A Disconnect of Supply and Demand: Survey of Forum Members' Mediation Preferences

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The use of mediation to resolve commercial disputes is widespread and growing, especially in the field of construction.[1] Many construction industry contracts, including the current American Institute of Architects' (AIA) A201 General Conditions, require parties to mediate as a condition precedent to arbitration or other binding dispute resolution procedures.[2] Because of its focus on dispute resolution and avoidance, Division One of the Forum on the Construction Industry has a special interest in mediation and its practices. Accordingly, this Division sent a survey to Forum members regarding their opinions and preferences concerning mediation. The goals of the survey were threefold: (1) learn how and on what basis Forum members selected their mediators; (2) determine how Forum members preferred to have certain parts of a mediation conducted; and (3) define the attributes the respondents typically wanted in a mediator and whether they typically received them. This article reports and comments on the results of the survey.

The Survey and the Respondents

The survey was disseminated by a mass mailing to the entire membership of the Forum, which is the largest and most representative organization of construction lawyers in the United States. Six hundred eighty-six members returned completed surveys.[3] These respondents represent a significant cross-section of construction law practice areas: 47 percent (325) reported that they primarily represent contractors; 22.5 percent (154) typically represent owners; 12.5 percent (86) principally represent subcontractors and suppliers; 11 percent (76) most often represent design professionals; and the remaining 6.5 percent (45) either did not indicate their primary practice area or represent other categories of clients in the industry.

The respondents constitute an impressive range of mediation experience. When asked how many mediations they have been involved in as lawyers, the following figures emerged:

Number of Mediations	Members
1–10 =	227
1–20 =	193
21–30 =	91
31–40 =	40
More than 40 =	127

Thus, the surveyed lawyers have represented clients in 10,581 to 15,540 mediations. Interestingly, the answers to remaining survey questions did not vary significantly according to the number of mediations in which the respondents had been involved.

The Results

How and on What Basis Mediators Are Selected

Question 3 of the survey asked how parties most often select their mediators. Four hundred ninety-eight (498) or 72 percent said that they choose their mediator through mutual agreement of the parties. One hundred forty-five or 21 percent selected their mediator through an organization that provides mediation services. Seventeen or 2.5 percent responded that they pick mediators equally from an organization or by agreement of the parties.

Of the 145 who reported using an organization to provide mediation services, only fourteen were willing to list the organization they typically use. The two most common were the American Arbitration Association (AAA) (8) and Judicial Arbitration and Mediation Services (4). Although the AAA reports increasing numbers of those using its construction mediation services,[4] the small number of those acknowledging use of the AAA to provide mediation services is somewhat surprising because the AIA A201 General Conditions (1997 ed.) specify that contracting parties use the AAA's mediation services unless they agree otherwise.[5] The mediation requirements in the 1997 A201 should have been in use long enough for Forum members to report widespread use of the AAA's services.

A successful mediation often depends on the selection of the right mediator, a fact that can result in a regional or even a nationwide search. Question 5 of the survey asked respondents to rank by importance (1 being the highest) the factors that would most influence selection of a mediator from another region of the country. In descending order, the most highly valued criteria (according to their average score) are:

2.36 = mediator's subject-matter expertise
2.86 = mediator's reputation
2.89 = mediator's mediation experience
3.73 = mediator's acceptability to all parties

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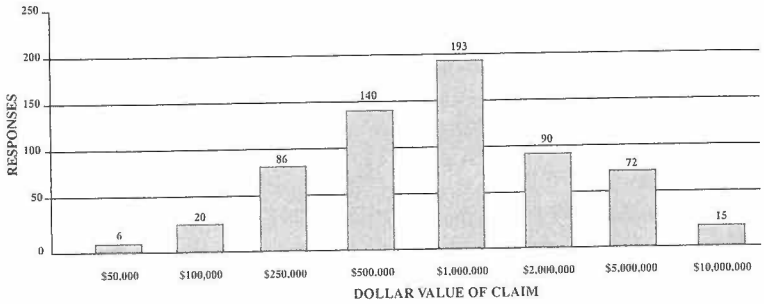
3.94 = mediator's mediation style
4.73 = size of claim
4.88 = mediator's legal expertise
5.71 = expense of mediator

With the exception of "size of claim," there is little reason why the relative importance of these factors would not also correspond to those considerations governing the choice of local mediators, not just those from another region.

If size of the claim mattered in selecting a mediator from another region, the respondents were asked to identify the threshold case value necessary to consider paying the higher costs of such a neutral. The peak of the bell curve appears to be around $1 million. (See "Minimum Claim Size" graph.) Size of the claim and expense of the mediator are respectively the third lowest and lowest factors in determining whether to select a mediator from another region. It appears that selecting the most appropriate mediator, no matter where he or she lives, is significantly more important than the extra cost that may be involved to retain the mediator. Considering the large amount of dollars common in complicated construction disputes, the case value at which Forum members and their clients would consider utilizing a mediator from another region seems relatively low.



Minimum Claim Size to Hire Mediator from Another Region

A comparison of the relative importance of other mediator selection factors provides interesting insights. A mediator's subject-matter experience appears to be the most important selection criteria (2.36), which contravenes the often-stated opinion that subject-matter expertise is not as important as a mediator's experience (2.89) or mediation style (3.94).[6] The mediator's legal expertise ran a distant seventh (4.88) out of eight selection factors.

It has been argued that, everything else being equal, a lay mediator is as good as a lawyer mediator. Ninety-four percent of those responding to the survey did not agree.

To further explore the importance of a mediator's legal experience in the selection process, the survey asked the following question, and the following underlined answers were received.

8. All other things being equal, would you prefer your mediator to be: (select one in each subpart)

.1	642	an attorney experienced in mediation and the field of your dispute, or
	34	a lay person experienced in mediation and in the field of your dispute?
.2	34	a lay person experienced in mediation, or
	621	an attorney experienced in mediation?
.3	203	an attorney experienced in mediation, but no in the field of your dispute, or
	446	a lay person experienced in mediation and in the field of your dispute?

It has been argued elsewhere that, everything else being equal, a lay mediator is as good as—if not better than—a lawyer mediator.[7] Ninety-four percent of those responding to the survey did not agree. The results changed significantly, however, in response to question 8.3 when the lay and lawyer mediator both had mediation experience but only the lay mediator had experience in the field of the dispute. In that case, 68.7 percent favored the lay mediator with experience in the area of the conflict, while 31.3 percent still would choose a lawyer inexperienced in that particular field. This result agreed with the answers to question 5.1, in which respondents found the mediator's subject-matter experience more important than his or her legal experience by a comparable margin of 67.4 to 32.6 percent. Nevertheless, question 8.3 established that a significant percentage of Forum members would prefer a lawyer mediate their dispute, even if the lawyer lacked substantive knowledge or experience in the field of the dispute.

The survey also inquired about situations in which a lawyer asked the mediator to evaluate the client's case confidentially to anticipate the litigation outcome. In such reviews, 62.5 percent of respondents preferred a mediator who was *not* personally acquainted with them based on previous professional or social dealings, while 37.5 percent favored the opposite. Apparently, although the credibility of the mediator is at issue in these circumstances, the clear majority preferred the presumed objectivity of an unknown neutral to the chance that prior personal or professional dealings might influence the mediator's evaluation.

Mediation Procedures

The survey also sought information on three common topics regarding the conduct of mediations: what type of premediation preparation respondents prefer, whether opening remarks are desirable, and how to make multiparty mediations more efficient and effective.

When asked to choose which of three types of premediation activities they preferred from a mediator (more than one could be chosen), 90.8 percent (624) selected a mediator who asks for and receives mediation position papers from all counsel, 41.3 percent (283) chose a mediator who speaks to each party's counsel before the mediation session, and 29.9 percent (205) favored a mediator who went even further and met with each party and its counsel before the

session. Clearly, the respondents want the mediator to come prepared to the mediation, and a substantial number want procedural and substantive discussions to begin before the start of the mediation session.

There is a debate whether requesting opening remarks from the parties is a desirable way to start the mediation. Some mediators think the statements identify issues and allow parties to approximate "having their day in court." Others believe that opening statements alienate the parties and, although momentarily satisfying, make settlement more difficult.[8] To gauge the preferences of participants in this process, the survey asked respondents to choose one out of three options regarding opening statements. Of those responding, 40.8 percent (276) preferred a mediator who insisted on opening remarks from each party, 47.5 percent (326) favored a mediator who gave the parties the choice whether to make opening remarks, and only 4.8 percent wanted a mediator who insisted that the parties not make opening remarks (6.9 percent did not answer this question). Although a significant number expressed a preference for mandatory opening statements, slightly more preferred that they be given the discretion to make a statement, perhaps to take into account the unique dynamics of each mediation.

One of the problems of construction or any complex commercial mediation is that it often involves multiple parties. If the mediator meets separately with each party, the sheer number of participants can cause parties to spend a lot of time simply waiting for their turn to meet with the mediator. To obtain suggestions on how to lessen this problem, the survey asked respondents to suggest techniques to improve the efficiency and effectiveness of large, multiparty mediations.

Two hundred and eight responses were received, many containing several suggestions. The most popular recommendation (60) was for the mediator to engage in significant premediation planning and preparation, which could include an exchange of premediation statements, submission of confidential settlement positions only to the mediator, a premediation meeting between the lawyers and the mediator to establish ground rules, and an exchange of expert reports, key exhibits, and damage summaries. All these activities could save everyone's time by educating the parties, and especially the mediator, about the facts and issues to be resolved and by establishing expectations and ground rules before the mediation starts.

Along similar lines, many (21) suggested that the neutral conduct several separate mediations with individual or logical groups of parties before convening everyone in one large mediation. The thought here is that all parties should not wait around (and possibly lose their enthusiasm for settlement) while significant, time-consuming issues are resolved within subgroups.

Because multiparty mediations are inherently time consuming, fourteen respondents cautioned the neutral to schedule enough time for the mediation, perhaps several days, with time in between each meeting. To further reduce the hours spent waiting without talking to the mediator, another fourteen suggested that the mediator combine parties into logical groups and have them interface with the mediator together. Twenty-five respondents emphasized the importance of the neutral establishing a schedule and sticking to it. One interesting suggestion was to have the mediator leave each group with an assignment to be completed before the mediator's return, such as estimating the probabilities of success on specific issues or calculating a detailed litigation budget. All of these timesaving suggestions seem to assume, and therefore support the recommendation for, significant premediation study and planning by the mediator.

Thirty-one respondents proposed using multiple mediators to increase the time that parties actually spend with a neutral. Although this was a relatively popular suggestion, not many of those surveyed described how the mediators could avoid the inefficiencies and difficulties inherent in attempting to coordinate efforts and share information among the multiple mediators. A few suggested mediators be assigned to discrete issues and parties under the control of a "master" mediator, but perhaps less continuity would be lost if only one person were involved and he or she conducted separate sessions between selected parties before the start of mediation among all parties. Scheduling separate submediations before the start of the main effort, however, assumes a detailed knowledge of the case that may be difficult to obtain until all important issues emerge, the parties gather, and the group dynamics appear.

Many other suggestions were made, including ensuring that people with authority to settle actually attended the mediation (23), utilizing trained and skilled mediators (23), employing a forceful, evaluative mediator (11), and breaking issues into logical subparts for settlement (7). All of these proposals, however, apply as much to two-party mediations as to multiparty ones.[9]

Mediator Attributes

Mediators have long debated whether they should facilitate, evaluate, or provide a combination of the two. At one end of the spectrum, those arguing in favor of the pure facilitative approach argue that mediation should be controlled by the parties and that the mediator should assist them only to explore settlement options. At the other extreme, strong advocates of the evaluative approach believe that the mediator's job is to achieve a settlement and that one of the best ways to accomplish that is to vigorously critique the parties' positions. Countless articles have been written about both the respective merits of each position and the vast array of options between the two poles.[10]

To better inform the debate, the survey asked what attributes the *participants* actually wanted in their mediators and how often they received those qualities. The idea simply was that mediators ought to know and try to provide what their clients want. The survey attempted to list common mediator attributes, starting with those considered to be the most "facilitative" and then progressing to the most "evaluative." For each of the nine qualities considered,

respondents were asked to rate from 1–10, ten being the highest, whether they typically *wanted* the attributes in mediators and then rate from 1–10 whether they typically *received* them. The averaged responses are shown in the table on page 20.

The first attribute respondents were asked to evaluate was a mediator who "communicates the parties' settlement positions and helps the parties avoid personality disputes." Not surprisingly, respondents wanted such service from their mediators, ranking it 8.1 out of 10, which was the third highest rating. An inability to communicate effectively and civilly is one of the main reasons parties need to resort to mediation, so being able to keep the peace represents an essential skill for a mediator.[11] Somewhat surprisingly, respondents reported finding this quality in their mediators only 69 percent of the time.

The next attribute considered was a mediator who "reviews with the parties the likely costs and expenses of proceeding and the uncertainty of the legal process." Respondents ranked their desire for this approach sixth, with an average score of 6.5. Not surprisingly, the respondents reported actually receiving this review from mediators 72 percent of the time, the highest percentage reported for receipt of an attribute. The relatively low demand for this service may be because counsel for the parties typically have reviewed (to some degree) with their clients the potential costs and risks of proceeding with the case, or perhaps because lawyers do not enjoy being encouraged to discuss in detail with the client the upcoming fees and costs of a case. Mediators frequently raise this topic, probably because mediation forms a logical juncture at which to emphasize that future costs can be avoided by settling the case.

The third attribute evaluated was a mediator who "asks the parties themselves to confidentially evaluate their own cases, but does not suggest any evaluation of the merits." Respondents liked this method the least of all nine and rated it 4.5 on a scale of 10, which was a full 1.5 points below the second lowest ranked approach. They reported receiving it, however, 50 percent of the time. Presumably, the parties and their counsel already have evaluated their case before the mediation and find this technique relatively ineffective.

The fourth attribute described a mediator who "presents various settlement options or solutions to the various parties based on the mediator's understanding of the case." Respondents wanted this service the most, rating it 8.9 out of 10, but received it only 60 percent of the time, fifth out of nine factors. As the most highly prized skill, it deserves more attention from mediators. This discrepancy suggests that mediators should engage in more creative discussions based on the mediator's informed understanding, experience, and judgment.

The next highest-ranked attribute was the fifth, describing a mediator who "confidentially discusses with each party the merits and potential outcomes of the case." This quality was ranked second, 8.4 out of 10, and was received 67 percent of the time, the third highest percentage. The described technique is more evaluative in character than the previous ones, and it allows the mediator to express his

ATTRIBUTES	Want to Receive	Typically Receive
1. Communicates the parties' settlement positions and helps the parties avoid personality disputes.	8.1	6.9
2. Reviews with the parties the likely costs and expenses of proceeding and the uncertainty of the legal process.	6.5	7.2
3. Asks the parties themselves to confidentially evaluate their own cases, but does not suggest any evaluation of the merits.	4.5	5.0
4. Presents various settlement options or solutions to the various parties based on the mediator's understanding of the case.	8.9	6.0
5. Confidentially discusses with each party the merits and potential outcomes of the case.	8.4	6.7
6. At an appropriate time during the mediation, encourages the parties to accept a resolution proposed by one of the parties or the mediator.	7.3	6.2
7. At an appropriate time during the mediation, forcefully *and* vigorously reviews with each party in confidence the mediator's opinion of the likely outcome of the case.	7.1	5.1
8. At an appropriate time during the mediation, forcefully *and* vigorously recommends a resolution proposed by one of the parties or the mediator.	6.3	4.8
9. Will not let the parties leave the mediation unless the mediator, not one of the parties, declares an impasse.	6.0	4.2

views on the merits and potential outcomes of the dispute based on his or her experience.

The sixth attribute described an increasingly evaluative mediator who, "at an appropriate time during the mediation, encourages the parties to accept a resolution proposed by one of the parties or the mediator." With this approach, the mediator attempts to reach closure by endorsing an outcome, a practice often discouraged by mediation trainers.[12] Nevertheless, the respondents ranked this technique fourth of nine, with a rating of 7.3, and they reported experiencing it 62 percent of the time, which also was fourth in terms of percentage received.

The seventh attribute evaluated a mediator who, "at an appropriate time during the mediation, forcefully *and* vigorously reviews with each party in confidence the mediator's opinion of the likely outcome of the case." By adding "forcefully *and* vigorously" and "mediator's opinion," this method represents an overtly directive and evaluative variant of the fourth attribute. The approach was ranked fifth, with a rating of 7.1, and it was used 51 percent of the time.

In an attempt to describe a mediator who exerts increasing pressure, the respondents in the eighth category were asked to evaluate a mediator who, "at an appropriate time during the mediation, forcefully *and* vigorously recommends a resolution proposed by one of the parties or the mediator." Significantly, any reference to maintaining the confidentiality of the recommendation was omitted. The respondents ranked the style seventh out of nine, with a rating of 6.3, and reported encountering this method 48 percent of the time. Again, overtly directive and evaluative mediation usually is not encouraged in mediator training programs, which may account for its relatively low occurrence. On the other hand, a rating of 6.3 indicates that it is an approach that is desired more than it is received.

The last attribute considered was a mediator who "will not let the parties leave the mediation unless the mediator, not one of the parties, declares an impasse." This quality was ranked eighth, with a score of 6.0, and was reported as being received the least or only 42 percent of the time. The relatively infrequent appearance of this approach may be explained by the often-expressed belief that the parties, not the mediator, should control the mediation.[13] Nevertheless, participants decidedly want this limit on quitting more often than not, reflecting a desire to exhaust the process until the neutral, not one of the parties, believes that the process has reached an impasse.

The attributes described in the survey are not mutually exclusive, and mediators often display many of them at different times. The survey indicates, however, that several of the techniques are not as frequently employed as would be expected based on the relative importance that participants place on them. For example, it is difficult to understand why the respondents, who have rated category four as high as 8.9 out of 10, receive the mediator's settlement options only a mere 60 percent of the time. One could argue that perhaps this highly rated function was appropriate for mediators to provide in only 60 percent of the mediations, but this rationale is doubtful for two reasons. First, stating settlement options represents a relatively uncontroversial mediator strategy that strikes a balance between a facilitative and evaluative approach, so it is difficult to believe it would be inappropriate 40 percent of the time. Second, *none* of the surveyed attributes (except number two, discussing the costs of litigation) actually were received more than 70 percent of the time. The typical frequency with which most of these techniques were used does not correspond to the relatively high importance placed on them. In short, there seems to be a disconnect between what participants are demanding and mediators are supplying.

It further would seem that if the construction mediation process will truly serve the needs of its consumers, mediators ought to better match the strategies they supply with those that the parties are demanding. There are several ways that a closer match can happen. First, mediators could be less constrained by theories of mediation and more concerned with providing and being flexible about what works in practice. Second, before the mediator is selected, counsel for the parties also ought to seek agreement about what methods would be most appropriate for their dispute and attempt to find and agree on a mediator willing to use those techniques. The participants and the selected mediator then should discuss (before the mediation convenes) what means they think might be appropriate for the mediator to employ. Finally, mediators could be encouraged and better trained to provide services that the consumers apparently want.

As an example, if participants highly value a mediator who "encourages parties to accept a resolution proposed by one of the parties or the mediator" (attribute number 6), then training programs should teach how to present this technique effectively. Assuming that getting beyond an impasse and settling the case are valued, then a range of impasse-breaking options ought to be learned and utilized by mediators.[14]

The key is for parties and the neutral to communicate their expectations before the mediation convenes, so that the mediator supplies what the participants demand.

Conclusion

With the use of mediation increasing at an exponential rate, it is important periodically to discuss and evaluate whether the process is meeting the needs of those using it. It is hoped that the empirical data derived from this survey will stimulate that discussion.

Endnotes

1. *See* GARY MORGERMAN, CONSTRUCTION MEDIATION: AFTER 20 YEARS, POISED AT THE NEW MILLENNIUM, (2001), (mediation is fast becoming and soon will be the prime forum for resolving construction disputes in the new millennium); Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479, 2000.

2. AIA Document A201, General Conditions of the Contract for Construction § 4.5.1 (1997 ed.)

3. The survey was sent to over 5,600 Forum members. A return of 686 surveys corresponds to a 12% response rate, which is a high rate of return given the time it took the recipients to complete the

survey, and the fact that the survey was sent as a mass mailing, after which no reminders were sent. Help! Wanted Cape Code's Seasonal Workforce, Cape Code Commission, Center for Policy Analysis, Univ. of Mass., Dartmouth (Oct. 2000).

4. *See* 1999 Construction Caseload Rises: Mediation Filings Alone Increase by 82%, Punch List (AAA, May, 2000).

5. *See* AIA Document A201 *supra* note 2.

6. *See* Fred D. Butler, *The Question of Race, Gender & Culture in Mediator Selection*, 55 DISP. RESOL. J. 36, 2001) ("It is widely held that while it is possible to facilitate a discussion with little or no subject-matter expertise, it is virtually impossible to mediate a dispute competently without process expertise"); Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, *in* DIVORCE MEDIATION: THEORY AND PRACTICE 429 (Jay Folberg & Ann Milne eds., 1988) (mediators who previously had mediated six to ten cases had a 64% settlement rate, whereas new mediators had only a 30% success rate).

7. *See* Cris M. Currie, *Should a Mediator Also Be an Attorney?* (2001), available at <www.mediate.com> ("There is no evidence to suggest that simply because a conflict may involve issues of law, that legal skills are more relevant to facilitating its resolution than human relations and negotiation skills"); Jessica A. Pearson, *Family Mediation*, in NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH FINDINGS—IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS 75 (Susan Keilitz ed., 1993) (research on mediator qualifications has failed to show a correlation between the mediator's education and rough indicators of performance, such as settlement rates or satisfaction by the parties); Craig A. McEwen, et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1344 (1995) (studies cast doubt on whether mediator qualifications, particularly educational degrees, make a substantial contribution to the fairness of the process); Robert M. Jarvis, *Lay or Law-Trained Arbitrators?: Some New Light on an Old Question*, 26 J. LAW & COMMERCE 601 (Oct. 1995) (although awards vary widely, the results for lay arbitrators and for lawyer arbitrators are almost identical).

8. *See* Marc Kalish, *Using Mediation to Settle Your Dispute*, 37 ARIZ. ATT'Y 22 (Jan 2001).

9. Steve Nelson, a Fellow in the American College of Construction Lawyers, has collected an interesting online discussion among various Fellows of the College regarding how to successfully manage multiparty mediations. *See* Steve Nelson, *Mediating the Multi-Party Construction Dispute—A Mediator's Perspective, State Bar of Texas* 11 CONST. L. NEWSLETTER (Winter) at <www.constlaw.org>.

10. Some authors contend that mediators should play a purely facilitative role in mediations. *See, e.g.,* Kimberlee K. Kovach & *Lela P. Love, Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOTIATION L. REV. 71, 79–81, 88–89, 92 (1998) (mediation is to assist parties in evaluating their own situations and developing their own solutions. Mediators may facilitate communication between the parties, help focus their understanding of their own and others' interests, assist in creative problem solving, and otherwise help the parties devise their own agreement. Yet, if the assistance a mediator offers becomes directive, such as providing legal advice or offering an evaluative assessment of each party's position, then the mediator is no longer mediating); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 941 (Summer 1997) (evaluation promotes positioning and polarization, which are antithetical to the goals of mediation, and mediator evaluation detracts from the focus on party responsibility for critical evaluation, reevaluation and creative problem solving); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669 (1997) (Evaluative mediation presents two primary dangers: (1) the parties' potential loss of self-determination, and (2) the mediator's potential loss of his or her impartiality). In contrast, others strongly advocate that mediators should take an active evaluative role in the mediation process. *See, e.g.,* John Forester and Lawrence Sussking: Activist *Mediation and Public Disputes, in* WHEN TALKING WORKS: PROFILES OF MEDIATORS 323, 328, 331, 333 (Deborah M. Kolb. et. al. eds., 1994) (it is not merely a matter of preference but a mediator's duty to evaluate and take active responsibility for reaching a sound agreement. A mediator is obligated to enlighten the parties with ideas and potential solutions drawn from the mediator's knowledge, experience, and expertise. Good mediators are "activists" who do not simply facilitate but work as advocates of a good solution); Maureen E. Laflin, *supra* note 1, at 479 (lawyers referring cases to mediators prefer those who fit the more "evaluative" profile); Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33:3 WILLAMETTE L. REV. 706 (Summer 1997) (evaluative mediation ranges from soft to hard: from raising options, to playing devil's advocate, to raising legal issues or defenses, to offering opinions or advice on outcomes. Mediation styles are more a continuum than distinctly different approaches).

11. *See* Love, *supra* note 10, at 941 (while parties typically enter the mediation process in a hostile and adversarial stance, the mediator seeks to shift them toward a collaborative posture in which they jointly construct a win-win solution); ROBERT D. BENJAMIN, GUERILLA MEDIATION: THE USE OF WARFARE STRATEGIES IN THE MANAGEMENT OF CONFLICT, (2001).

12. *See* AAA TRAINING MANUAL FOR CONSTRUCTION INDUSTRY MEDIATORS: FUNDAMENTALS OF THE MEDIATION PROCESS 84 (1997); Love, *supra* note 10, at 941.

13. *See* Robert P. Schuwerk, *Reflections on Ethics and Mediation*, 38 S. TEX. L. REV. 757, 762 (1997) (it is the parties who determine how the dispute between them should be resolved, and who decide how the mediator will function in helping them resolve their problem).

14. For example, grouping defendants can be more efficient; on the other hand, sometimes the defendants in a group begin to limit their offers based on what other defendants in the group are offering. If this happens, mediators could consider separating defendants and requesting that all offers be kept confidential. In this way, each party evaluates the case independently and is not influenced by the analyses and different goals of another party. Having the parties talk directly to each other with the mediator but without counsel can also break an impasse. The ability to use these two techniques, however, usually must be specified in the mediation agreement because it is often difficult to arrange and obtain consent for these strategies in the midst of a fast-paced mediation. A good discussion of impasse breaking strategies can be found in AAA TRAINING MANUAL, *supra* note 12, at 87.

COMMENTS FROM THE CHAIR *(Continued from page 4)*

lawyer's library. We are also developing a series of regional programs based on the *Fundamentals of Construction Law.* We hope to make the high-quality programming of our national programs more affordable and available on a local or regional basis. We intend to continue our leadership role in the development of quality construction lawyers.

While understanding established case law is critical, there is much more to being a good construction lawyer. The real-world experiences of problem solving on construction projects, not just dispute resolution, are fundamental to that development. The Forum remains committed to providing that education, but we can do it only with the continued assistance of the many volunteer members of this organization.