



## **How Guiding Mediators Can Help You Get Earlier Settlements and Reduce Legal Expense**

**Paul M. Lurie**

Schiff Hardin LLP

[pmlurie@early-dispute-resolution.com](mailto:pmlurie@early-dispute-resolution.com)

**Mark R. Becker**

Fabyanske, Westra, Hart & Thomson, P.A.

[mbecker@fwhtlaw.com](mailto:mbecker@fwhtlaw.com)

**Dean B. Thomson**

Fabyanske, Westra, Hart & Thomson, P.A.

[dthomson@fwhtlaw.com](mailto:dthomson@fwhtlaw.com)

**William G. Geisen**

Stites & Harbison

[wgeisen@stites.com](mailto:wgeisen@stites.com)

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## **Why Read This Pamphlet?**

Most construction disputes are settled and not adjudicated. When you use mediators earlier in the settlement process, you get settlements that clients perceive as more valuable. Why is that the case? Because legal expense is directly related to the time the dispute is pending. Properly trained mediators get earlier settlements by using a Pre-Settlement Negotiation Phase before encouraging settlement discussions. During that phase, the mediator identifies the parties' needs and the obstacles that might lead to impasse and, with the parties' involvement, designs a process to satisfy those needs. Those needs include not only information but also human behavior issues and organizational needs. The best mediators do not impose ideas. They create an atmosphere of collaboration so that the parties are engaged and buy into the process. Mediators identified with these processes are called "Guiding Mediators."

Whether you are a litigator, a business lawyer, in-house counsel, an arbitrator, or a mediator, you rely for your livelihood on clients in the construction industry. Clients want to learn about and understand their settlement and litigation options. They are not satisfied if their lawyers do not know how to minimize the legal expenses involved in preparing a dispute that will be settled. Clients also don't want project contract clauses that interfere with their use of using mediation for early resolutions.

Read this pamphlet to learn how to use mediators and overcome resistance among many lawyers to the early use of mediators who provide economic value whether the case is settled or eventually litigated or arbitrated.

## Hire a Mediator Sooner than Later

Most construction disputes facing litigation or arbitration will settle without a binding third party adjudication. And while mediators are not generally involved in most disputes that arise during construction, once lawyers get involved, the scenario changes. As a case approaches trial or hearing, parties get more concerned about the outcome and additional expenses and reach late settlements that they may have rejected at earlier times. As one commentator noted, "The decline in trials, at both the federal and state levels, has been driven in large part by disputing parties concerned with the risks, costs and public scrutiny of going to trial, and increasingly relying instead on [mediation]."<sup>1</sup>

But late settlements substantially increase legal and expert expenses. Late settlements also increase the parties' animosity, which makes business relationships that were once successful difficult to repair.

So why hire a mediator? Mediation confidentiality helps the parties achieve earlier settlements of disputes. Mediators can learn what is really causing impasse much more efficiently than lawyers can through discovery, discussions, and investigators. Mediators have the unique statutory power to confidentially learn what the parties need to accept a settlement ("Settlement Needs"). Based on this knowledge, mediators can help the parties design a settlement process to meet those needs.

The parties' Settlement Needs are often more complex than the amount of money to be paid or received. For example, when parties have uneven information about a dispute, that disparity needs to be efficiently reduced before they start negotiating a settlement. The animosity that typically arises using adversarial methods makes traditional discovery inefficient and time consuming, and traditional discovery does not allow for the parties' decision makers' need to share their story. Further, there may be financial issues, disputes over legal issues and damages, and anger and

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<sup>1</sup> "Arturo J. González, "What the Vanishing Trial Lawyer Means for In-House Counsel, and 5 Things They Can Do," [corpcounsel.com](http://corpcounsel.com) | October 14, 2016.

fears about the consequences of settlement. Guiding Mediators know how to deal with these concerns.

To reduce legal and expert expense, the mediator needs to be retained as early as possible and before the parties have incurred considerable expense through adversarial processes and before they are too angry or resentful to settle. Mediators should be used even if the parties agree to use a contractual "step negotiation" process. The mediator's role in those situations will depend on what the parties agree to.

Global Pound Conference data supports our authors' advice. We are all experienced advocates and mediators who achieve earlier dispute resolution than occurs from the traditional use of mediation, arbitration, or litigation. The 28 Global Pound Conferences were held in the major cities of the world in 2016 and 2017 -with thousands of attendees. ([www.globalpound.org](http://www.globalpound.org)) The conference's purpose was to determine what clients want from lawyers, mediators, and arbitrators. As a result of the GPC, committees of the International Mediation Institute endorsed the ideas of the Guided Choice movement and have encouraged us to prepare educational materials including this pamphlet.

Earlier resolutions benefit both businesses and the legal industry. Attorneys and experts generally represent clients on an hourly fee basis. There are seldom caps on fees because lawyers are reluctant to take responsibility for the cost and efficiency of litigation with an adversary whose actions they cannot control. But change is occurring. Major companies now may require caps on billing based on shared responsibility for choosing a dispute resolution process. Those requests are more palatable if the attorney and client share in the selection of a process that promotes earlier and less expensive settlements.

### What Distinguishes a Guiding Mediator

The Guided Choice Mediation Interest Group was formed in 2013 to help identify methods that would resolve commercial disputes earlier and with lower costs.

From our research we have identified the category of a Guiding Mediator. These are mediators who understand that when mediators are hired early, the parties may not be immediately ready to begin the settlement negotiation phase of a settlement process. First, the parties must obtain the information they need to understand what has been causing impasse ("Settlement Needs"). A mediator can help the parties satisfy their needs by using the mediator's ability to have confidential discussions and to create a confidential diagnosis of the reasons for settlement impasse ("Impasse Diagnosis"). Using the Impasse Diagnosis, the Guiding Mediator helps the parties design a settlement process that will satisfy the parties' needs. In this capacity, the Guiding Mediator is acting as a "Process Facilitator." The mediator's role in the Process Facilitation phase is different from the mediator's role in the Settlement Negotiation phase.

As a Process Facilitator, the Guiding Mediator determines when the parties have enough information to begin the Settlement Negotiation Phase. This process involves more than asking the lawyers to submit legal briefs or to meet with the mediator shortly before settlement negotiations begin. It may involve encouraging collaborative information exchange, privileged meetings of experts to reduce differences, initiation of litigation or arbitration, receiving non-binding expert opinions on issues of law or damages, separation of insurance issues and engagement of carriers. Also, because of time constraints, some disputes require the expense of trial preparation. This may occur even as the parties continue the settlement process. In this situation the Guiding Mediator can provide value in reducing trial preparation expense by encouraging lawyer collaboration, even among otherwise hostile parties, on information exchange and finding areas where the parties are not in disagreement.

### Overcoming Resistance to Hiring a Mediator Early

Most construction cases settle eventually. Why are they settled so late and after so much expense? Often there is resistance by one or more parties or their lawyers to engage a mediator, especially if the suggestion is made "early." The resistance is usually attributed to lawyers. As Michael Leathes, a

prominent observer of the dispute resolution has noted in a Kluwer Mediation Blog: *“My experience as a user convinced me that parties very often don’t understand mediation and many law firms are not motivated to explain and recommend it to clients until late in the litigation life cycle.”*<sup>2</sup>

Lawyers’ resistance is typically based on (1) the belief that an adversarial information exchange—discovery and courtroom conversation—is the best way to convince other parties that their positions are untenable; 2) the fact that adversarial procedures are economically beneficial to lawyers who are compensated on an uncapped hourly rate basis; (3) overconfidence in the merits of a client’s position, which leads to a lack of respect or understanding as to how the opposing party’s position may be reasonable; and (4) conflicts in applicable dispute resolution requirements because of multiple jurisdictions. These misconceptions lead lawyers to believe that mediation is a waste of time and money. They also create the erroneous view that agreeing to mediate is a sign of negotiation weakness. To overcome resistance, the parties must understand that even if the case is tried, the mediator can help make the pre-trial/arbitration process more efficient. The parties can engage in less discovery by reducing the critical issues that need adjudication. When expert opinions clash, the parties can reduce differences on a collaborative basis.

It is common to hear lawyers or parties object to mediation because of confidence in their legal motions in court or arbitration. But it can be unclear whether winning or losing a motion is in the party’s best interest. Therefore, the settlement process may need to include getting decisions on legal motions on a binding or non-binding basis. Preparing for these motions

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<sup>2</sup> **Michael Leathes** is a co-founder and formerly a director of the International Mediation Institute (IMI). He spent much of his career as an in-house counsel for a number of international corporations in a variety of roles, including General Counsel of Pfizer International (1984-87), General Counsel of International Distillers & Vintners Limited (1992-97), and Head of Intellectual Property of BAT (1997-2006). He has spent much of that in-house career managing disputes around the world. Michael is the author of the book, *Negotiation, Things Corporate Counsel Need to Know but Were Not Taught* published by Wolters Kluwer in January 2017. The book contains a discussion of Guided Choice.

can educate the parties about whether they should litigate/arbitrate rather than settle.

Techniques to overcome advocate lawyer resistance to hiring a mediator include the following:

1. Use a Pre-Settlement Negotiation Agreement. Sometimes reluctant parties are concerned that they will be required to participate in settlement negotiations before they are ready to consider changing their position. The attached simple agreement will protect parties from being required to negotiate prematurely. It assures that the mediator will be acting only as a Process Facilitator to address identifying and satisfying Settlement Needs. A form is attached.
2. Use AAA Construction Rule 10. If the parties are contractually bound to arbitrate under the rules of the American Arbitration Association, the AAA will honor a request to help appoint a mediator. (Rule 10 is the same in the AAA Commercial Rules).
3. Enlist a judge's assistance. If a court proceeding is in progress, many courts will require a mediator to be appointed. Some judges will be happy to assist the mediation by issuing rulings. But in these circumstances, the mediator should be ideally be qualified as a Guiding Choice Mediator and should not be someone drawn from a court list.
4. Educating the parties and lawyers that the early hire of a mediator is valuable whether the dispute is settled or tried. Few law schools, business schools, continuing education programs feature this subject or have programs teaching the use of mediation.

### How to Choose the Best Mediator

Frequently, mediators are chosen based on perfunctory basis with email inquiries among colleagues. Mediator reputation (and

price) is frequently based on the number cases that they have settled. In fact, the most important consideration should be what processes the mediator used to settle and when the settlement occurred to avoid expense. Early settlements mean the parties saved money by having used a mediator. Use of the principles of Guiding Mediators is good standard.

## How To Find a Guiding Mediator

Guiding Mediators increasingly make reference in their resumes and promotional material to achieving early dispute resolutions as a Guiding Mediator. They look forward to being interviewed. Mediators, unlike arbitrators, can be interviewed ex parte. The person conducting the interview should ask questions like (1) What if a party or essential non-party refuses to participate in the mediation? (2) What "Settlement Needs" do you look for? (3) What will your services cost if we never start the settlement negotiation phase? (3) How do you deal with insurers? (4) Will there be an open session with all of the parties? (The correct answer to this question is, it depends what I learn from understanding Settlement Needs and the Impasse Diagnosis); (5) Do you participate in mediation continuing education? (6) How can we as attorneys collaborate with you as mediator to best meet the needs of our clients? (7) If we must also engage in litigation or arbitration, can you help us as a mediator to resolve procedural disputes? (7) What will my role as a lawyer be in the process? (8) How can you help us with our contractually required "Step Negotiation" Process?

## Preparing for an Initial Confidential Discussion with the Mediator

This checklist is intended primarily to guide discussions between lawyer and client and then between lawyer and Guiding Mediator. It will help lawyers working with mediators to understand and recommend a settlement process that will satisfy their settlement needs and also efficiently prepare for an adjudication if necessary.

- What is the history of the business relationship between the adverse parties?
- What is the history of the dispute?
- Who are the people in the client organization who determined that party's current position? What people will be involved in determining a settlement position? Who will participate in negotiations ?
- Is there a concern that the client or an opposing party will view your recommendation to mediate is a sign of weakness?
- What are the applicable contractual and court rule requirements that could affect settlement choices? Will conflicting rules of multiple venues be involved.
- What is the likely date the matter will reach a final third-party determination - i.e. time to trial.
- What information does the client need to evaluate its position for adjudication or settlement? How will the client access that information? Will the information come from cooperative or non-cooperative parties?
- What resources will the lawyer use to gain information necessary for adjudication (for example, law office lawyers and staff, experts, data analysis, adversarial or collaborative discovery)?
- What are the lawyers' fee arrangements? Will a budget be prepared? Are the lawyers bearing any fee risk with caps?
- Who are the key stakeholder entities in the dispute, including insurers, vendors, subcontractors, governmental agencies?
- What influenced the client in reaching the position that led to the impasse - e.g. internal investigation, experts?
- How did the opposing reach its position that led to the impasse?

- What will be the consequences to the parties if settlement is delayed (including financial consequences)?
- What is the likelihood that the dispute will escalate if not settled? Why?
- What are the uncertainties and fears associated with a settlement?
- Are group dynamics present.? Are there multiple level of approvals needed for changes in settlement position?
- Who is likely to resist the involvement of a mediator and why?
- What is your experience using a mediator? Your client's?
- What are your good and bad experiences using courts or arbitration?
- Do you think the opposing parties are amenable to settle now? If not, why not?
- What kind of the outcome is in your best overall interest?
- What is the negotiation style of your client's decision makers?

### Examples of Settlement Process Options Based on Impasse Diagnostics

A mediator may recommend the following types of settlement processes based on Impasse Diagnosis:

1. A commitment that negotiations will not commence until the parties have satisfied their Settlement Needs. An agreed schedule should be established with target dates.
2. An agreed schedule for collaborative information exchange with or without the need for depositions and document exchange (electronic or paper).
3. The mediator helps the parties design a required step negotiation process that some parties may insist on using.

4. A social meeting of the parties, without lawyers, at a breakfast before settlement negotiations start.
5. A meeting of experts within the confidentiality of the mediation process to reduce their differences or to suggest ways to approach repair costs.
6. The use of Guided Choice-based “What If” scenario planning allows each party to try to anticipate impasses long before negotiation begins and address how they might be managed. This process is taught in many business schools and enables parties to consider their range of options if and when impasse is encountered and to address and possibly reconsider errors in decision-making based on overconfidence. This contingency planning technique can be especially useful in larger, multiparty disputes and when the form of a settlement agreement may be difficult to anticipate. Examples of “What If” issues to be discussed in pre-negotiation discussions could include: (1) what if an impasse develops over a legal, factual, or damage calculation issue; (2) what if the insurer or subrogee disagrees with the proposed settlement; (3) what if the person attending the negotiation claims they do not have authority to raise or lower an offer; (4) what if a delay in settlement is delaying the project completion; (5) what if the parties are committed to commence litigation or arbitration before settlement discussions are exhausted? Discussing these issues and acceptable outcomes privately with the mediator before they surface makes the parties consider how to circumvent an impasse that might otherwise terminate the mediation.
7. Use of judges or arbitrators to monitor the parties’ commitment to a mediated settlement process by using progress reports. Judges can issue stay orders for preservation of legal rights and defer dispositive motions or formal discovery while mediation is pending.
8. There is impasse over a legal issue involving law or damages which a party believes needs to be resolved in court or arbitration: (a) expert opinions may be enlisted before or after settlement negotiations begin, but the parties may also use arbitrators or judges for limited binding

decisions.; or (b) hold a mock hearing before the mediator who does not issue an opinion. The parties' preparation for the hearing and participation in the hearing can cause a change in settlement positions.

## What is Guided Choice?

About six years ago, members of our pro bono group observed that clients in the U.S. and abroad, were unhappy with the expense and delay involved in resolving disputes. We knew that earlier settlements meant less expense and business distraction and a greater opportunity to preserve valuable relationships. We discovered that the best mediators understood the importance of earlier settlements. However, the techniques they used were not generally taught in law schools, or in continuing legal education programs, nor were they the subject of scholarly research. Further, it was difficult to identify qualified mediators.

We began the Guided Choice Mediation Group to educate lawyers and mediators on the best techniques to resolve disputes sooner. We chose the term Guided Choice Mediation to create a brand of mediation that emphasized techniques for earlier resolutions. Most people did not associate the term "mediation" with earlier resolutions.

We were fortunate that the research coming out of the worldwide Global Pound Conferences supported our approach. Also, the large number of readers of our website from around the world further support the proposition that for mediation to become more valued and used, it must focus on achieving earlier resolutions. Our Guided Choice website collects the best proven techniques for earlier resolutions. Our teaching focuses on training mediators to use the best Guided Choice tools. Guiding Mediators have many tools in their toolbox. It is the mediator's job to determine whether and when to use which tools. We also established a Guided Choice Mediation website [www.gcdisputeresolution.com](http://www.gcdisputeresolution.com) Since we created it, we have had thousands of visitors from the United States and around the

world. Our goal is making the website a resource for people to learn about best practices, and to encourage research on best practices.

## Frequently Asked Questions

1. What do Guiding Mediators do differently during the Settlement Negotiation Phase?

Guiding Mediators can better understand all the dynamics of impasses that may arise during the Negotiation Phase because of what they learn during the Diagnostic Phase. The Guiding Choice mediator is better able to convince the parties to resume controlled litigation or arbitration while also continuing settlement negotiations when appropriate. And, of course, Guiding Mediators use impasse-breaking techniques used by traditional mediators, but based on their understanding of Settlement Needs, they are better able to select the more appropriate technique.

2. Doesn't a Guided Choice pre-mediation investigation just add another layer of expense?

No. Retaining a mediator early in a case can actually reduce expenses even if the case is tried. The mediator can facilitate an efficient and less costly information exchange. But the lawyers may be skeptical about hiring a mediator at the start of a case, thinking that the other parties (including insurers) are not interested in settlement because of the wide disparity between the parties' positions. Lawyers may also believe that they need significant discovery to "teach" the other side that their position is unrealistic.

A mediator can help overcome these obstacles to settlement. Using Guided Choice principles, a mediator can conduct a quick and confidential investigation, often through phone calls and the review of existing documents. The mediator and the parties can agree on a budget and schedule. And after the

investigation, the parties and mediator may assess whether settlement negotiations are ready to begin.

3. I am concerned that an extended mediation process will delay getting the dispute resolved by court or arbitration.

That won't happen when you use the a Guiding Mediator. The Guiding Mediator's job is to resolve disputes earlier: get the case settled faster or move it to the next adversarial step if settlement is not achievable. Since 2015, American Arbitration Association Rules for Commercial and Construction specifically require that the parties consider mediation when a demand for arbitration is filed, even if there is no specific pre-dispute requirement to mediate. Those rules specifically provide that any mediation process should be in parallel with arbitration and should not delay that process.

4. We have tried to settle the case, but we are too far apart. Won't mediation be a waste of time and money?

No, it won't. Most commercial disputes eventually settle before adjudication even after early negotiations have broken down. It's important to remember that agreeing to mediate is not agreeing to start settlement discussions before the parties are ready. Rather, it is an agreement to employ a mediator to first facilitate the settlement process before helping with settlement negotiations. A key goal of the mediator is to satisfy information needs of the parties as efficiently as possible. This can reduce the cost of discovery and encourage earlier trial and arbitration dates.

5. The contracts have a step negotiation clause requiring executive level negotiations before mediation or arbitration. Shouldn't we have a meeting of senior executives before we start a mediation?

Guided Choice is a process to help guide the parties to a negotiated settlement. It is not just a single-day mediation meeting. Negotiations before mediation begins can be helpful

but they must be carefully planned, or executive meetings may make parties angrier and more entrenched in their positions. Under Guided Choice, a mediator performs a confidential investigation to learn the reasons why the parties haven't settled. Based on this investigation, the Guiding Mediator may have ideas about how the executive meeting should be conducted, and whether the presence of the mediator or attorneys is desirable. Using a mediator in this way can be a good investment in any type of negotiation.

6. Should I include an arbitration clause in my commercial contracts? I don't like the inability to customize the process. How can a mediator provide value to an arbitration?

Arbitration has many advantages over court. Especially in areas likely to involve technical and custom and usage issues, an arbitrator is a more reliable trier of fact than a judge. Arbitration is also more private and usually quicker. The key to a good arbitration process is using a mediator to assist in the customization of the arbitration process.

One of the criticisms of using arbitration is the difficulty of customization. Case administrators can seldom convince hostile parties to compromise on procedural issues. Arbitrators are reluctant to enter procedural orders where there is party resistance. The mediator, through confidential investigation, can help create a customized arbitration process that is more cost efficient. Mediators, with their power of confidential diagnosis and a trust relationship, can help the parties customize the arbitration process to make it more efficient. Further, arbitrators often don't like to be perceived as caring about settlement. Having a mediator in place during an arbitration can help the parties decide whether settlement negotiations are appropriate.

## 7. Is Guided Choice really a new idea?

Guided Choice is a new way of introducing the best practices used by the best mediators to a broader audience. The term “mediation” has too many meanings and does not focus on early and more efficient settlement. Unfortunately, many mediators do not receive training in these techniques aimed at earlier settlements. Pre-negotiation activities have always been necessary to create an efficient settlement process but have gotten lost in many mediations. Instead, counsel focus on litigation expectations and preparations. Early case assessment with the help of a Guided Choice mediator can materially advance either negotiated or mediated settlements.

## 8. I am a businessperson and hire lawyers to resolve claims. How can I get the benefits of the Guided Choice process?

Include a mediation provision in all your project or “deal” contracts. A good example are the AAA forms available online. It is better to have an administrator but that is not a requirement. If you are involved in a dispute, ask your lawyers early on to consider how to achieve the earliest and least expensive settlement and to consider mediation.

## 9. What if there are insurance coverage and/or indemnity disputes involved? How can a mediator help to reduce delay and time related expenses of coverage and indemnity disputes?

It can be difficult for the parties to advocate coverage positions with insurers while also negotiating settlements with parties. Disputes in this area often will considerably delay the ultimate settlement and increase expense. The early hire mediator, using their power of confidential impasse diagnose can be help in several efficient ways: (1) Help the parties determine the necessary parties to a settlement; (2) Help the parties determine and help satisfy the information needs of insurers which may be different than the needs of the parties to the dispute; (3) Discourage the start of settlement negotiations with parties and relevant insurers until information needs

have been satisfied for both parties and insurers. Mediators help the parties understand why collaboration is in their best interest to satisfy such needs, instead of using adversarial processes; and (4) the mediator can help set up separate dispute resolution processes with insurers which allow the parties to proceed with different but ancillary processes to resolve party differences. See Van Osselaer, Paul J., "The Art of Mediation of Coverage Disputes," *The Brief*, Spring 2018, pp.46-57 (ABA Trial & Insurance Practice Section, Spring 2018).

10. My company is being represented by an insurance company, though we have a high deductible/self-insured retention. How do I ensure that the lawyers who represent us settle the case early to avoid the expense that we have to absorb within our deductible/retention?

You may need to apply pressure directly or through your broker. If that is not successful, you may need to retain coverage counsel. Finally, you should look to a Guided Choice mediator to help with any negotiations.

11. I understand that having a mediation requirement in our contracts is a good idea with no downside. How do I ensure that all our subcontractors, consultants, vendors, and sureties participate in mediation if a dispute arises that affects all of us?

Include an obligation to mediate in all of your contracts. In the construction industry that would include a requirement to

mediation in the General Conditions document. The language for that type of clause is contained in all standard form construction contracts, which can serve as models for other disputes.

12. After we have reached an impasse, my client does not want to pay additional mediation costs. And I don't want the mediator interfering in my trial strategy. What should I do?

Don't set an expectation that disputes will be settled at the initial negotiation session. Too often parties are angry or disappointed if the case does not settle at the first (and sometimes only) negotiation session. A good mediator prepares the parties for a situation where a negotiation may have to be adjourned for the parties to resolve an impasse. In this type of situation, it is common for disputes to settle without the later involvement of the mediator.

Even if there are no planned subsequent negotiations, the mediator may help reduce the dispute resolution costs significantly by helping to design an efficient discovery process for whatever is the going forward dispute resolution process. If arbitration is the default, the mediator can also help the parties select the best arbitrator(s) and customize the arbitration process. The mediator can also help the parties be mindful of opportunities to resume settlement discussions.

13. You talked about the mediator suggesting arbitration as a tool to break impasse. Would the mediator also be the arbitrator?

No, we do not generally recommend that the mediator also act as an arbitrator. We are concerned that a party may be reluctant to share important information with the mediator if the mediator could ultimately make a binding decision in the case. There may be situations where this concern doesn't apply, but they would be an exception to the general rule.

14. I am an in-house counsel. I don't want to give up control of managing the settlement. The Guiding Mediator seems to have more control over the negotiation than a traditional mediator does.

We understand your concern but remember that you have the power to control the negotiation process and the offers and demands you are willing to make. The Guiding Mediator is your resource and not your negotiator. Remember, too, that the Guiding Mediator can assist by learning about your opponent's position and what needs to happen for you to reach a settlement.

15. Is Guided Choice Mediation useful if a lot of time has already been spent in discovery?

Yes. While Guided Choice encourages settlement as early as possible, sometimes the case is further along the road to trial or hearing and saving the expense of discovery and experts is not possible. Even late in the game, a mediator can facilitate settlement by designing an effective negotiation process.

16. How do you get a mediator involved as early as possible when a party objects that it is too early for mediation?

This objection is usually based on the lack of understanding of the mediator's multi-phase role. The objectors believe that by agreeing to mediation they have agreed to settlement negotiation. They have not. The objector does not understand the important pre-settlement negotiation role a mediator can play. Mediators can use their power of confidentiality to learn the parties' needs that must be satisfied before they are ready to negotiate. These needs are more than just discoverable information and may include biases and heuristics. This could include cultural and gender differences, organizational decision-making culture, reliance on differing data or opinions,

fear of how settlement will be perceived, personal anger, and perception of prior offers and demands.

17. Does early dispute resolution depend on attorney hiring and staffing choices?

Your lawyers should have experience resolving cases using mediation. Ask for examples of cases settled before various stages such as before summary judgment and after depositions; before depositions; before written discovery; before complaint is filed. Evaluate counsel's ability to maintain composure, civility, and to garner respect from the other parties.

## **Agreement to Retain Mediator for Limited Services**

The signatories have a dispute ("Dispute") which they desire to resolve as quickly and efficiently as possible. However, the parties, while agreeing to mediate, are not ready to commit to negotiate a settlement agreement. The parties want to retain the Mediator to help them create the best process for achieving an early settlement that is efficient in minimizing expense uncertainty.

The parties wish to benefit from the Mediator's ability to provide process recommendations based on confidential information which is privileged from further use. The parties want to ensure that any information they or their counsel exchange or provide to the Mediator and other parties as part of the process will be treated as confidential.

Therefore, the Parties and the Mediator agree as follows:

1. The parties agree to retain the Mediator based on the Commercial Mediation Rules of the American Arbitration Association ("Rules"), or such other agreed Rules, which are incorporated by reference. To the extent such Rules conflict with applicable law, the more restrictive law will apply. Further, this retention is not a consent for the Mediator to schedule or begin settlement negotiation of the Dispute without affirmative consent of the parties.
2. Any party may terminate the Mediator's services upon written notice without prejudice to subsequently using the Mediator or another mediator to assist in subsequent mediated settlement negotiations. The confidentiality of the information covered by this agreement shall continue, unless otherwise agreed by the parties in writing.
3. The parties agree that the Mediator will not be made a party or a witness to any legal proceeding nor will they seek discovery from the Mediator. Furthermore, all communications exchanged with the Neutral and each other under this agreement shall not be discoverable.
4. Nothing herein shall prevent the parties from also pursuing their rights to litigate or arbitrate while the Mediator is also serving under this agreement.
5. Unless the parties have agreed otherwise, nothing herein shall require that these prenegotiation services or subsequent mediated settlement negotiations be administered by an agency.

Johanna Doe, Mediator

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