parallel with your trial preparation, yet avoid the most significant costs?

Why do companies that use your competing lawyers get the information needed to decide whether to change settlement position more quickly and with less expense?

Further, we are learning that collaborative law may be a better way for all the parties to satisfy our information needs, and result in comparatively better outcomes for us. What effort have you made to cause this to happen?

Also, we like earlier settlements because they let us restore valuable business relationships and avoid the uncertainty that delay causes.

These clients' needs have been confirmed by the Global Pound Conferences that have taken place over the last two years in 40 U.S. and major foreign cities. (www.globalpoundconference.org).

When clients consider the value of legal services, they don't look just at the terms of settlement. Instead, clients look at when a dispute resolves and how the lawyers either helped it settle sooner or contributed to the delay. They also want their lawyers to share the risk of their efficiency by not just paying for unlimited hourly rate fees. Increasingly, major clients want to fix legal fees so that lawyers are rewarded for spending fewer hours on the resolution process. Major clients such as Microsoft and Shell Oil are already insisting on using fee structures which put some risk on the lawyers. As reported by the Cushman & Wakefield 2017 National Legal Sector Benchmark Survey:³ “[f]or the third consecutive year, the top issue that [law firm] respondents said will have the greatest impact in the legal sector over the next decade is fixed fee structures. Of those surveyed, 68 percent said the biggest issue they're currently facing is fixed fees” up from 61 percent previously.⁴

Earlier resolutions will provide value not just to clients, but also to the economics of law practice. Clients will reward lawyers who can get them earlier and less expensive resolutions that reduce the toxic effect of unresolved disputes pending for long periods. Earlier resolutions will also reduce the risk that

lawyers may have under fixed fee arrangements to pay for unanticipated expense in litigation preparation and actual trials, arbitrations, and associated appeals.

How Can Lawyers Achieve More Efficient and Less Time-Consuming Resolutions?

A well-designed dispute resolution process helps the parties (a) identify the issues that have blocked earlier attempts at settlement; (b) satisfy their needs for information necessary to evaluate their settlement positions; and (c) decide whether settlement or arbitration is their best alternative to the court system.

How can people design an effective process? Some companies have internal processes for investigating the issues in disputes. In some cases, the attorneys have a relationship that may lead them to agree on limited and speedy discovery, be able to avoid motion practice, and to limit trial or arbitration time.

But what is missing from these client-only internal investigations and friendly lawyer discussions is information about certain issues that the parties may not disclose to their opponents. These issues include (1) financial issues; (2) how the parties' positions were developed, which may be based on advice (good and bad) from lawyers and experts; (3) the real decision makers and their emotional needs;⁵ (4) the identity of decision-makers that aren't parties, such as insurers, vendors and governmental entities; and (5) the social decision-making process within large organizations and political bodies. Lawyers think that after discovery and conversations with opposing counsel they are ready for "trial." This is much different than being ready to negotiate a settlement. The issues described in this paragraph are not typically well understood through substantive issue-based pre-trial preparation, but are common reasons for negotiation impasse.

Hire a Mediator Initially to Analyze and Help Facilitate Processes that lead to an Arbitration Award or a Settlement.

A mediator is the best person to help the parties understand all the factors causing resolution impasse, including those not publicly disclosed. The mediator can recommend how to design the best process to overcome impasse. The mediator's power is based on the mediator's unique ability to speak confidentially with everyone involved and use that knowledge in making process recommendations. Neither consultants, judges, adversarial litigators, nor adverse lawyers who have a good working relationship have this power. At this point in the matter, the mediator is acting mainly as a process facilitator. For this reason, this recommendation calls on parties to hire a mediator as soon as possible to help structure, design, and manage the mediation process for success but not to start a traditional mediation bargaining session before the parties are ready. It is critical that the parties hire a mediator as early as possible in the history of the dispute, so that the mediator can be effective as a settlement process facilitator. The mediator retains value as a process facilitator even after arbitration or litigation has commenced. Parties should understand that hiring a mediator early is not a sign of weakness, but rather a smart choice to maximize the potential for reasonable, early, and cost-effective outcomes.

Mediators are often incorrectly perceived only as "settlement facilitators." Not in the situation where the mediator is hired early at the very outset of a matter. Rather, the mediator facilitates the mediation process to expedite the exchange of high value information necessary for the parties to be ready to engage in bargaining that affords the best chance of an early settlement.

Choose the Best Process for the Matter

The mediator should help the parties choose the best procedures to quickly and efficiently resolve the dispute, whether by settlement or award. Parties may consider using the mediator to assist the parties in the following choices:

1. Commencing Arbitration or Litigation

If there is a pre-dispute agreement to arbitrate, one or more parties may want to pursue arbitration. A party may make this decision for strategic reasons, or because of affected third parties. For example, the party may have an insurer who will not participate in an early resolution process without the existence of a litigation or arbitration. In this situation, the parties may not want to pursue settlement through mediation “until they are ready.” Traditionally, that means after a lot of money has been spent on discovery and motion practice. And even if there is no pre-dispute arbitration clause, the mediator may recommend that the parties commence an arbitration so that the parties’ publicly see that more is going on than “settlement talk” alone. A mediator – who has no decision-making power– would be the best person to convince the parties of the benefits of using arbitration rather than court litigation.

Recent American Arbitration Association Commercial and Construction Rules provide that arbitration and mediation can run in parallel and do not have to be sequenced. The rules specifically require that mediation should not delay arbitration unless by consent.⁶

Mediator as Arbitration Process Facilitator

If an arbitration is commenced, the mediator should act as an Arbitration Process Facilitator (APF) to help the parties create an efficient arbitration process concerning discovery, motion practice, number of witnesses, and length of hearing. The mediator as a facilitator can help resolve discovery disputes since the mediator, unlike an arbitrator, has no power to enter any discovery orders. The parties may also authorize the mediator to act in an evaluative but non-binding role. The mediator is also the best person to convince the parties why it is in their best interest to engage in discovery on a collaborative rather than an adversarial basis.

Arbitrators should welcome the mediator’s role to assist, not decide, issues affecting the efficiency of the arbitration. Arbitrators, like judges, want the parties to agree on procedural issues, such as e-discovery protocols and limits, issues involving discovery disputes, length of the hearing, use of electronic exhibits, whether key isolated legal issues creating settlement impasse should be decided by the arbitrator quickly on a bifurcated basis, etc. The mediator can facilitate agreements and turn any disputes over to the arbitrator who makes the final decision. Mediators can therefore help give arbitrators good reputations for running efficient arbitrations. This role is much less antagonistic to arbitrators than the role that many agency case administrators play especially in international arbitrations.

Even though the parties are engaging in arbitration, if they have already engaged a mediator, any party has the opportunity to suggest that the parties should also begin settlement negotiations with or without delaying the pending arbitration. Any party can make an *ex parte* call to a mediator and feel comfortable that the conversation is private.

In theory, the lawyers should be able to agree on an efficient arbitration process. However, as a practical matter, it is difficult to get the lawyers to agree to anything that they perceive limits their ability to try the case. It is also common that arbitration agency case administrators cannot get more efficient arbitration processes. The reason why mediators are more successful is because of the information they have learned about the parties’ needs that may not be public. The mediator also may have better relationships with the lawyers to get process resolutions than the lawyers can do among themselves.

2. Commencing Mediation. Based on the mediator's diagnoses of the causes of the impasses, the mediator as Mediation Process Facilitator may be able to convince the parties that they can be ready to begin settlement negotiations after they have satisfied their respective information needs. The mediator is the person best qualified based on confidential relationships to convince the parties to exchange information collaboratively. If discovery is required from uncooperative third parties, the parties can agree to use arbitration or court processes to get that information. If a procedural issue arises where the mediator cannot get agreement, the parties can agree to use an arbitrator for that limited purpose, without using an agency and incurring costs.

The mediator's impasse diagnosis may have discovered that the parties' experts disagree about causation or damages, and that has caused the impasse. The mediator may suggest pre-settlement negotiation meetings among these experts for the purposes of narrowing their differences. These meetings would be protected by the mediation confidentiality privilege. This is widely used technique among the best mediators.

Further, during the impasse diagnosis or any subsequent settlement negotiation impasse, the parties may have identified a legal issue that could be difficult to compromise on. The mediator can convince the parties that it is in their best interest to get a non-binding or binding opinion from a respected expert on the issue. The mediator may help design a process where the parties have a hearing on that single issue before a third party neutral, and the neutral does not disclose the decision until the parties agree. The parties may agree as to whether the opinion is admissible in the arbitration or not. Experience has shown that parties often settle before the single issue arbitrator issues an opinion. If a binding opinion is issued by a single-issue arbitrator, the parties usually settle the case without further arbitration.

3. Using Judges to Encourage Mediation While Staying Litigation

The techniques discussed above assume that the parties are required to mediate by a pre-dispute contractual agreement; or that the parties have voluntarily hired a mediator either as a process facilitator or under a more traditional agreement to mediate. But what if the parties refuse to hire a mediator in any capacity and are proceeding with litigation? Consider this example from the Guided Choice toolkit of using a mediator-to-judge or mediator-to-arbitrator reporting process. With this process, a court or arbitrator would stay litigation or arbitration pending mediation, with the mediator making reports to the judge about the progress the parties are making on settling the case. These reports are not admissible and include no confidential information. If and when the court or arbitrator perceives a lack of progress the court or arbitrator can order the case to proceed.

Parties would employ this process by requesting the entry of a formal stay order. This would not be a short stay for court-ordered mediation but instead a stay for as long as the mediation process is progressing. For complex, multi-party disputes, this could be six months to a year. In the stay request, the parties should identify the mediator by name and note the mediator's particular subject matter experience, focus or skill, so the judge knows that the mediator is a real expert in the field and should have some latitude to work the mediator's "magic."

A smart judge or arbitrator will then include in the stay order a requirement that the mediator submit regular progress updates, every 90 days being a suggested reporting period. In a recent multi-party case, the mediator skillfully used the court-ordered reporting process to (A) summarize the efforts made such as reporting on the documents exchanged, briefs exchanged, meetings held; (B) summarize the progress made in terms of how far apart the parties started, and how much progress the parties have made to reduce the gap, without disclosing the concessions made by any party; and (C) advise as to plan going forward, such as the time frame for future meetings, sub-group topic discussions, and in-person

negotiations. The reports do not share anything confidential to the judge, but are copied to each party. Such reports are crucial to the parties seeing the continued value of the mediation process, and the path forward.

Conclusions

Lawyers should understand that arbitration and mediation need not be separate options for resolving disputes, but may actually work together to get a more efficient result whether by award or settlement. However, whether the parties have agreed to mediate or arbitrate, the parties must hire mediators as soon as possible to maximize the value of the process for the party users of the process. If an arbitration is commenced, the mediator as arbitration process facilitator can make the process more efficient and reduce delay and expense. Even though an arbitration has been commenced. The mediator is also available when and if the parties want to begin settlement discussion. Unlike being in the court system, in many arbitrations, the subject of settlement or mediation never arises except by way or rejection at the beginning of the arbitration.

If mediation comes first, the parties may reach an impasse. The mediator can help parties overcome this Impasse by having the parties' present key issues to an arbitrator or an agreed-on expert at a binding or non-binding hearing. Parties can ask that either type of opinion be delayed until the case cannot settle without the opinion.

If there is no agreement to mediate and the case is in court, the parties and the judge can agree to begin and continue mediation while the litigation is stayed. When the court perceives progress using mediations the order can continue until a lack of progress causes termination of the stay order.

Paul M. Lurie is internationally known for techniques he has developed over 50 years of practice as a construction lawyer in a major national firm, and now as a mediator and arbitrator, for getting construction disputes resolved more quickly and with less expense, using widely accepted arbitration and mediation tools. Member of Master Panel of Mediators, American Arbitration Association, CPR Panel of Distinguished Neutrals and Distinguished Mediator, International Academy of Mediators; Certified Mediator International Mediation Institute; Highest rankings for Chambers, Best Lawyers, Who's Who Mediation; President's Award from AAA and ABA Forum on Construction for creating and managing the 23 year old 750 member Mediate & Arbitrate Listserv; Chair of Guided Choice Dispute Resolution Interest Group www.gcdisputersoluton.com and active in the worldwide Global Pound Conference www.globalpoundconference.org improving dispute resolution service; Founding member and active in the American College of Construction Lawyers ADR Committee. Contact: pmlurie@early-dispute-resolution.com

Mark R. Becker is a shareholder with the nationally recognized construction law group of Fabyanske, Westra, Hart & Thomson. Mr. Becker is a leader in the field of early mediation advocacy, with a proven record of routinely securing early resolutions of high-stakes, complex, multi-party construction disputes for ENR ranked contractors, ENR ranked design firms, and major private and public owner clients. Mr. Becker is the Chair of the Construction Section of the Minnesota State Bar Association, serves as an Arbitrator with the American Arbitration Association, and has served on the Board of Directors of the Minnesota Construction Association. Mr. Becker has been named a rising star on multiple occasions, and is a sought after speaker on construction law topics. Contact information: mbecker@fwhtlaw.com, (612) 359-7620, Fabyanske, Westra, Hart & Thomson, PA, 333 South Seventh St., Suite 2600, Minneapolis, Minnesota, 55402.

¹ See www.gcdisputeresolution.com.

² See the recent American Arbitration Association study on B2B arbitration titled “AAA Arbitration, faster, more cost effective than litigation” appended to this article.

³ Available by request at: <http://www.cushmanwakefield.us/en/news/2017/06/annual-legal-benchmark-survey-results>.

⁴ See Lauren P. Duncan, “*Survey: Lawyers Expect Shifts Ahead*,” Chicago Daily Law Bulletin, July 20, 2017.

⁵ (see Kahneman, Daniel, *Thinking Fast & Slow*)

⁶ See AAA Commercial Mediation Rule R-9 and Construction Rule R-10.

AAA[®] ARBITRATION

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B2B arbitration is used by thousands of businesses in every sector. Companies trust the AAA to handle commercial disputes, including large, complex cases, through this private, customized process decided by arbitrators expert in the intricacies of the parties' industries.

Some people say that arbitration is becoming as lengthy and expensive as litigation. This analysis—of 4,434 cases administered by the AAA and concluded in 2014 through 2016; across five important U.S. business sectors; with billions of dollars in claims, one-third with \$500,000 or more involving complex disputes—challenges that.

FACT: Parties Settle Prior to Hearings at a Rate of 66%

Disputes in industries where parties typically continue to work together, like Healthcare, settled at a rate of 79%.

The AAA, cognizant of its high settlement rates, works hard to move each case fairly and efficiently, resulting in earlier and less-expensive settlements for the parties. Median forum costs (AAA fees + Arbitrator Fees) on the settled cases were just \$4,000.



FACT: Some Large and Complex Cases were Awarded in 5 Months or Less

B2B arbitration users depend on the AAA for speedy resolution of disputes. A critical component of AAA arbitration is helping the parties customize the process. While some parties add litigation-like procedures that lead to a more time-consuming process, most adhere to arbitration's original intent of a fair, fast, and efficient resolution of their disputes.



FACT: Companies with Large Cases Trust Arbitration and the AAA

With high-stakes cases, transaction costs increase rapidly. In business, time is money. Every large, complex case (LCC) involved at least \$500,000 in claims, and one had over \$3 billion in dispute. These parties know that the AAA is experienced at administering high-profile, high-stakes cases efficiently.

