



## Guided Choice: Innovations in Mediation to Get Better Settlements at Less Cost

June 10, 2014 – 1:00 p.m. – 2:30 p.m. ET

### PROGRAM SUMMARY

**Speakers:** Paul Lurie, Laura Kaster, and Adrian L. Bastianelli, III

Most complex commercial disputes settle before awards and judgments. Yet, in court and often in arbitration, today's litigation community often resists serious settlement negotiations before engaging in extensive, costly document and expert discovery. These activities often result in substantial delay, increased animosities, and destruction of valuable relationships. The Guided Choice Process, the newest mediation innovation, offers a means to achieve earlier settlements, reducing the time and cost of dispute resolution, and increasing user satisfaction. In this 90-minute webinar, an experienced faculty will show you how following the Guided Choice blueprint can lead to better outcomes.

### AGENDA

<b>1:00 p.m.</b>	<b>Welcome and Introduction of Speakers</b>	(10 minutes)
<b>1:10 p.m.</b>	<b>Guided Choice</b> <ul style="list-style-type: none"><li>• Why Resolving Construction Disputes is So Expensive and Takes So Long</li><li>• Why Don't Cases Managed by Lawyers Settle Earlier?</li><li>• Key Elements of the Guided Choice Process</li><li>• How Guided Choice Works<ul style="list-style-type: none"><li>○ Diagnostic Phase</li><li>○ Process Design Phase</li></ul></li><li>• How Is Guided Choice Initiated?</li><li>• How to Find a Guided Choice Mediator</li></ul>	(70 minutes)
<b>2:20 p.m.</b>	<b>Conclusion and Questions</b>	(10 minutes)
<b>2:30 p.m.</b>	<b>Evaluation</b>	(5 minutes)
<b>2:35 p.m.</b>	<b>Adjourn</b>	

## Adrian L. Bastianelli, III

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Adrian L. Bastianelli, III is a partner at Peckar & Abramson. His practice focuses on construction claims and litigation, with an emphasis on government construction claims. He represents all sectors of the construction industry, including general contractors, subcontractors, owners, design professionals and sureties. Mr. Bastianelli also has an active alternative dispute resolution (ADR) practice. He has served as an arbitrator and a mediator on hundreds of construction disputes. He has served on numerous DRBs.

Mr. Bastianelli is a fellow of the American College of Construction Lawyers and has served on its Board of Governors, as the editor of its law review, and as the chair of its ADR Committee. He is also past Chair of the American Bar Association (ABA) Forum on the Construction Industry and past President of the Washington Building Congress. He received the prestigious Cornerstone Award from the ABA Forum on the Construction Industry. He is active in the Associated General Contractors, having written several amicus briefs on its behalf, and spoken at its national convention and for its local chapter and served on its Federal Regulations Committee.

Prior to joining Peckar & Abramson, Mr. Bastianelli was a founding partner at Bastianelli Brown & Kelley, Chtd., which merged with Peckar & Abramson. Prior to that, he served as a law clerk for the United States Court of Federal Claims, where he worked on cases involving federal contract claims. He also worked as



### Practice Areas

- Construction
- Dispute Resolution
- Government Contracts

### Education

- Purdue University, B.S.
- University of Louisville, J. D.

### Admissions

- District of Columbia
- United States Supreme Court
- United States Court of Federal Claims
- United States District Court for the District of Columbia
- United States Court of Appeals for the Federal Circuit
- United States Court of Appeals for the Fourth Circuit
- District of Columbia Court of Appeals

### Professional Associations

- American College of Construction Lawyers
- American Bar Association (Forum on the Construction Industry)

### (Adrian L. Bastianelli, III *continued*)

a civil engineer for the Corps of Engineers and obtained his professional engineers license (now inactive).

Mr. Bastianelli has written and spoken extensively on construction topics. He took the lead role in developing and editing the American Bar Association Forum on the Construction Industry's book *Federal Government Construction Contracts*, which is the standard in the industry on that subject. For seven years, he served as the associate editor or editor of *The Construction Lawyer*, the law journal of the ABA Forum on the Construction Industry. Mr. Bastianelli is on the Construction Advisory Council for Thomson/West.

Mr. Bastianelli is admitted to practice in the District of Columbia, the United States Supreme Court, the United States Court of Federal Claims, the United States District Court for the District of Columbia, the United States Courts of Appeals for the Federal and Fourth Circuits and the District of Columbia Court of Appeals. He received his bachelor of science from Purdue University and his law degree from the University of Louisville.

### Awards and Recognitions

- Recipient of the Cornerstone Award from the ABA Forum of the Construction Industry
- *Best Lawyers in America*, "Lawyer of the Year" in 2012 for Construction Law in Washington, D.C.
- *Chambers USA* in Construction
- *The International Who's Who of Business Lawyers*
- *The International Who's Who of Commercial Mediation*
- *Best Lawyers in America* in Construction
- *Washington D.C. Super Lawyer* in Construction/Surety; Top 100 Washington DC Super Lawyer, 2013
- Recipient of Cornerstone Award from the ABA Forum of the Construction Industry

### Publications

- *Federal Government Construction Contracts*, editor
- *The Construction Lawyer*, editor
- Construction Advisory Council for Thomson/West



Laura A. Kaster is a full-time mediator and arbitrator who has over 30 years of experience with arbitration, mediation and settlement negotiation in a wide variety of complex commercial and intellectual property disputes. As chief litigation counsel for AT&T Corporation and AT&T Labs for almost 10 years and as a partner at Jenner & Block, she was responsible for numerous settlement negotiations and mediations, many reaching novel results in matters involving multimillions of dollars. These matters including complex supplier disputes, class actions, all of AT&T's insurance claims arising out of the destruction of its hub on 9/11, patent claims, shareholder actions, outsourcing, and class actions. She has published and spoken widely for the ABA, PLI, CCA, NYSBA and NJSBA on issues involving attorney prediction error, and the cognitive biases and heuristics that impact settlement. She is co-editor in chief of *Dispute Resolution Lawyer*, the Journal of the NYSBA Dispute Resolution Section.

She is CEDR accredited and an International Mediation Institute certified mediator. She serves as a mediator in the greater New York metropolitan area for the American Arbitration Association, CPR and the New Jersey and New York Courts. More information about her can be found at [www.AppropriateDisputeSolutions.com](http://www.AppropriateDisputeSolutions.com).

Paul M. Lurie has been an experienced construction lawyer for more than 40 years, resolving a wide variety of cases for major owners, developers, architects and engineers through court, arbitration and mediation systems. He was the founder and construction group practice leader at Schiff Hardin LLP for many years. He was a founder of the American College of Construction Lawyers. He frequently speaks and writes to that group, and to training programs of AAA, the ABA Construction Forum, and programs of the International Bar Association on dispute resolution subjects.

For more than 15 years as a mediator appointed by AAA and by CPR, he has successfully resolved a wide variety of complex multi-party construction, environmental and real estate cases. He serves as an ACCL delegate to AAA's National Construction Dispute Resolution Committee.

He received the AAA Special Presidential Award for Leadership in Conflict Management for his 1998 creation and continuous management of the 700 member Mediate and Arbitrate Listserv. He is an International Mediation Institute certified mediator and a Distinguished Fellow of the International Academy of Mediators.

He founded and serves as Chair of the Guided Choice Dispute Resolution Interest Group, whose members include many prominent persons concerned about the cost of dispute resolution systems. His articles on the Guided Choice mediation system have appeared in the Journal of ACCL, the Construction Law Quarterly (UK) and will soon appear in the IBA's CIntl (Construction) Journal. CPR recently awarded his ACCL paper a 2013 best short ADR article award.



# Guided Choice: Innovations in Mediation to Get Better Settlements at Less Cost

AAA Webinar June 10, 2014

## Frequently Asked Questions

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### 1. If others are not interested in mediation, doesn't a Guided Choice pre-mediation investigation just add another layer of expense?

A basic Guided Choice confidential investigation phase can be done quickly and inexpensively, often by using phone conversations and reading existing documents. The mediator could also agree on a budget and schedule. After investigation, the mediator may report that settlement negotiations are not ready to begin. If so, the mediator may help the parties streamline document disclosure, either an arbitration or a court case to reduce the expense of those processes, especially concerning discovery (and e-discovery) and motions. The investigation often prevents false starts to mediation and makes it more successful at an earlier point. This reduces the overall cost of mediation and improves the likelihood of settlement.

### 2. I am concerned that the mediation process will delay getting the dispute resolved by court or arbitration?

The Guided Choice mediator's job is to shorten the process: get the case settled faster or move it to the next step if settlement is not possible. At the end of the day, I think you will find that the Guided Choice mediator will not cause delay and will help the parties achieve settlements more quickly.

### 3. We have tried to settle the case, but we are too far apart. Won't mediation be a waste?

Despite initial negotiation failure, the mediation process is often successful in getting disputes settled. The Guided Choice mediator examines whether further information exchange is needed and what each party needs to do to examine its risk assessment and better understand the opposing perspective. Mediation helps the parties change their initial positions based on new information and objective risk evaluation. Mediation starts the process of re-evaluation. The mediation process is a continual learning experience for the decision makers that helps with negotiations and if necessary fashions a means for expert advice or an adjudication of individual issues or the entire matter. Remember, even during mediation, parties cannot be forced to accept settlements they don't want.

**4. The contracts have a step negotiation clause. 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 a one day mediation event. Negotiations prior to mediation are a good thing and an important tool that should be overlooked. However, it works best when outside litigating counsel is not yet involved and there is a good business relationship between the parties. If these factors are not present, these executive meetings can make parties more angry and unwilling to change positions. Under Guided Choice, the mediator does a confidential investigation and obtains knowledge of the reasons for the reluctance to settle. As a result, the Guided Choice mediator may have some suggestions about how the executive meeting should be conducted with or without the presence of the mediator or attorneys.

**5. Should I have an arbitration clause in the commercial contract?**

I think we could start a long debate with this question. The pendulum swung toward litigation. However, I heard a study that after being given the opportunity to litigate, the pendulum is swinging back. There are some things that arbitration provides that litigation does not. One is the ability to select the arbitrators and second is the ability to design a process that works for the parties and the dispute. The Guided Choice mediator can be of great assistance in this respect.

**6. What if I don't have an arbitration clause in the underlying contract?**

The Guided Choice mediator may recommend that the parties fashion an expedited arbitration which can be limited in scope to the questions to be decided. For example liability or damage issues could be decided without deciding the final award.

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

Guided Choice is a re-introduction into the mainstream settlement procedures that are already used by the best mediators. Unfortunately, many mediators do not receive training in these techniques. For example, pre-mediation activities were always considered necessary for an efficient settlement process. These seem to have gotten lost in many mediations. Some counsel do not focus on the pre-negotiation and pre-mediation phase, remaining focused on litigation expectations and preparations, even timing. Early case assessment and the help of a Guided Choice mediator can materially advance either negotiated or mediated settlement.

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

Make sure that mediation is included in all your and the project or "deal" contracts. If you are in a dispute, as early as possible, tell your lawyer you want them to consider ways to achieve the earliest and least expensive methods of resolution. Ask them to contact the American Arbitration Association if they want more information. They can also review the Guided Choice website [www.gcdisputeresolution.wordpress.com](http://www.gcdisputeresolution.wordpress.com)

- 9. 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 and avoid the expense that we have to absorb within our deductible/retention?**

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

- 10. I understand that having a mediation obligation in our contracts is a good idea with no downside. How do I ensure that all of our subcontractors, consultants, vendors, sureties also must participate in mediation if a dispute arises that affects all of us?**

Include an obligate to mediate in all your contracts and general conditions to which your team is bound. The language for such a clause is contained in all standard form construction contracts. These can serve as models regardless of the industry involved.

- 11. Once an impasse is reached in the mediation, my client does not want to pay more mediator costs. Also I don't want the mediator sticking his nose in my trial strategy.**

There is no reason for a final impasse in a Guided Choice mediation. If the case does not settle in the initial negotiations, there is still a reasonable likelihood that it will settle in the future, particularly if there is a Guided Choice mediator to schedule future settlement discussions. In addition, until the case does settle, the Guided Choice mediator can reduce the dispute resolution costs significantly by assisting with design of a court or arbitration procedures, including an efficient discovery process synchronized with opportunities to resume settlement discussions. The mediator can also help the parties select the best arbitrator(s).

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

We would not generally recommend the mediator agree to 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 have the power to make a binding decision. There may be some situations where this is not a problem, but it would be an exception to the general rule.



# Using the guided choice process to reduce the cost of resolving construction disputes

**Paul M Lurie**

*Schiff Hardin,  
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In this article the author explores recent developments in the use and practice of 'Guided Choice Dispute Resolution', a novel approach to traditional mediation to create a customised process for the parties to accelerate settlements resulting in reduced time and expense.

## **The current situation is unacceptable to business**

Existing methods of resolving construction industry disputes using courts and arbitration are often regarded as too expensive and too time consuming. This excessive expense affects profits of project participants and increases the risk of higher insurance premiums and

the self-insured expense for companies with large deductibles and retentions. The same problems exist both in the United States and in other international arenas.

While most commercial cases settle before judgment or award, these settlements often occur late in the litigation or arbitration process. Earlier settlements that avoid excessive delay and expense are the best way

to achieve acceptable results and reduce the cost of dispute resolution in the construction industry. However, traditional mediation and arbitration do not focus on the cost and aggravation-saving advantages of early settlements. Arbitrators often do not encourage settlement in a meaningful way. Traditional mediation often terminates over impasse issues and the involvement of the mediator ends.

The Guided Choice system recognises that not all disputes can be settled without some formal or informal information exchange process. When a party believes it lacks outcome determinative information, this situation often results in a rejection of mediation as being 'too early'. Under Guided Choice, when it is apparent that information is necessary for position change, but not voluntarily available to break impasse, the Guided Choice mediator facilitates the customisation of arbitration, litigation or dispute review board processes focused on the impasse issues, which require more information – or even decisions. Unlike traditional mediation, the Guided Choice mediator continues to be involved only in settlement discussions, even while the parties engage in these other processes.

### **Some problems with arbitration**

As Professor Thomas J Stipanowich has noted in his many writings, arbitration has the potential to achieve quicker and less expensive binding results than court-based legal systems.<sup>1</sup> But recently arbitration has acceded to the desire of litigators for expensive adversarial discovery and motion practice, including e-discovery issues. Because of this expense, standard one-size-fits-all arbitration, based on well-known rules of procedure, has started to fall out of favour with respected critics in the United States and internationally.<sup>2</sup>

The legal profession generally sees arbitration as an alternative to a court proceeding; they do not see customised arbitration as a method to develop information which can affect settlement positions and break impasses.

### **Some problems with traditional mediation**

Mediation has the potential to significantly reduce the cost and time for settling construction disputes. Most commercial

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## *The Guided Choice system recognises that not all disputes can be settled without some formal or informal information exchange process*

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disputes are settled and do not go to judgment or arbitration award, and many of the widely used published standard construction industry contracts require mediation as a precondition to litigation or arbitration.<sup>3</sup> Also, procedural court rules increasingly require mediation. Still, the concept of mediation as a flexible process is often misunderstood. John Bickerman, former chair of the ADR Section of the American Bar Association (ABA), recently wrote: 'There is no clarity in what mediators do, and so [mediation users] have no idea what style of mediation they are buying and whether it is what they want for their dispute. In the past, some in the field have tried to define mediation as one style and ban the rest. All of the models of mediation have merit in the right circumstances.'<sup>4</sup>

As presently used, the mediation process does not realise its potential to promote early settlements that reduce costs and delay. Instead, mediation is frequently seen as a tool to be used close to trial or an arbitration hearing as a hedge against an unfavourable judgment or award.

### **Why doesn't mediation achieve earlier settlements?**

#### *Failure to consider non-legal factors in a settlement*

The negotiations during a traditional mediation process focus on the risk of winning or losing and the related costs. Many users and mediators view 'mediation' as the date on which the parties meet to attempt a negotiated settlement (which is referred to here as the 'negotiation event'). The reasons that mediations fail to produce settlements at the time of a negotiation event, especially if it occurs early in a dispute, are more complicated than just undertaking a probability analysis of winning and losing issues. Besides legal and factual disputes, the factors include issues of personality, risk tolerance and corporate culture. They also include the parties' wish to avoid a perception that they lost based on

their acceptance of a settlement proposal. That perception of loss is often based on erroneous predictions of outcomes by lawyers and experts.<sup>5</sup> Traditionally, these obstacles to settlement are not identified until after settlement negotiations begin, and they can result in an impasse that may be fatal to the process. The Guided Choice process identifies these factors confidentially, pre-negotiation, so that a mediation process can be designed to overcome potential impasses.

*Expanding cost versus ultimate information*

In order for parties to change their settlement positions, they need information to evaluate their chances of success or failure and change their perceptions of fairness before a court or arbitrator. Lawyers generally assume that the best way to gather that information is to prepare their cases for trial or hearing rather than for settlement. ‘We start off knowing 80–90% of the facts; we then spend 80–90% of the costs trying to find the other 10–20% – and then learn nothing really important.’<sup>6</sup> The Guided Choice mediator convinces the parties and their lawyers that information gathering for settlement should be different than information gathering for trial or arbitration.<sup>7</sup>

As US District Court Judge Patrick J Walsh recently said in the *ABA Litigation Journal*:<sup>8</sup>

‘Lawyers still conduct pre-trial as if their cases are going to trial; I think that is a mistake... Less than one percent of the civil cases that could go to trial actually do.’... [T]he scorched-earth practice many lawyers employ, attempting to discover “everything” without regard to cost and aggressively litigating when production is not forthcoming, seems inconsistent with the goals of the civil rules – the just, speedy, and inexpensive resolution of the case – and what one assumes is the client’s goal: obtaining the best possible result for the least amount of money.’

While lawyers seek ‘perfect knowledge’ with legal discovery, in the world of commerce, people make decisions about business matters, including settlements, with much less information than would make a trial lawyer

comfortable. As Malcolm Gladwell wrote in his book *Blink*,<sup>9</sup> ‘[I]f we are to learn to improve the quality of the decisions we make, we need to accept the mysterious nature of our snap judgments. We need to respect the fact that it is possible to know without knowing why we know and accept that – sometimes – we’re better off that way.’<sup>10</sup>

The different ways the human brain makes decisions have been summarised in the important work of Daniel Kahneman in his book, *Thinking Fast & Slow*.<sup>11</sup> Kahneman’s work should be required reading for every mediator and advocate.

The Guided Choice process recognises that previously unknown or understood information is critical to settlement positions. Guided Choice mediators must convince the parties that a cooperative method of information exchange is better than the use

*Guided Choice mediators must convince the parties that a cooperative method of information exchange is better than the use of a court or arbitration-based adversarial system*

of a court or arbitration-based adversarial system. Guided Choice mediators know how to show the parties that they have a common interest in an efficient and timely exchange of outcome-determinative information that is perceived as truly reliable. These objectives can be

achieved in a Guided Choice mediation even if the parties prefer to use the formality of pre-hearing arbitration or court procedure to ‘make a record’.

**How Guided Choice works to achieve early settlement**

Before encouraging direct negotiations, the Guided Choice mediator investigates and diagnoses the reasons that the parties have been unable to settle. Mediators have the unique ability to investigate because of their use of confidentiality privilege.<sup>12</sup> Many traditional mediators ask for pre-mediation briefs that discuss legal and factual issues. The Guided Choice mediator also analyses the psychological and social science factors affecting the decision-makers. The Guided Choice mediator understands the importance of information exchange to settlement positions. He or she also understands the relevance or not of electronically stored information. Based on this diagnosis, the mediator then suggests a

process designed to overcome the impediments to settlement of the dispute.

At the early stages of litigation, lawyers and their experts may give clients unrealistic evaluations of the cost, time and probable outcome of the litigation. Some decision-makers may fear how settlement is perceived within their organisation. Other decision-makers may have cultural elements in play. For example, face saving may be culturally important. Some positions are based on experts' evaluations. Business and governmental units have formal or informal rules about how their representatives should negotiate. This is especially true for insurance companies. Further, some negotiators have more 'clout' or are more sophisticated and experienced than others.

The Guided Choice mediator investigates these factors and develops a diagnosis as to why the dispute has not yet settled. The diagnosis then becomes the basis for the treatment plan or design process. Too often in traditional mediation practice, the mediator discovers the factors influencing settlement during the negotiation process, when it is difficult to overcome them.

How the mediation process is designed may be the most important predictor of a successful settlement.<sup>13</sup> The process must be perceived as useful to both parties' interests; otherwise the process will be terminated. But frequently mediators give little thought to process design, beyond scheduling a negotiation event, preceded by the parties exchanging legal-style briefs.

A Guided Choice mediator would investigate factors such as the following:

- What information must be exchanged?
- Is there a requirement for the parties' executives to meet before mediation? If so, what role should the mediator play in preparing the parties for the meeting so that it is productive for settlement purposes?
- Is there a contractual requirement for a Dispute Review Board? If so, how should it be used for settlement purposes?
- Is there a requirement in place for an 'adjudicator?' If so, what role should that person play in a settlement process?
- What are the legal issues and the state of the law on these?
  - How will the lawyers inform each other and their clients about the legal issues that need to be resolved in court or arbitration?
  - Do the parties wish to certify questions

for binding or non-binding decisions by a specially selected arbitrator?

- Who will be involved in the negotiations for each party? Who would the parties like to see represent the opposition? Why? Will those people be physically present at the negotiations? If not, how should they participate?
- Are insurers involved in any settlement and if so how? Are there coverage issues? Is there separate coverage counsel for the parties? Should the mediator independently 'visit' with the insurance representative?
- Are there 'authority problems' that the attending party decision-maker may have? If so, how will those problems be addressed?
- What are the important entities that are not formally represented in the mediation? How will they participate in the negotiations? Examples could include subcontractors, vendors, governmental entities, citizens' groups or other aggrieved parties.
- Should multiple parties be broken into groups and meet independently with the mediator? When should those meetings take place?
- Can customised arbitration be a useful settlement tool?
  - If impasse cannot be overcome at a particular point in the negotiations, are the parties willing to begin a customised arbitration to resolve legal or factual issues? Can this subject be addressed during the planning of the process design without indicating a lack of faith in the mediation process?<sup>14</sup> Would the parties prefer to start the dispute resolution process with a customised arbitration process that assures that a final award is given by a date certain? Are the parties willing to commit to continue the mediation notwithstanding the parallel arbitration?
  - Where should the negotiations take place? In an office or in a more relaxed setting?
  - What is the form of the negotiation event?
    - Where should any meetings occur?
    - Should there be public opening statements? Should they be positional or invite conversation?
    - Is it likely that 'nothing will happen until 4 o'clock'? How can that be avoided?
    - What are the roles of the lawyers, the client representatives and the experts in making public presentations?
    - Will negotiation be conducted by the mediator shuttling between parties in

- separate rooms, or will negotiations be in public?
- Can the parties meet with or without their lawyers during the negotiation?
- How can we anticipate and overcome an impasse?
- What is the best setting for the negotiation?
- What are likely areas of impasse during the negotiations? What are effective methods for overcoming any impasse?
- Are apologies appropriate?
- Is disagreement among experts a potential cause of impasse? If so, how can differences between the experts be identified so that they can be factored into a settlement choice? Should the experts meet before negotiations, under the confidentiality privilege, to discuss ways to narrow their differences?
- Is a Dispute Review Board (DRB) in place and active? If so, under what circumstances would questions be referred to a DRB either on a binding or non-binding basis?
- Are the parties committed to a continued facilitated negotiation even if they are also pursuing arbitration or litigation?

**How is the Guided Choice process implemented?**

The only basic requirement for the Guided Choice process is an agreement to mediate since this empowers the mediator to conduct a confidential investigation of a broad range of issues. Mediation is already in a standard form construction contract if those were used. Mediation may be suggested by a judge or arbitrator. It may also be suggested by an agency case administrator. Any agreement to mediate opens the opportunity for discussion of why mediation in general and the Guided Choice process in particular make sense. Confidential conversations with a neutral should be valuable, even if the parties determine that the case is not then ready for mediated settlement negotiations.

If the parties agree to use the Guided Choice process for the mediation, they can simply incorporate by reference to the

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*How the mediation process is designed may be the most important predictor of a successful settlement*

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*The best mediators can achieve earlier, acceptable settlements and reduce the cost and time of dispute resolution using widely available techniques*

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procedure set out in the ConsensusDocs Guidebook, freely available online.<sup>15</sup> The underlying contracts do not have to be based on ConsensusDocs forms.

When the AAA/ICDR is administering a mediation,<sup>16</sup> it has agreed to help the parties implement the Guided Choice process if the parties ask. AAA/ICDR mediation clauses are included in the contracts published by the major US trade associations, including the American Institute of Architects, ConsensusDocs, Design Build Association of America and EJCDC.<sup>17</sup> The parties may also agree to mediation by referring to the AAA/ICDR in their agreement without having the case administered by AAA/ICDR. The parties can also place a detailed requirement to use the principles of Guided Choice into their pre-dispute agreement. An example of such a clause is contained in the author’s earlier article on Guided Choice.<sup>18</sup>

**Conclusion**

The best mediators can achieve earlier, acceptable settlements and reduce the cost and time of dispute resolution using widely available techniques. The Guided Choice process summarises the available tools. To achieve widespread use of these tools, lawyers must re-focus their practices to increase client value and satisfaction by reaching the earliest possible dispute resolution. Clients who want to achieve earliest possible settlements should ask their lawyers and mediators to use processes like Guided Choice. In addition, mediators should be trained to recognise the concepts of Guided Choice. Web-based training programmes are being developed by the Guided Choice Dispute Resolution Interest Group. For the latest developments in the Guided Choice process, see the blog [www.gcdisputeresolution.wordpress.com](http://www.gcdisputeresolution.wordpress.com).

**Notes**

1 Thomas J Stipanowich, ‘Beyond Arbitration: Innovation and Evolution in the United States Construction

- Industry' (1996) 31 Wake Forest LR R 65.
- 2 Steven Seidenberg, 'International Arbitration Loses Its Grip' *ABA Journal* (1 April 2010).
  - 3 The forms of the American Institute of Architects, ConsensusDocs, EJCDC and the Design Build Institute of America all include the mediation clause of the American Arbitration Association (AAA).
  - 4 John Bickerman, 'Adapting Mediation to What Users Want' *Maryland Bar Journal* (March 2012), 55 et seq.
  - 5 The seminal work substantiating lawyers as poor predictors of outcome is Jane Goodman-Delahunty, Par Granhag, Maria Hartwig and Elizabeth Loftus, 'Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes' (2010) 16(2) *Psychology, Public Policy, and Law* 133-57.
  - 6 Unknown source quote in an IBA Listserv email received by the author.
  - 7 This role of the mediator to convince the parties of the best settlement process can be described as being a 'nudge'. This is a different role than the traditional role helping the parties reach a substantive settlement. See Richard H Thaler and Cass R Sunstein (Yale University Press 2008).
  - 8 'Rethinking Civil Litigation in Federal District Court' *Litigation* (Fall, 2013), 6.
  - 9 Malcolm Gladwell, *Blink: The Power of Thinking without Thinking* (Back Bay Books, Little, Brown 2005).
  - 10 Gladwell, see n 9 above.
  - 11 Kahneman, Daniel, *Thinking Fast and Slow* (Farrar, Straus and Giroux, New York 2011).
  - 12 Christian Bühring-Uhle, Lars Kirchhoff and Gabriele Scherer, *Arbitration and Mediation in International Business* (Wolters Kluwer 2006), 175 et seq; Uniform Mediation Act (US) (UMA s 4(b)).
  - 13 Paul M Lurie, 'The Importance of Process Design to a Successful Mediation' in *AAA Handbook on Construction Arbitration and ADR* (2nd edn, Juris Publications 2010), Chapter 18. This work cites the research showing that process design is the most important factor in successful outcomes.
  - 14 Compare the construction partnering process, which anticipates that pre-construction the parties will meet to discuss the identification of problems likely to occur during the construction process and how they will

**Paul M Lurie** is a commercial mediator and arbitrator and Chair of the Guided Choice Dispute Resolution Interest Group. He is a partner in the Construction Law Group of Schiff Hardin. He is a Fellow of the American College of Construction Lawyers and a member of the Arbitration and Mediation Committees of the IBA's Dispute Resolution Section. He is a Fellow of the College of Commercial Arbitrators, the International Academy of Mediators and is an International Mediation Institute Certified Mediator. He can be contacted at [plurie@schiffhardin.com](mailto:plurie@schiffhardin.com).

be resolved so as not to slow the completion of the project or cause unnecessary expense. See AGC website [www.agc.org/cs/industry\\_topics/additional\\_industry\\_topics/partnering](http://www.agc.org/cs/industry_topics/additional_industry_topics/partnering).

- 15 The Guided Choice process is described beginning at p 10 in the ConsensusDocs Guidebook.
- 16 Also, under the new 2013 AAA/ICDR Commercial Rules, parties that submit an arbitration demand will be required to opt out of mediation, even if there were no mediation requirement in the pre-dispute commercial agreement. Hopefully this process will be adopted for the AAA/ICDR Construction Rules.
- 17 American Institute of Architects General Conditions, Form A-201 (2007). Sec 15.3 incorporates the American Arbitration Association Construction Rules. Other AIA documents also include mediation. See, for example, AIA B-101 2007. Sec 8.2. ConsensusDocs agreements also incorporate the AAA Rules. For examples, see ConsensusDocs form 240 Standard Agreement Between Owner and Design Professional (2011) Sec 9.4 and ConsensusDocs form 200 Standard Agreement and General Conditions Between Owner and Contractor (2011) Sec 12.4.
- 18 Paul M Lurie, 'Guided Choice: Early Mediated Settlements and/or Customized Arbitrations', *American College of Construction Lawyers Journal* (Summer 2013) available on Westlaw.



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