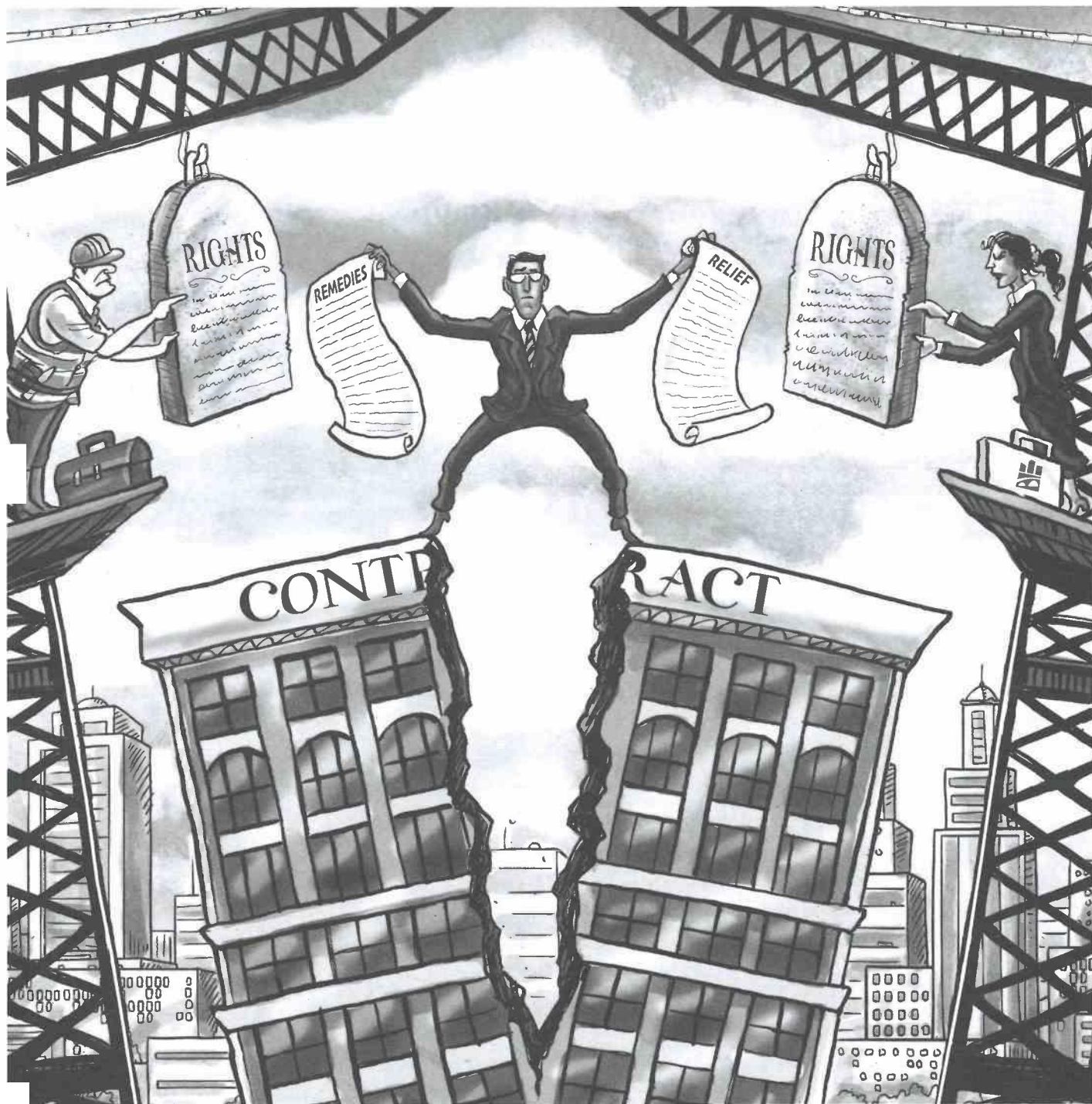




CONSTRUCTION LAWYER

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION | FORUM ON CONSTRUCTION LAW

VOLUME 42 | NUMBER 3 | 2023



RIGHTS, REMEDIES, AND RELIEF

Comparing Theory and Practice: Survey Results of What Attorneys and Arbitrators Want in Construction Mediation and Arbitration

By Dean Thomson and Julia Douglass



Dean Thomson



Julia Douglass

Theories abound about what construction attorneys want in mediation sessions. Equally numerous are theories about procedures, practices, and preferences of construction arbitrators. Most of these theories are based on the advocate's personal experience, but to better test the accuracy of those assumptions, the authors conducted two surveys to get a broad perspective on these questions. The first part of this article examines survey responses from over 330 construction attorneys about what they want from their mediators and whether mediators are

meeting that demand. The second part of the article offers survey responses from over 220 construction arbitrators about how they conduct arbitrations and make decisions.

Guiding Mediation to Meet Demand

All standard construction industry contract forms require mediation of disputes as a condition precedent to proceeding toward binding dispute resolution;¹ accordingly, 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 as follows: (i) the parties (or some dispute resolution service²) select the mediator; (ii) the parties and mediator schedule the mediation session; (iii) several days before the mediation, the parties send their position statements to the mediator and/or each other; and (iv) finally, the parties attend the scheduled mediation session to see if the mediator can help them settle their dispute.

Because the majority of construction disputes eventually settle, it is fair to say that 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 on all that practitioners desired.³ This portion of the 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, survey respondents indicated they wanted a mediation process that facilitated a rational, well-informed settlement as early as possible and 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 (10 being highest) how important it was to resolve disputes before incurring full discovery expenses, the average score was 7.7.⁴ 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 also 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.⁵ 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. The difficulty with this approach, however, is that the discovery process used in litigation to deliver that information has increasingly become too expensive.⁶

Therefore, the goal of a good mediation process would be to strike a balance between full litigation discovery and the information needed to make an informed decision. This goal is often hard to achieve even where the parties attempt to fashion a cooperative information and document exchange without resorting to a more "full litigation discovery" approach. To avoid this problem, the parties can enlist a mediator early in their negotiations to help craft an information exchange specific to the disputes (well short of full discovery) that can be geared toward a successful mediation process that ties the parties to structured discussions so they do not become intransigent before a meaningful and informed mediation session occurs.

Designing an early settlement process (i.e., before a lawsuit is filed or soon thereafter) often 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 percent of necessary information can be exchanged relatively cheaply, and the remaining 30 percent (the most expensive to obtain) can wait.⁷ 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 does not start to mimic a document exchange consistent with Federal Rule of Civil Procedure (FRCP) 34.

Where survey respondents favored early mediation, they were then asked what types of pre-mediation discovery or information exchange best helped achieve settlement during the mediation. Two hundred ninety-three respondents 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 often enough for the parties to properly evaluate their case for mediation.

Another issue addressed by the survey was the impact on mediation where parties to a dispute concurrently sought to maintain business relationships and focus on future work between their respective companies. When asked to rate how important it typically was for 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 one-third rating it 7 or higher. Relations in the construction industry are important to maintain, and early engagement of a mediator to design a settlement process without protracted discovery can be well-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 nonmonetary options parties might consider in order to accomplish both settlement of the instant dispute and an ongoing business relationship, and how the mediation process can be best structured to reduce adversarial tensions.

In response to the question of how important it usually was for their clients to resolve their disputes in relatively short order so as to return to their core businesses, 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. Oftentimes, where parties use the Standard Approach mediation, the

parties may not settle their dispute as part of the first formal mediation session; however, after spending a day with the parties, the mediator often learns 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, a majority of survey respondents believed that 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 because the parties' and the mediator's attention may move on to other matters following a formal session, and the mediator has to keep negotiation momentum alive and perhaps schedule a subsequent mediation when the parties are nearing readiness to settle. Best practices suggest that a mediator 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, and/or by exchanging damage calculations and backup. The eventual mediation session will have a much better chance of success if parties do not disclose they need more information or that they need a longer time to review it after receiving it for the first time at the initial session.

Setting Your Mediation Up for Success—The Importance of Preparation

A majority of survey respondents expressed concern over preparedness by parties to a mediation; in response to a 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. It is axiomatic that if parties are only adequately prepared approximately half of the time, many mediations will struggle to reach resolution of the subject dispute. In addition to the parties themselves, however, the mediator can also take steps to ensure parties are properly prepared to address issues that are likely to come up during mediation. 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; this then permits the mediator to assist all parties to properly prepare to address those issues at the eventual session.

When asked, however, 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 preferable for parties to explain impediments to mediators well in advance of the session rather than during or toward the tail end of the session when there is significantly less time to address them. One respondent stated that when acting as a mediator, one of his goals was to make sure there were no

surprises at the eventual sessions so the parties could focus on how best to settle the case; this goal can usually only be realized, however, when the mediator is actively engaged with the parties well before the session and is provided sufficient information to do such advance work.

An important case in point is a mediation involving insurers. Survey respondents were asked, “When insurance coverage is involved in the claims at issue, how prepared are the insurers to reach a settlement at the scheduled mediation session?” The average response was 4.8 (i.e., less than 50 percent of the time). Given the long lead time insurers typically need to make decisions, set their reserves, or change their evaluation of a case, it is unrealistic to expect meaningful contributions from insurers at a mediation session without substantial pre-mediation discussions with them. When counting on insurance dollars to fund significant parts of a settlement, one must lay the foundation for that recovery well before the mediation; this weighs strongly in favor of early mediator engagement. During these pre-mediation discussions, the mediator should explore basic insurance issues, such as (i) What is a particular insurer’s “time on the risk?”; (ii) Which exclusions may be at issue?; (iii) Are there one or multiple occurrences?; (iv) Is there excess as well as primary coverage available?; (v) Are there opportunities for parties to assert claims as additional insureds?; and (vi) 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 the value of pre-mediation service from mediators, survey 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 before the mediation session about obstacles to settlement and information needed before a decision could be made. 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. These responses reflect 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 correspond to a process known as “Guiding Mediation,” which seeks to quickly resolve 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.⁸ 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’ true 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 that 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 assess a potential contribution.

The Effectiveness of Evaluative Mediation

In addressing the type of mediator they prefer, 81 of the survey respondents emphasized a strong preference for an evaluative mediator (these responses were provided as part of a more narrative section of the survey).⁹ When asked what techniques used by mediators that they have found effective, respondents provided several responses.

Of course, to provide well-informed and trusted analysis, mediators must 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 the parties before the mediator 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 self-educating about the case and may not have sufficient time to form an 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 actual mediation session to become well informed about the issues in dispute and begin to establish credibility with the parties. When asked to offer, or proposing to offer, an evaluation of the dispute, the Guiding Mediator will be in a much better position to do so, and the evaluation will likely be better received because it has a more informed and trusted basis.

To emphasize the importance of pre-mediation preparation, in response to a survey question concerning effective mediator techniques, 52 respondents answered that they found pre-mediation conferences among the mediator, parties, and counsel to be very effective.¹⁰ Of course, significant pre-mediation activity takes time, which may pose a challenge. Many in-demand mediators are scheduled for mediations four or five days per week for several months, so finding time to engage in pre-mediation conferences is challenging for those who are constantly in session on other matters. Accordingly, if parties and counsel are interested in early mediator engagement, they should make sure that their chosen neutral has time for the process.

Another mediator technique that survey respondents

found effective was for the mediator to issue a mediator's proposal when impasse has been reached. Respondents were asked in instances where 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 as a mechanism to potentially achieve settlement (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 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; this is difficult where the mediator's engagement is limited by the time constraints of the Standard Approach.

Ineffective Mediation Practices

Survey respondents were also 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 counterproductive, and 20 respondents found that bullying, strong-armed, hardball, and/or 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 in the process 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 served to polarize rather than assist with resolution of 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 because those risks are typically already known by sophisticated parties.¹³ Just asking that the parties "split the baby" at a 50/50 compromise was found ineffective by seven respondents, and excessive "war stories" were disfavored by four respondents.

The Efficacy of Virtual Mediation in the Post-COVID Era Beginning in 2020, the use of Zoom or another videoconferencing platform for mediations rose dramatically due to COVID-19 concerns, and survey 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, which allowed all involved to be better prepared for the actual mediation session. In addition, insurance adjuster participation and engagement were easier to obtain with videoconferencing because adjusters did not have to travel

to attend the mediation. Respondents who favored in-person mediations thought it was easier for the mediator to establish a personal relationship with parties and be better able to "read the room" in person than over Zoom.¹⁴

Effective Mediation Techniques to Break Impasse

Survey respondents were asked what techniques mediators have used successfully to break an impasse. Predictably, there were many suggestions, with some of the more frequent responses and the number of time they were given as follows:

- A mediator's proposal that is declared rejected by all unless it is accepted by all: **107**
- Bracketing where either the parties are encouraged to propose brackets or the mediator proposes them in order to narrow the parties' positions¹⁵: **47**
- Meeting with principals of parties or decision-makers only, without attorneys¹⁶: **23**
- Meeting with counsel only, without clients: **10**
- Providing a candid, private evaluation of each party's position and risk¹⁷: **21**
- Encouraging exchange of targeted information on issues causing impasse and then resuming mediation¹⁸: **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 issues: **9**
- Dogged, determined perseverance and engagement post-impasse¹⁹: **11**
- Scheduling subsequent mediation session to let parties reconsider their positions and consider issues posed by the mediator²⁰: **8**

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 their engagement with the dispute past the date of the mediation session if necessary.

Selecting an Effective Mediator

Regarding choice of mediators, respondents were asked the type of mediator they found most successful in achieving settlement of disputes. Their responses were (i) party-appointed mediators with construction law expertise (301 respondents); (ii) party-appointed mediators with general commercial litigation experience (13); (iii) federal magistrate judges (18); and (iv) 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.²¹ Parties in federal courts are often required to participate in settlement conferences with magistrates, and it is notable that so few respondents found magistrates to be 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 pretrial schedule, they believed that federal magistrates created a process or established procedures to encourage early resolution of a case before discovery was completed. The average rating was only 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 (including those discussed in this article) to encourage early resolution of disputes such resolution presumably being in the interests of the court system itself.

Contracting for Guiding Mediation

Finally, survey 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 include achievement of quick, efficient, and effective settlement so as to return focus to core business, 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 authors propose that the following clause amending the AIA General Conditions could be considered toward that end:

§ 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 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; and

§ 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.

Arbitration Myths and Preferences from the Arbitrators' Perspective

There are several common myths about arbitration that can persuade parties to avoid arbitration in favor of litigation. Among these myths are (i) parties are unable to obtain discovery in arbitration; (ii) arbitrators do not grant summary judgment; (iii) arbitrators tend to “split the baby” and award an amount somewhere in the middle of parties' positions; and (iv) arbitrators do not follow the law.

To test whether these concerns have a credible basis, the authors conducted a survey of construction arbitrators to ask their practices regarding these issues (the Arbitrator Survey). In addition, the arbitrators were asked what advocacy techniques they found effective and ineffective. This article summarizes the results of that survey.

To get a broad response, the Arbitrator Survey was emailed to members of the ABA Forum on Construction Law, JAMS, the College of Commercial Arbitrators, the Mediate-Arbitrate listserv, and the American College of Construction Lawyers; only those persons who had actually served as an arbitrator in a construction dispute were invited to reply. The 228 who replied collectively reported to have participated as arbitrators in over 9,000 construction arbitrations. The experience reflected in the responses should provide a useful and authoritative resource for both parties and advocates when considering not only whether to choose arbitration as a dispute resolution process, but also how to best present cases to the arbitrators.²²

Can You Get Discovery in Arbitration?

There is a long-standing debate about how much discovery

is appropriate in arbitration,²³ and various ADR organization rules have attempted to establish some parameters for pre-hearing exchange of information, including document exchange, interrogatories, and depositions. For example, the AAA Construction Industry Arbitration Rules prohibit discovery in Fast Track Arbitrations except as ordered by the arbitrator in exceptional cases.²⁴ In its Regular Track Rules, the AAA attempts to lessen the burdens of document production by requiring the arbitrator to “manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of a dispute, while at the same time . . . safeguarding each party’s opportunity to fairly present its claims and defenses.”²⁵ Parties are not required to produce all relevant information, or at least as the Federal Rules of Evidence define “relevant”—i.e., information reasonably calculated to lead to the discovery of admissible evidence.²⁶ Instead, the AAA Rules allow the arbitrator to require parties to exchange documents in their possession “on which they intend to rely” and documents not in the requesting party’s possession “reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of the disputed issue.”²⁷ The arbitrators’ answers to questions about discovery in the Arbitrator Survey suggest a wide variety of practices regarding discovery/disclosure. The majority of arbitrator respondents (52.5 percent) seldom or never require each party to exchange its entire project file with the other, but a substantial minority (28.5 percent) usually or always do (19 percent require such an exchange about half the time). Relatedly, some arbitrators (37.2 percent) take on the task of limiting or targeting production as determined by them in their judgment, while 38.1 percent seldom or never do (24.8 percent) take such action approximately half the time.

When asked whether they apply the new standard of production created by AAA Rule R-24(b)(i)—i.e., production of only documents “on which you intend to rely”—68.1 percent of arbitrators indicated that they seldom or never order production using this standard; only 19.2 percent usually or always do, while 12.8 percent order such production approximately half the time.

The Arbitrator Survey also sought to compare the use of another new standard of production—i.e., production of documents considered “relevant and material to the outcome” as compared to the definition of relevance used by the FRCP—i.e., production of documents reasonably calculated to lead to the discovery of admissible evidence. The results indicate that a majority of arbitrators (56.1 percent) seldom or never use the “relevant and material” standard as opposed to the “reasonably calculated” standard, while 29.1 percent usually or always do; and 14.8 percent of arbitrators use the new definition about half the time. Arbitrators usually or always use the “reasonably calculated” standard to determine the scope of production 46.1 percent of the time, with 16 percent using such standard approximately half the time. Of

course, the FRCP contains a system of required disclosure, not only of documents, but also other case-related information at the very start of a case, which the federal judiciary and bar find useful. When arbitrators were asked if they require disclosures consistent with FRCP 26, 57.9 percent indicated they seldom or never do so, 28.7 percent said they usually or always do so, and 13.4 percent reported they did so approximately half the time.

One of the more common discovery disputes in any case (litigated or arbitrated) is whether, and, if so, what kind of electronically stored information (ESI) will be produced. The Arbitrator Survey polled arbitrators regarding the specific nature of ESI production ordered in cases where the parties could not agree to their own parameters. The arbitrators were given the common production methods of (i) paper only; (ii) native format ESI; (iii) non-native ESI (such as PDF or TIFF); and (iv) ESI with metadata or in OCR/extracted text format.

Most practitioners would acknowledge that a paper-only production with no ESI is uncommon even in small cases. The Arbitrator Survey bore this out. Most arbitrators (43.6 percent) seldom required a paper-only production and a significant number (26.1 percent) never require a paper-only production. There was, however, a small, but significant, number of arbitrators (14.7 percent) who usually required paper-only production with no ESI. Thus, while practitioners can now expect ESI to be produced in most cases, the Arbitrator Survey shows this is not universal.

Receiving ESI in PDF or TIFF format is not very helpful because it cannot easily be searched by optical character recognition software and there is no assurance that the PDF or TIFF copy has not been altered from the original native format of the ESI. Nevertheless, 22.7 percent of arbitrators always or usually order ESI to be produced in PDF or TIFF format, while 49.2 percent seldom or never do, and 28 percent do so approximately half the time. There is a slight improvement in the number of arbitrators who order ESI produced in its native format so its original format can be verified and it can be searched with OCR software. Thirty-five percent of arbitrators always or usually ordered ESI production in native format; 36.4 percent seldom or never did; and 28.6 percent did so approximately half the time. The most useful, but also the most expensive, production of ESI is with OCR/Extracted Text and/or Metadata; Arbitrator Survey respondents indicated this is not often ordered, with 12.2 percent always or usually ordering it, 73.1 percent seldom or never ordering it, and 14.6 percent ordering it approximately half the time. The varying practice of how ESI is handled by arbitrators suggests that more ESI training for arbitrators would be useful for the parties to increase the utility and consistency of ESI production.

In addition to concerns about the mounting cost of arbitration, there also is increasing anxiety about whether arbitration is becoming too much like litigation and allowing litigation-like discovery as a matter of course.²⁸

The average frequency that depositions of parties were allowed per survey results was 68.5 percent in regular cases and 88.9 percent in complex cases.

The AAA Rules discussed above do not encourage litigation-like discovery in Regular Track cases, and even though types of permissible discovery are to be discussed under the Procedures for Large, Complex Construction Disputes, arbitrators in such cases are required to “take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Construction Dispute.”²⁹ Even in a Large, Complex Construction Dispute, however, an arbitrator may order depositions only in “exceptional cases, at the discretion of the arbitrator, [and] upon good cause shown and consistent with the expedited nature of arbitration. . . .”³⁰

The Arbitrator Survey inquired about the scope of discovery the respondents usually allowed in both regular arbitrations and large, complex arbitrations. Surprisingly, there were some, but not very significant, differences between the discovery allowed in a regular arbitration and a complex arbitration. If the answers of “always,” “usually,” and “half the time” are averaged together, there is about a 10 percent to 15 percent difference between the discovery allowed between regular and complex arbitrations. For example, in a regular arbitration, the Arbitration Survey revealed that interrogatories are allowed 28 percent of the time in the range between “always” and “half the time,” whereas in complex cases within the same range, the average is 45.4 percent. The difference between the allowance for requests for admissions between regular and complex cases was 20.8 percent (regular) and 38.6 percent (complex).

The same range of difference appears in how often depositions are allowed. The average frequency that depositions of parties were allowed per survey results was 68.5 percent in regular cases and 88.9 percent in complex ones. These percentages would be surprising if the arbitrators were conducting their cases pursuant to the AAA Rules because the ability or option of ordering depositions is not discussed in the Regular Track Rules³¹ and in the Procedures for Large, Complex Construction Disputes, depositions are to be allowed only in exceptional cases.³² The amount of depositions allowed of third parties is comparable to the results for depositions of parties, but the gap between regular and complex cases begins to narrow—i.e., an average of 75.9 percent in regular cases and 88.0 percent in complex cases. Expert depositions are allowed more frequently in complex cases than in regular ones, by an average difference of 22.3 percent across the categories of “always,” “usually,” and “half the

time”; but the gap is actually larger because the number of “always” responses is higher in complex cases versus regular cases by 18.8 percent. Prehearing subpoenas are more frequently allowed in complex cases (within the same range of answers) by an average of 75 percent to 85.7 percent, although the actual difference is higher as the number of “always” answers for complex cases is greater than the number in regular cases by 13.4 percent.

Granted, the actual number of times discovery has been allowed is lower than the above averages indicate because the categories of “always,” “usually,” and “half the time” have been averaged together for illustrative/comparative purposes. Nevertheless, if we assume that “always” equals 100 percent of the time, “usually” equals 75 percent of the time, and “half the time” equals 50 percent of the time, the actual number of times discovery is allowed is significant; for example, using these equivalents, depositions of parties occur 48.8 percent of the time in regular cases and 70 percent in complex cases.

Do Arbitrators Grant Summary Judgment?

The increasing use of pre-hearing summary judgment motions has come under criticism for increasing the cost of arbitration, without the corresponding benefit of reducing the issues to be arbitrated.³³ Indeed, this concern led the AAA to modify its Commercial Arbitration Rules to require a preliminary showing to the arbitrator of probable success before such motions could be filed.³⁴ The AAA has not followed suit in its Construction Industry Arbitration Rules, and parties are able to file dispositive motions upon written application to and approval by the arbitrator. The Arbitrator Survey sought to determine whether arbitrators considered the utility of dispositive motions to be as bleak as sometimes portrayed.

Question 16 of the Arbitrator Survey explored how open construction arbitrators were to summary judgment motions and whether arbitrators imposed conditions on such motions before allowing them to be filed. Approximately an equal number of arbitrators either always or usually freely entertain such motions (42.2 percent), while 38 percent seldom or never do; the remaining 17.1 percent freely allow motions for summary judgment approximately half the time. Forty-eight percent of arbitrators seldom or never discourage such motions unless the parties stipulate that no material facts are in dispute, while 41.5 percent usually or always do so. The Arbitrator Survey also asked if arbitrators impose the same condition that the AAA Commercial Rules impose on summary judgment motions—i.e., that the proponent of such motion seeks the arbitrator’s approval after making a showing the motion is likely to succeed, dispose of, or narrow the issues in the case. Only 37.1 percent of respondents reported the proponent always or usually doing so, while 55.7 percent seldom or never doing so.

The expected efficiency of bringing such motions was questioned by asking whether, despite the filing of a summary judgment motion, arbitrators nevertheless declined

or reserved ruling on such motions until after the close of the hearing. Arbitrator respondents reported that 23.2 percent always or usually defer their decision, but 59.1 percent do not, while 17.7 percent do so half the time.

A more fundamental inquiry is whether arbitrators find summary judgment useful and worthwhile. Arbitrator Survey question 17 asked if a dispositive motion was useful to the arbitrator's preparation for the hearing even if the motion was unsuccessful, with the results being nearly evenly split among the three answer options (35.9 percent of respondents said such motions were always or usually useful, 27.8 percent said the motions were useful approximately half the time, and 36.3 percent said they were seldom or never helpful). The same approximate distribution of answers was provided in response to the question of whether such motions were useful to extract or establish specific facts necessary for the resolution of the case: 33.5 percent of respondents said always or usually; 29 percent said half the time; and 36.3 percent said seldom or never.

In response to the criticism that summary judgment motions are overused by parties and not helpful to the arbitrators, 41.3 percent of respondents found that to be the case always or usually, 26.1 percent reported half the time, and 32.6 percent said seldom or never. The takeaway from the data is that summary judgment motions in construction arbitrations have perhaps been overcriticized. If a healthy majority of 63.7 percent of arbitrators found that such motions were useful half the time or more even if unsuccessful, there appears to be some utility in seeking summary relief. Similarly, if 58.7 percent of the arbitrators believe that half the time or more such motions are not overused or unhelpful, then the AAA Construction Rules should remain as they are and not mirror the Commercial Rules.

Do Arbitrators "Split the Baby"?

A common criticism about arbitration is that arbitrators supposedly simply "split the baby" and render compromise awards in an amount apparently somewhere between the parties' conflicting claims, without much regard to the respective merits of the claims.³⁵ Given the seriousness of these concerns, the Arbitrator Survey sought to determine how often arbitrators actually issue unprincipled compromise awards and whether arbitrators render decisions not tied to the theories or facts presented to them.

The first inquiry in the Arbitrator Survey asked questions regarding the above-described view that arbitrators often "split the baby" or render a compromise award. The first question asked whether arbitrators rendered an award based only on the law and facts presented, and the Arbitrator Survey reported that 62.7 percent of arbitrators "always" follow the law and facts presented; 33.3 percent "usually" do so; 0.9 percent do so only half the time; 2.7 percent "seldom" do so; and 0.4 percent "never" do so. Thus, rather than rendering compromise awards or decisions not based on the law and facts presented, the

Arbitrator Survey arbitrators stated they always or usually took the opposite approach 96 percent of the time.

Similarly, the arbitrator respondents flatly rejected the perception that they rendered compromise awards based on the amounts of the claims asserted: 1.1 percent said they did so "always," 2.5 percent reported they "usually" did, 1.3 percent did so "half the time," 26.9 percent seldom did so, and 69.5 percent "never" did so. Accordingly, 96.4 percent of the time arbitrators who responded in the survey seldom or never rendered merely compromise, split-the-baby awards.

In an attempt to gauge whether parties might do better or worse in court compared to arbitration, the vast majority of arbitrators (94.5 percent) reported that claimants always or usually would not do better in arbitration than they would in court, and a comparable percentage (90.3 percent) believed that parties would not do any worse in arbitration than they would in court. Finally, the Arbitrator Survey asked whether in close cases they might render a compromise award rather than what might be rendered according to a strict view of the proof and law. Consistent with their answer to the first question, 93.3 percent of arbitrators responded that they would seldom or never render a compromise award even in such circumstances.

Based on these survey results, the often-heard fear of compromise, split-the-baby awards in construction arbitrations is not borne out by the experience of actual arbitrators.

Do Arbitrators Follow the Law?

Another related concern is that arbitrators do not always enforce the parties' contracts because arbitrators are not always bound to follow the law, or, even if they are, appeal rights to ensure they have done so are typically limited.³⁶ The Arbitrator Survey explored this concern by first asking arbitrators to what extent they enforce the parties' contract in strict accordance with its terms: 90.2 percent of respondents reported that they "always" or "usually" do. Sixty percent responded that enforcement of the parties' contract was seldom or never dependent on whether the contract's arbitration clause required the arbitrators to do so. As for not being bound by the law in their awards, 87 percent of arbitrators reported they "always" or "usually" resolved disputes strictly in accordance with applicable law or statutes.

In response to a reciprocal question, only 10 percent of arbitrators reported that they always or usually apply their own sense of justice and industry standards in formulating their awards even where such sensibility may conflict with the requirements of the contract or applicable law; however, 82 percent of respondents stated that they "seldom" or "never" did so.³⁷

These responses should give parties and counsel considerable comfort that construction arbitrators will enforce contracts as written and apply the law to the proven facts. On the other hand, some advocates still may feel uncomfortable that a small percentage of arbitrators do

not always apply the law, sometimes render compromise awards, and occasionally apply their own sense of justice to render a decision. Perhaps the only way to evaluate the validity of this concern is to consider the alternative. To believe that judges always correctly apply the law to the proven facts ignores the frequent reversals of trial court decisions by state appellate courts, and appellate court decisions by state supreme courts.³⁸ And while trial by jury may be “the glory of the English Law,”³⁹ those who have tried or been involved in a jury case cannot believe that juries of six or twelve laypeople do not occasionally reach compromise verdicts on questions of entitlement or quantum or that juries always apply or fully understand the law they are instructed to follow.

What Advocacy Techniques Do Arbitrators Find Effective?

The arbitrators in the Arbitrator Survey were also asked what advocacy techniques they found to be effective and ineffective. Among some of the most helpful suggestions were as follows:

- With regard to organization of a party’s case, Arbitrator Survey respondents suggested that parties and their counsel (i) support organized testimony with contemporaneous documents; (ii) commit to an organized use of exhibits avoiding repetition; (iii) conduct well-organized, nonleading direct examinations; and (iv) conduct limited and organized cross-examinations. Arbitrators also recommended that questions seek to exhaust the evidence on one issue before proceeding to the next, and, in the case of delay and/or acceleration claims, to present evidence in a chronological manner (with 20 arbitrators recommending that all evidence submitted be placed in context of a timeline of significant project events).
- With regard to the presentment of damages, arbitrators suggested that parties (i) summarize claims and damages at the beginning of the case for context for subsequent evidence and (ii) submit a “scorecard” of damages claimed broken out by a description of the claim (i.e., retention, contract balance, individual change orders, time-related damages, etc.). Arbitrators also found that scorecards with summaries of the parties’ respective positions and/or citations to oral or documentary testimony were helpful. Notably, several respondents stated that they reduce awards due to insufficient proof of damages.
- Arbitrators also recommended that counsel tailor their case presentations to the arbitration setting instead of simply using a “one-size-fits-all” approach that could be interchanged between litigation and arbitration. Arbitrators cautioned counsel from acting as though the dispute was tantamount to a jury trial and to take advantage of the fact that

construction industry arbitrators would apply their own knowledge bases to the issues in dispute.

- With regard to conduct at the hearing, arbitrators appreciated counsel who consistently showed respect to both the arbitrators and the opposing party, were not overly aggressive, and avoided bluster, posturing, and sarcasm.

The Arbitration Survey also requested that arbitrators identify advocacy techniques that they find to be ineffective, as noted below:

- With regard to witness testimony, arbitrators reacted negatively to unfocused and/or unstructured testimony and where witnesses were unprepared, leading to rambling responses. Arbitrators also cautioned counsel to avoid long-winded leading questions and to move on once counsel has made the point sought in questioning. Counsel were also encouraged to avoid cumulative and/or duplicative testimony across witnesses.
- With regard to evidence in general, counsel are cautioned against providing a “data dump” to arbitrators in the hopes that the arbitrators will themselves sort through unorganized evidence as part of their decision-making.

Expert evidence was also addressed by many arbitrator respondents. Among items disfavored by arbitrators were (i) experts who appear to be “advocating” for the party that retained them rather than offering a more impartial analysis; (ii) schedule delays analyses that depart from the project record; (iii) measured mile analyses that made use of distinguishable projects; and (iv) experts who were used by parties to offer “facts” into evidence that were better left to persons with direct knowledge. Additionally, arbitrators cautioned parties and their experts to not offer expert testimonial evidence that veered from the expert’s written report(s).

Conclusion

It is beneficial periodically to compare theory with practice in order to reevaluate each. Some of the comparisons and answers provided by the two surveys summarized in this article will hopefully provide support for improving how mediators deliver their services and help explain actual arbitration practices and provide guidance on how to present one’s case more effectively. In sum, it is hoped that the two surveys will help advance the administration and practice of construction ADR.

Dean Thomson, dthomson@fwhtlaw.com, is a shareholder in the Construction Law Department of Fabyanske, Westra, Hart & Thomson in Minneapolis, Minnesota. He has authored/co-authored many The Construction Lawyer articles and is President-Elect of the American College of Construction Lawyers. Julia Douglass, jdouglass@fwhtlaw.com, is a shareholder at the same firm.. She focuses on

Endnotes

1. AIA A201 § 15.3; ConsensusDocs 200 art. 12.4; EJCDC C-700 art. 12.01; DBIA Standard Form art. 10.2.

2. AIA A201 § 15.3 specifies mediation shall be administered by the AAA; ConsensusDocs 200 art. 12.4 permits the parties to choose mediation through either the AAA or JAMS; EJCDC C-700 art. 12 does not specify which service the parties must utilize; and DBIA Standard Form art. 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.

3. The survey was comprised of 21 questions and sent to members of the American Bar Association Forum on Construction Law and members of the Top 50 Construction Law Firms in the U.S. as determined by *Construction Executive Magazine*. The authors thank the survey respondents for their time in carefully answering the questions posed to them.

4. Indeed, all but 41 respondents rated this concern at a “6” or higher.

5. See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (describing modern discovery rules as intended to permit “the parties to obtain the fullest possible knowledge of the issues and facts before trial”).

6. See Kathleen S. McLeroy, *The Next Frontier of Mediation: Mediating E-Discovery Issues*, Bus. L. Today (ABA Mar. 13, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2018/03/e-discovery/.

7. See Dean B. Thomson, *Early Mediator Engagement: Lessons from Master Mediators*, 15 J. ACCL 39, 41 (2020).

8. *Id.* Guiding Mediation is also sometimes referred to as Guided Choice. See Dean B. Thomson & Paul M. Lurie, *The Guided Choice Process for Early Dispute Resolution*, 1 AM. J. CONSTR. ARB. & ADR 23 (2017).

9. 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 CONSTR. LAW., no. 4, 2001, at 17. Responses to the survey that is the subject of this article included the following comments regarding positive evaluative mediator traits: (i) “Candid evaluative private feedback with the client in the room. Smart, experience-based understanding of the difficult issues and the risks they pose.”; (ii) “Speaking directly to parties (with counsel present) about strengths and especially weaknesses in their factual legal positions. Not doing it 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.”; (iii) “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. . . .”;

(iv) “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.”; and (v) “Confidential delivery of frank—but informed and credible—assessments of strengths and weaknesses of both sides’ cases and a strategic plan for moving both sides to resolution.”

10. Responses included the following: (i) “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.”; (ii) “The mediator presiding over limited information exchange and exploring each party’s motivations for settlement beyond pure dollars before the mediation.”; (iii) “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.”; (iv) “Private meetings with parties or attorneys prior to official mediation; multiple private meetings with [insurance] 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.”; and (v) “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.”

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 that the subject of litigation costs, while valid, should be reserved until the end of the mediation as a gap closer if the parties are close to settlement. 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 issue should

take on greater importance.

14. For an excellent discussion on how to maximize the benefits of Zoom in mediations, see Robyn Miller & 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, eight respondents found it to be an ineffective technique, which shows that one technique is not suitable for all mediations.

16. After recommending this technique, 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 a “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. Although not as frequently mentioned, respondents also offered the following suggestions: (i) explaining or exploring the costs of continuing to litigate or arbitrate the dispute if the case does not settle at mediation (5 respondents); (ii) referring an issue to a neutral expert or technical consultant for a nonbinding decision or for guidance for the parties (5); (iii) exploring nonmonetary reasons or advantages to settle (4); (iv) meeting with competing experts to see if disagreements can be lessened or resolved (was sometimes described as “hot tubbing” the experts under the mediator’s guidance) (4); (v) asking each party for its litigation budget; (vi) exploring what acceptable settlement agreement terms would be before numbers are exchanged; (vii) getting a physical check from the offering party and presenting it to the other party; (viii) two mediators tag teaming on complicated multiparty litigation; and (ix) having each side argue the other side of the dispute in open session. One respondent had this intriguing additional suggestion: “An alternative that worked was a Mediator that locked his restroom after a day of mediation.”

21. A similar result was reported in a 2001 survey of Forum members. See note 10, *supra*.

22. This paper is a condensed summary of some of the findings discussed in two articles, Dean B. Thomson & Jesse

R. Orman, *Inside the “Black Box”: The Preferences, and Rule Interpretations of Construction Arbitrators*, 12 J. ACCL, no. 2, Summer 2018, at 37; and Dean B. Thomson & Michael T. Burke, *The Advocacy Preferences of Construction Arbitrators*, 14 J. ACCL, no. 1, Winter 2020, at 67.

23 See Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, n.25 (1994).

24. AM. ARB. ASS’N CONSTR. INDUS. ARB. RULES r. F-9 (July 1, 2015).

25. *Id.* r. R-24(a).

26. See FED. R. CIV. P. 26.

27. AM. ARB. ASS’N CONSTR. INDUS. ARB. RULES r. R-24(b) (i), (ii) (July 1, 2015).

28. PHILIP J. BRUNER & PATRICK J. O’CONNOR, BRUNER & O’CONNOR ON CONSTRUCTION LAW § 21:3 (2014 ed.) (“Arbitrations all too frequently assumed the trappings of unwanted judicial proceedings, characterized by over-lawyering, unlimited discovery, extensive motion practice, liberal hearing ‘due process,’ repeated pre-hearing and hearing delays, extensive post-award disputes over confirmation of binding awards, heavy expense, and long delay in resolution.”).

29. AM. ARB. ASS’N CONSTR. INDUS. ARB. RULES r. L-4(a) (July 1, 2015).

30. *Id.* r. L-4(f).

31. *Id.* rr. R-4, P-1.

32. *Id.* r. L-4(f).

33. Phillip L. Bruner, INTRODUCTION TO CONSTRUCTION ADR 1–li (Adrian L. Bastianelli & Charles M. Sink eds., 2014) (discussing growing dissatisfaction with the “judicialization” of arbitration).

34. See AM. ARB. ASS’N COM. ARB. RULES r. R-33 (Oct. 1, 2013)

35. AM. ARB. ASS’N, HANDBOOK ON CONSTRUCTION ARBITRATION & ADR 63 (2d ed. 2010).

36. See *David Co. v. Jim W. Miller Constr., Inc.*, 444 N.W.2d 836, 837 (Minn. 1989) (upholding arbitration award even though arbitrators did not follow law in calculating damage award).

37. The occasional resort to equitable or industry standards by arbitral decision-makers is sometimes considered one of the advantages of arbitration and perhaps the genesis of its use. As Aristotle observed, “It is equitable . . . to prefer arbitration to the law court, for the arbitrator keeps equity in view whereas the [court] looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.” Harter-Uibopuu, *Ancient Greek Approaches Toward Alternative Dispute Resolution*, 10 WILLAMETTE J. INT’L L. & DISP. RESOL. 47, 55 (2002) (cited in Bruner, *supra* note 33, at xlii).

38 *2015 Outcome of Appeals Decided on the Merits by Court Type*, NAT’L CTR. FOR STATE CTS., <http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP Intro> (last visited Oct. 24, 2017) (finding that of 1,405 cases decided on the merits in 2015, the Minnesota Court of Appeals reversed either in whole or in part the trial court in 22 percent of cases; of the 99 cases decided on the merits by the Minnesota Supreme Court in 2015, 27 percent were reversed either in whole or in part).

39 3 WILLIAM BLACKSTONE, COMMENTARIES *379.