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GUIDING MEDIATION TO MEET DEMAND

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All standard construction industry contract forms require mediation of disputes as a condition precedent to proceeding toward binding dispute resolution,[2] so it is a fair assumption

that parties want their disputes to settle and use mediation to achieve that goal. There is wide variation in how the mediation process proceeds, but a common approach, which this article will refer to as the "Standard Approach" is a follows: The parties (or some dispute resolution service[3]) selects the mediator; the parties and mediator schedule the mediation session; several days before the mediation, the parties send their position statements to the mediator and each other; finally, the parties attend the scheduled mediation session to see if the mediator can help them settle their dispute. Most construction disputes eventually settle, so the Standard Approach works, but to examine how it might be improved, the authors conducted a survey of 330 construction law attorneys from across the country to determine whether the Standard Approach was delivering all that practitioners desired.[4] This article discusses the results of that survey, and based on the responses proposes modifications to the Standard Approach to better achieve the results desired by the survey respondents.

Important Timing Considerations for Effective Mediation

In general, the respondents indicated they wanted a mediation process that facilitated a rational, well-informed settlement as early as possible and that that early engagement of a mediator in the parties' mediation planning best serves that goal. Not surprisingly, when respondents were asked to rate on a scale of 1-10 (ten being highest) how important it was to resolve disputes before incurring full discovery expenses, the average score was 7.7.[5] While limiting the cost and time associated with full discovery is important, receiving sufficient information to be able to make a good settlement decision is equally important. Traditionally, the goal of full discovery prior to mediation was to give parties complete information so they could make rational decisions on how to resolve their disputes,[6] but the problem is that the

discovery process used in litigation to deliver that information has simply become too expensive.[7] Without full litigation discovery, respondents reported that their information needs were met only 6.5 times out of 10 before they participated in a mediation.

Therefore, the goal of a good mediation process would be to strike a balance between full litigation discovery and the information needed to make a good decision. This goal is hard to achieve if the parties attempt to fashion a cooperative information and document exchange without resorting to litigation and full litigation discovery. To avoid this problem, the parties can enlist a mediator early in their negotiations to help craft a collaborative, targeted information exchange (well short of full discovery) and to design a successful mediation process that keeps the parties in discussions through a structured process so they do not become intransigent before a meaningful and informed mediation session occurs.

Designing a settlement process early - before a lawsuit is filed or soon thereafter - pays dividends. Most parties and counsel acknowledge that the information needed to settle a case is often less than that needed to litigate or arbitrate it. As one experienced mediator observed, perhaps 70% of the information needed can be exchanged relatively cheaply, and the remaining 30% (the most expensive to obtain) can wait.[8] The mediator should help the parties satisfy their limited individual information needs, preferably on an expedited basis. The goal is to keep the exchange limited and targeted for settlement purposes so that it is not just the equivalent of an early federal or state Rule 34 document exchange.

If the respondents to the survey favored early mediation, they were asked what types of pre-mediation discovery or information exchange best helped achieve settlement during the mediation. Two hundred ninety three (293) replied that a detailed statement of damages was

helpful; 246 thought a limited exchange of requested documents was useful; 200 suggested an exchange of initial expert reports; and 151 thought the information exchange should be guided by the mediator. Other less favored information exchanges were targeted depositions (85), full project document exchange (47), interrogatories (25), and requests for admission (17). These responses confirm that a focused exchange of information on key issues and damages is enough for the parties to properly evaluate their case for mediation.

Another issue addressed by the survey was the extent parties wanted to maintain business relationships and focus on future work rather than past disputes. When asked to rate how important for their construction industry clients to maintain relationships with the other party after the mediation, the respondents rated that goal an average of 5.7 out of 10 with more than a third rating it 7 or higher. Relations in the construction industry are important to maintain, and one way to do that in mediation is again through early engagement of a mediator to design a process best suited to do that. Through early, confidential discussions with each party well before the mediation session is scheduled, the mediator can determine which relationships are important to preserve, what monetary or non-monetary options parties might consider to accomplish that goal, and how the mediation process could be structured to reduce adversarial tensions.

In response to the question of how important it usually was for their clients to resolve their disputes with other parties and get back to their business, the average response was 7.7 out of 10. This result emphasizes the importance of designing the mediation process so that it has the best chance of returning clients to their business after a hopefully successful mediation session. So often after a mediation session using the Standard Approach, the parties have not

settled their dispute, but after spending a day with the parties, the mediator has finally learned the parties' true impediments to settlement. As a result, it is common for the mediator to keep discussing with the parties how the dispute might settle. Indeed, the respondents state the continued engagement with a mediator after an unsuccessful mediation session resulted in a settlement an average of 6.3 out of 10 times. Nevertheless, these discussions are somewhat catch-as-catch-can as the parties' and the mediator's attention move on to other matters, and the mediator has to keep negotiation momentum alive and perhaps schedule a subsequent mediation when the parties are eventually ready to settle. A better approach would be to conduct discussions with the parties well before the scheduled mediation session to discover any impediments to settlement and how they might be addressed – e.g. through limited information exchange, an exchange of preliminary expert reports, a meeting among experts monitored by the mediator to see whether agreement can be reached on certain issues, exchanging damage calculations and back-up. The eventual mediation session will have much better chance of success if parties do not disclose they need more information or longer time to review it for the first time at the session.

Setting Your Mediation Up for Success – The Importance of Preparation

The general lack of mediation preparation by the parties is shown by answers to the survey question asking whether all parties were usually adequately prepared at the mediation session to reach a settlement; the average response was only 5.2 out of 10, and it does not bode well for a successful mediation session if parties are only adequately prepared close to 50% of the time. The responsibility to ensure parties are properly prepared to address issues that are likely to come up during mediation falls to the mediator. The mediator is in the best position to

have confidential discussions with the parties and their counsel before the session begins to discover issues that are important to them and impediments to settlement so the mediator can get all parties to properly prepare to address those issues at the eventual session. Yet when asked on a scale of 1 – 10 whether the mediators usually knew the particular impediments to settlement before the mediation session began, the average score was only 6.4. In order to be more effective at the mediation session and focus on solving the impediments, it is obviously preferable to know them well in advance before the session starts rather than discover them at the end of the day. One respondent stated that when acting as a mediator his goal was to make sure there were no surprises at the eventual sessions so the parties could focus on how best to settle the case; that can only be done if the mediator is actively engaged with the parties well before the session.

An important case in point is a mediation involving insurers. If insurance coverage is involved in the claims at issue, the respondents were asked on a scale of 1 -10 how prepared the insurers were to reach a settlement at the scheduled mediation session? The average response was 4.8 or less than 50% of the time. Given the long lead time insurers need to make a decision, set their reserves, or change their evaluation of a case, it is unrealistic to expect substantial contributions from insurers at a mediation session without substantial pre-mediation discussions with them. When counting on insurance dollars to fund significant parts of the settlement, one must lay the foundation for that recovery well before the mediation, which is another reason for early mediator engagement. During these pre-mediation discussions, the mediator should explore basic insurance issues, such as: what is a particular insurer's "time on the risk"; which exclusions are at issue; are there one or multiple occurrences; is there excess as well as primary coverage available; are there opportunities for parties to assert claims as Additional Insureds; and what are

the self-insured retentions applicable to the policies. The mediation session is not the time for the insurers to only just start monetizing risk, and if coverage issues and demands are saved until the mediation or shortly beforehand, the advocate is hurting its cause because the insurer needs time to process those demands.

To determine whether they were receiving the type of pre-mediation service they desired from mediators, the respondents were asked on a scale of 1-10 whether it would be helpful for a mediator to have a confidential discussion with them and their clients about obstacles to settlement and information needed before a decision before the mediation session. The average answer was 8.5. The respondents were then asked how often mediators contacted them before the mediation session began to have a substantive, confidential discussion about the dispute. The average response was 5.1. Clearly, there is a significant gap between the demand for early engagement by mediators and the mediation services that are being supplied.

Early engagement of a mediator and using techniques to resolve disputes as quickly as possible corresponds to a process known as "Guiding Mediation" which seeks to quickly resolving disputes and reduce the time-related expense of the adversarial process, preserve opportunities for maintaining valuable business relationships, and allow for innovative business ideas to facilitate settlement.[9] Getting the mediator involved early to help the parties design a successful settlement process are common themes of Guiding Mediation. The dynamics of each dispute are different, but a Guiding Mediator frequently seeks to have confidential discussions with each party and its counsel well before the mediation session in order to become familiar with the parties and their decision making processes, identify obstacles to resolution, and determine what discrete and specific information may need to be exchanged before a settlement

decision can be made. A Guiding Mediator also seeks to ensure that all parties' real decision makers are involved and prepared to negotiate by the time the mediation session is scheduled. If insurance coverage issues may be involved, the Guiding Mediator seeks to make sure the carriers are sufficiently informed about the dispute and engaged so they do not appear at the mediation claiming to need more time before they can determine their contribution, if any.

The Effectiveness of Evaluative Mediation

In addressing the type of mediator they prefer, 81 of the respondents in more narrative answers emphasized a strong preference for an evaluative mediator.[10] When asked what techniques used by mediators that they have found effective, respondents provided these illustrative responses:

- "Candid evaluative private feedback with the client in the room. Smart, experience-based understanding of the difficult issues and the risks the pose."
- "Speaking directly to parties (with counsel present) about strengths and especially weaknesses in their factual legal positions. Not doing is as just an exercise in "beating both sides up", but truly as an impartial and experienced neutral who can provide an actual evaluation of the parties' respective positions in an effort to facilitate a resolution."
- "My clients and I always appreciate hearing an objective, fact-based assessment of some of the key disputes in the case. Not standard mediator fare where both sides are told they will probably lose, but a truly independent perspective where the mediator frankly acknowledges some of our strong points, while also

explaining where they think some of our weaknesses lie. That assessment carries a lot of weight with senior executives…."

- "Speaking directly to clients about risks,… finding a way to develop trust of the parties,… and understand[ing] when to be facilitative and when to be evaluative depending on the circumstances."
- "Confidential delivery of frank – but informed and credible – assessments of strengths & weaknesses of both sides' cases and a strategic plan for moving both sides to resolution."

Of course, in order to provide well informed and trusted analysis, the mediators have to form a relationship of trust among the parties and understand the nuances of the dispute. This task is difficult in the Standard Approach because the mediator only receives mediation statements shortly before the session, meets the parties for the first time at the mediation session, and typically has only one day with them before he may be asked to provide a well-informed evaluation. In other words, under the Standard Approach, a mediator must spend the initial part of the mediation educating himself or herself about the case and may not have time to form a sufficiently informed evaluation or mediator's proposal. By contrast, a Guiding Mediator will typically have scheduled several private calls or meetings with each party before the session to become well informed about the issues in dispute and begin to establish credibility with the parties. When asked to offer, or deciding to offer, an evaluation of the dispute, the Guiding Mediator will be in much better position to do so and the evaluation will likely be better received as it has a more informed and trusted basis.

To emphasize the importance of pre-mediation preparation, in answer to the same question about effective mediator techniques, 52 respondents answered that they found pre-mediation conferences among the mediator, parties, and counsel to be very effective:

- "Receiving and reviewing key pleadings, documents, and expert reports before mediation, meeting with counsel for the parties privately before the mediated settlement conference takes place."
- "The mediator presiding over limited information exchange and exploring each party's motivations for settlement beyond pure dollars before the mediation."
- "Being prepared by knowing the relevant barriers to resolution pre-mediation so time can be effectively used during mediation without having to spend a lot of time educating."
- "Private meetings with parties or attorneys prior to official mediation; multiple private meetings with adjusters prior to mediation to confirm they are ready, fully informed, and [have] proper authority; mediator's assistance in ensuring parties have the information needed prior to mediation."
- "Long before settlement negotiations, the mediator diagnoses all the causes of impasses based on legal, factual, and human psychology and group sociology and recommends processes to satisfy the parties needs to change their position. Prior to negotiations, confidential videoconferences with each of the parties. Prior to negotiations, collaborative meetings with party experts to reduce differences."

This degree of pre-mediation activity takes time, which may pose a challenge. Many in-demand mediators are scheduled for mediations four or five days a week for several months, so finding time to engage in pre-mediation conferences will be difficult for those who are constantly in

session on other matters. If they are interested in early mediator engagement, parties and counsel have to make sure their chosen neutral has time for the process.

Another mediator technique the respondents found effective was for the mediator to issue a mediator's proposal when impasse has been reached. The respondents were asked, if a case does not settle at the mediation session, to rank on a scale of 1 – 10 how often they favored the mediator making a mediator's proposal to settle the case (where both parties' responses are kept confidential unless both parties said yes). The average response was 6.4. The result indicates this is a favored technique, but in order for it to be effective, mediators need to have spent sufficient time with the parties and the issues to make a credible proposal that might be accepted by all the parties which is difficult if the mediator's engagement is limited by the time constraints of the Standard Approach.

Ineffective Mediation Practices

Conversely, respondents were asked what they found were ineffective mediation techniques. Given the strong preference for evaluative mediator assessments, it is not surprising that 66 respondents found that mediators who shuttled numbers back and forth without substantive analysis trying to close the gap were ineffective.[11] Of course, being over-evaluative can also be counter-productive, and 20 found that bullying, strong-armed, hard ball, and argumentative mediators were ineffective.[12] Related to their desire for substantive analysis from the mediator, 16 respondents thought that ineffective mediators sought and focused on numbers too early and did not sufficiently discuss or pay adequate attention to the merits of the issues in dispute.

Twenty five respondents found that presentations by counsel to opposing parties in joint session were counterproductive and polarized rather than resolved the parties' differences. Seventeen respondents found that unprepared, unenergetic, and uninterested mediators were ineffective, especially those who declared impasse too soon. Another ineffective technique identified by 15 respondents was discussion about or emphasizing the costs of litigation as those risks were already considered known by sophisticated parties.[13] Just asking that the parties "split the baby" at a 50/50 compromise was found ineffective by 7 respondent, and excessive "war stories" were disfavored by 4 respondents.

The Efficacy of Virtual Mediation in the Post-COVID Era

Over the last several years, the use of Zoom or another video conferencing platform for mediations rose dramatically due to COVID 19 concerns, and the respondents were equally divided over whether mediations by Zoom were preferable over those conducted in-person. Those favoring Zoom emphasized the ease by which the mediator could conduct prehearing conferences with all parties and counsel session which allowed all involved to be better prepared for the actual mediation session. In addition, insurance adjuster participation and engagement was easier to obtain with video conferencing as they did not have to travel to attend the mediation. Respondents who favored in-person mediations thought it was easier to for the mediator to establish a personal relationship with parties and be able to "read the room" in person than it was over Zoom.[14]

Effective Mediation Techniques to Break Impasse

Respondents were also asked what techniques mediators have used successfully to break an impasse. Predictably, there were many suggestions, and some of the more frequent follow:

- A mediator's proposal that is declared rejected by all unless it is accepted by all: **107**
- Bracketing in which either the parties are encouraged to propose brackets or the mediator proposes them in order to narrow the parties' positions[15]: **47**
- Meeting with principals of parties or decision makers only without attorneys[16]: **23**
- Meeting with counsel only without clients: **10**
- Similar to the answer to the previous question on effective mediation techniques, providing a candid, private evaluation of each party's position and risk[17]: **21**
- Encouraging exchange of targeted information on issues causing impasse and then resuming mediation[18]: **16**
- Focusing on the easier or discrete parts of the dispute that can be settled to create momentum and then return to the more difficult ones: **9**
- Dogged, determined perseverance and engagement post-impasse[19]**: 11**
- Schedule another subsequent mediation session to let parties reconsider their positions and consider issues posed by the mediator: **8**

Although not as frequently mentioned, respondents also had other various suggestions:

- Explaining or exploring the costs of continuing to litigate or arbitrate the dispute if the case does not settle at mediation: **5**
- Referring an issue to a neutral expert or technical consultant for a non-binding decision or for guidance for the parties: **5**
- Exploring non-monetary reasons or advantages to settle**: 4**
- Meeting with competing experts to see if disagreements can be lessened or resolved[20]: **4**
- Asking each party for its litigation budget.

- Exploring what an acceptable settlement agreement terms would be before numbers are exchanged.
- Getting a physical check from the offering party and presenting it to the other party.
- Two mediators tag teaming on complicated multi-party litigation.
- Have each side argue the other side of the dispute in open session.[21]

What all of these options have in common is continued engagement by the mediator with the parties. A Guiding Mediator—who has already taken the time to know the parties and evaluate the issues in dispute—will be in a better position to implement these techniques to avoid impasse or continue his or her engagement with the dispute past the date of the mediation session if necessary.

Selecting an Effective Mediator

In regard to choice of mediators, respondents were asked the type of mediator they found the most successful in getting disputes settled, and their responses follow:

- Party appointed mediators with construction law expertise: **301**
- Party appointed mediators with general commercial litigation experience: **13**
- Federal magistrate judges: **18**
- Former or current state court judges: **15**

The overwhelming preference for experienced construction attorneys to select their own kind as mediators is not surprising as like usually seeks like.[22] Parties in federal courts are often required to participate in settlement conferences with magistrates, and it is surprising that so few respondents found magistrates effective mediators. One reason might be that magistrates do not appear to use the same methods to prepare a case for settlement as do successful Guiding

Mediators. Respondents were asked to rate on a scale of 1 -10 whether, beyond establishing a detailed pre-trial schedule, they thought federal magistrates created a process or established procedures to encourage early resolution of a case before discovery was completed. The average rating was 4.53. Magistrates must ensure discovery and the pretrial matters proceed as required by the Federal Rules of Civil Procedure, but the survey responses indicate magistrates could explore other means, such as those discussed in this article, by which to encourage early resolution of disputes which either is or should be an aspirational goal of the federal courts.

Contracting for Guiding Mediation

Finally, respondents were asked, on a scale of 1 -10, whether they thought a mediation clause was the most important risk management tool in the contract. The average score was only 4.0. With due respect to the respondents, if their dispute resolution goals are getting disputes quickly, efficiently, and effectively resolved and getting their client back to work, then the content of a contract's mediation clause should be of paramount importance. Based on responses to the survey, early mediator engagement and Guiding Mediation techniques are effective in achieving those goals, but the mediation clauses in standard form contracts simply require mediation without ensuring Guiding Mediation techniques will be considered or used. If early mediator engagement is desired, the following clause amending the AIA General Conditions could be considered toward that end:

Guiding Mediator Addendum

§15.3.5 The parties hereby amend Section 15.3 of the AIA A201 General Conditions of the Contract for Construction (2017 ed.) regarding mediation of Claims, disputes, or other matters in controversy ("Disputes") as follows:

> §15.3.5.1 A mediator shall be engaged by the parties as soon as one party thinks that resolution of the Dispute would benefit from the active involvement of a mediator. The

mediator shall consider and utilize Guiding Mediator principles and techniques to the extent appropriate and helpful to resolve the Dispute.

§15.3.5.2 Guiding Mediator principles and techniques considered by the mediator can include, but are not be limited to, the following:

§15.3.5.2.1 Contacting each party and its representative on a confidential basis to familiarize the mediator with the parties, identify decision makers, and learn each party's perspective on the Dispute before either scheduling or conducting a mediation session with all parties;

§15.3.5.2.2 Contacting each party and its representative on a confidential basis to determine its perspective of impediments to resolution of the Dispute;

§15.3.5.2.3 Exploring, discussing, and designing various approaches to and structures for the eventual mediation session with all the parties;

§15.3.5.2.4 Determining whether any discrete and limited information needs need to be met that would materially increase the chance of resolution of the Dispute and how the parties might cooperatively meet those needs;

§15.3.5.2.5 Identifying and attempting to secure the participation of all parties necessary for resolution of the Dispute such as, without limitation, insurers, sureties, subcontractors, design professionals, subconsultants, or other entities or individuals not currently participating in the mediation.

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[2] AIA A201 § 15.3; ConsensusDocs 200 Article 12.4; EJCDC C-700 Article 12.01; DBIA Standard Form Article 10.2.

[3] AIA A201 § 15.3 specifies mediation shall be administered by the AAA; ConsensusDocs 200 Article 12.4 permits the parties to choose mediation through either the AAA or JAMS; EJCDC C-700 Article 12 does not specify which service the parties must utilize; and DBIA Standard Form Article 10.2 specifies that the mediation will be conducted by a mutually agreeable impartial mediator or a mediator designated by the AAA if the parties cannot agree to select a mediator.

[4] The survey was comprised of 21 questions and sent to members of the American Bar Association Forum on the Construction Industry and members of the Top 50 Construction Law Firms in the US as determined by Construction Executive Magazine. The authors wish to thank the survey respondents for their time in carefully answering the questions posed to them.

[5] Indeed, all but 41 respondents rated this concern at 6 or higher.

[6] *See Hickman v. Taylor*, 329 U.S. 495, 501, 67 S. Ct. 385, 389 (1947) (describing modern discovery rules as intended to permit "the parties to obtain the fullest possible knowledge of the issues and facts before trial.")

[7] *See* Kathleen S. McLeroy, *The Next Frontier of Mediation: Mediating E-Discovery Issues*, American Bar Association (Mar. 13, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2018/03/e-discovery/.

[8] *See* Dean B. Thomson, *Early Mediator Engagement: Lessons from Master Mediators*, 15 Journal of the ACCL 39, 41 (No. 1, 2020).

[9] Dean B. Thomson, *Early Mediator Engagement: Lessons from Master Mediators*, 15 Journal of the ACCL 39 (No. 1, 2020). Guiding Mediation is also sometimes referred to as Guided Choice. *See* Dean B. Thomson and Paul M. Lurie, *The Guided Choice Process for Early Dispute Resolution*, 1 The American Journal of Construction Arbitration & ADR, 23 (2017).

[10] The preference for evaluative rather than facilitative mediators was consistent with an earlier survey of Forum members done in 2001. *See* Dean B. Thomson, *A Disconnect of Supply and Demand: A Survey of Construction Mediation Practices*, 21 The Construction Lawyer, 17 (No. 4, 2001).

[11] Other descriptions of the same characteristic were: "simply communicating demands and offers without an appreciation of the details or a qualitative assessment of the dispute"; "passive mediators who do not get engaged or understand the facts and appear to be merely repeating what the other side said"; "just shuttling numbers back and forth and not seeking to articulate the weaknesses in both sides of the case"; "unwillingness to challenge the parties"; "numbers mover without any substantive opinions on certain legal issues of factual issues"; "staying too neutral (i.e. not being willing to play devil's advocate—in an effort to retain parties' trust"; and "not addressing the merits of the legal or factual issues and not being prepared to challenge a party's proof".

[12] A variant of this complaint is a mediator who overstates criticisms of a party's position in order to encourage settlement. Mediators who state positions that are not based on logic or compelling facts lose credibility. As one respondent stated, "Mediators who simply attempt to discredit each party's case are transparent. A mediator need not focus on the good, but don't give me or my client a bad reason to dismiss my client's good argument. But absolutely do tell us the true vulnerabilities of our case. Any mediator who does not employ confidential evaluative mediation is wasting the parties' time."

[13] One respondent suggested this concern, while valid, should be reserved until the end of the mediation as a gap closer if the parties are close. Another respondent noted an exception to this complaint if there was a clause in the parties' contract allowing the prevailing party to recover attorney fees, in which case the concern should take on greater importance.

[14] For an excellent discussion on how to maximize the benefits of Zoom in mediations, *see* Robyn Miller and Paul M. Lurie, *Using Zoom for Pre-Mediation Activities to Achieve Earlier Settlements*, 22 Under Constr. 2 (ABA 2020),https://www.americanbar.org/groups/construction_industry/publications/under_construction/2020/winter2020/using-zoom-for-pre-mediation/.

[15] Bracketing was sometimes described as suggesting or recommending conditional offers – i.e. if they go to X will your party go to Y? Even though proposing brackets was favored by many as a means to break impasse, 8 respondents found it to be an ineffective technique, which shows that one technique is not suitable for all mediations.

[16] After recommending this techniques, one respondent cautioned, "But this was a disaster on one mediation where my client disclosed our worst case scenario to the mediator and other party within 5 minutes of meeting without counsel." Presumably, this is why another respondent recommended, "Structured meeting with the principals of the parties."

[17] Respondents described evaluation as giving parties a "second, independent opinion about the realities and costs of a dispute proceeding beyond mediation"; focusing on "particular cases that are reflective of what might occur"; "drawing on personal experience or other examples of likely outcomes to help reinforce risks of moving forward"; and "helping clients to be realistic about their positions w/o being critical of the party's counsel as mediators can more objectively deliver bad news."

[18] This was also described as giving "homework assignments" to each party where knowledge gaps exist to be answered before the next mediation session.

[19] As one respondent remarked, "If a mediator continues to check in with parties after an "impasse", often the logjam will break. In fact, I know several highly effective mediators who will not even use the word [impasse] unless the Court requires it."

[20] This was sometimes described as "hot tubbing" the experts under the mediator's guidance.

[21] One respondent had this intriguing additional suggestion: "An alternative that worked was a Mediator that locked his restroom after a day of mediation."

[22] A similar result was reported in a 2001 survey of Forum members. *See* Note 10, *supra*.