

Tactics and Strategies for Mediating the Multi-Party Complex Construction Case



This article first appeared in *Orange County Lawyer* magazine in March 2010, Vol. 52 No. 3 (page 22). © Copyright 2010 Orange County Bar Association. The views expressed herein are those of the author. They do not necessarily represent the views of the *Orange County Lawyer* magazine, the Orange County Bar Association or its staff. All legal and other issues should be independently researched.

by Randy Erickson

The “10 Questions”—Answered

Use of the terms “tactics” and “strategy” in reference to mediation clearly demonstrate that mediation is analogous to war. Thus, Karl Von Clausewitz’ famous treatise *On War* is highly instructive. He viewed war as an extension of diplomacy, just as mediation is an extension of business. Von Clausewitz contended that “[t]he political objective is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.” Similarly, in mediation, the business objective is the goal. Mediation should never be thought of as something independent therefrom. The business objective is to let the parties rid themselves of a burden—the objective is not justice, retribution, nor victory. Thus, participants must be ever mindful to “strive for attainable things.” (Pindar, *Odes*)

Here we answer the ten most commonly asked questions about mediation.

1. Question: Why should you ever settle a case?

Answer: Because going to trial is the right decision only 15% of the time.

“You got to know when to hold ’em, know when to fold ’em. Know when to walk away, and know when to run.” (Kenny Rogers, *The Gambler*)

Mediation has developed cachet. As a result, it has been the subject of myriad articles. Most of these contain elucidations on the obvious. One can find countless musings on the importance of mediator selection, opening statements, use of the private caucus, deal-making skills, techniques of gamesmanship, significance of opening offers, and the use of a decision tree to evaluate a case. To sophisticated business people and their lawyers, these discussions are not particularly illuminating.

However, informative research does exist. The *Journal of Empirical Legal Studies* has recently concluded an enlightening study. Of the 2,054 surveyed cases tried from 2002 to 2005, 61% of plaintiffs received verdicts less than the last settlement offer. Conversely, 24% of defendants made the wrong decision (*i.e.*, the defendants paid out less than the plaintiff originally demanded, but more than they offered). Both defendants and plaintiffs made the right decision to go to trial only 15% of the time. Also, while plaintiffs more often incorrectly chose to go to trial, their risk in doing so was less. The differential between offer and verdict for plaintiffs was only \$5,700. For defendants, the delta was \$1.1 million.

Given these statistics, going to trial creates an 85% chance for an unhappy result. Do you want to bet against those odds?

For defendants, these statistics are highly instructive and support the oft forgotten postulate that a defendant usually pays, one way or another.

“It isn’t important to come out on top; what matters is to be the one who comes out alive.” (Bertold Brecht, *The Life of Galileo*)

2. Question: Who is the best suited to mediate a complex construction case?

Answer: The parties should select a mediator with experience in the field and who understands troubled construction projects.

“Intuition is given only to him who has undergone long preparation to receive it” (Louis Pasteur, *Three Publications*).

The “Punch List” of *The Construction Lawyer* revealed predilections of mediation

participants. While subject-matter expertise was valued above mediation experience, legal experience ranked 7th individually. However, 94% of the participants said that, given equal subject matter expertise, they would choose a lawyer over a layperson. This study also showed that (up to a point) participants preferred the “evaluative” mediator to the facilitative. This simply stands to reason: Mediation is about lawsuits. Lawyers with experience in the field make the best mediators. Their instincts are predicated on vast experience with troubled projects.

For construction disputes, this means one should select a proactive lawyer with experience in construction.

3. Question: If the goal is to settle, and the parties control the outcome, why do some mediations fail?

Answer: It is because one or more of the parties has lost sight of reality.

“Ask the gods nothing excessive.” (Aeschylus, *Prometheus Bound*)

Too often, one or more of the parties comes to the table with unrealistic goals. Either their strategy is flawed or they have deficient tactics. That is, they seek a resolution that is not supported by the facts.

“Strategy without tactics is the slowest route to victory. Tactics without strategy is the noise before defeat.” (Sun Tzu, *The Art of War*)

Thus, for example, seeking to be paid on a delay claim where delay analysis has not been performed by a competent expert is simply wishful thinking. But, I have seen this attempted.

“Knowledge of what is possible is the beginning of happiness.” (Santayana, *The Genteel Tradition: Nine Essays by George Santayana*)

4. Question: If I have a “sure winner,” why compromise?

Answer: First, because nothing is certain.

“Despair is the price one pays for setting himself an impossible aim.” (Graham Greene, *The Heart of the Matter*)

All too often, parties have advanced a contention so long and so vigorously that they have fallen in love with it and forgotten its shortcomings. When reminded of them by the mediator, hubris often forecloses common sense.

“Take calculated risks. That is quite different than being rash.” (General George S. Patton, *The Poems of General George S. Patton, Jr.: Line of Fire*)

Mediation is designed to resolve disputes. There is a dispute because the project did not go as planned. Thus, the “Troubled Project Doctrine” is triggered. This Doctrine dictates that no one gets what they originally bargained for. No one becomes whole, obtains fee and profit, gets the job they expected on time, nor is vindicated.

5. Question: If I settle for less than I think I deserve, am I not a loser?

Answer: “If you can’t accept losing, you can’t win.” (Donald T. Phillips, *Run to Win: Vince Lombardi on Coaching and Leadership*)

When a case settles, the parties have controlled the outcome. That is the “win.” No one is validated as a result of settlement. Moreover, what you think you deserve may not be what you deserve.

All too often, I have seen a party’s decision-making influenced by a Project Manager who has an emotional, but not financial, investment in the litigation. That input must be carefully weighed.

“Be wary of the man who urges an action in which he himself incurs no risk.” (Joaquin Setan)

6. Question: Are mediations confidential?

Answer: Yes, for the most part.

Confidentiality is provided by the Code (*Cal.Evidence Code* §§1119, 1121) and presumed by the parties.

However, creative minds and activist courts have been punching holes in that concept. In *Rojas v. Superior Court*, 33 Cal.4th 407 (2004), the Supreme Court drew a distinction between “derivative evidence” (lawyers’ evaluations of the case) and “non-derivative” (photos and raw data).

Probably the most significant aspect of this case is the fact that two different mediation organizations came to diametrically opposing views as expressed in their *amicus* briefs, demonstrating that mediators themselves can disagree.

An even finer line was established in *Wimsatt v. Superior Court*, 152 Cal.App.4th 137 (2007). The plaintiff’s lawyer was accused of tendering a settlement offer that had not been authorized. The Court here held that the mediation briefs were not discoverable. However, subsequent oral communications between the two lawyers were.

And, in *Fair v. Bakhtiari*, 40 Cal.4th 189 (2006), subsequent to “settlement” the attorneys wrangled over the final terms of an agreement. The Court held that the mediation proceedings could be

examined to determine if the dispute was settled so that the arbitration clause was enforceable.

Thus far, these situations have been confined to comparatively small cases involving individuals. However, it is reasonable to expect to hear these arguments on a larger stage.

A practical problem does arise from mediation confidentiality. If a settlement has been achieved, and the agreement subsequently not complied with, how then may a party enforce it? *Evidence Code* §1123 provides an exception to the ban on disclosure of mediation communications for settlement agreements prepared in course of mediation. If any of the following is obtained, a signed settlement agreement reached during mediation is admissible and can be disclosed: a) The agreement provides that it is admissible or subject to disclosure, or words to that effect; b) The agreement provides that it is enforceable or binding or words to that effect; c) All parties to the agreement expressly agree in writing, or orally in accordance with *Evidence Code* §1118, to its disclosure; or d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Thus, to satisfy *Evidence Code* §1123(b), a settlement agreement must include a statement that it is “enforceable” or “binding,” or a declaration in other terms with the same meaning. The statute leaves room for various formulations. However, arbitration clauses, forum selection clauses, choice of law provisions, terms contemplating remedies for breach, and similar commonly employed enforcement provisions typically negotiated in settlement discussions do not, of themselves, qualify as an “agreement” for admission under §1123(b). *Fair v Bakhtiari*, 40 Cal.4th 189 (2006).

One simple solution is a “Memorandum of Settlement” agreement. Ostensibly, this is intended to be a short form of agreement which counsel can subsequently flesh out. In practice, however, thrashing out the verbiage can be as difficult as coming to agreement on the economic issues. With this in mind, I typically hand a draft of this to counsel early on so that he or she may review and edit while the economic terms are being negotiated.

It is imperative that the signatories have authority to sign. See *Rael v. Davis*, 166 Cal.App.4th 1608 (2008).

7. Question: Is there a preferred format for mediation?

Answer: While legal sophists have articulated diverse arcane formats, I find that the “grind it out” methodology is most commonly used.

However, the creative minds of lawyers have developed myriad variation on the mediation theme. Thus, one can find (hypothetically) the following: a) Baseball mediation—Each side submits his or her final position in writing and the mediator then chooses which to use; b) Golf mediation—The mediator writes down his or her number and the parties submit theirs. The mediator chooses the one closest to his or hers; c) Pocket Golf Mediation—The mediator develops a number and separately submits it to each side, which each party may accept or reject; d) High-Low mediation—The parties establish the parameters of potential settlement and the mediator works to resolve the dispute within them; e) The classic “grind it out” mediation—Here the mediator just works it. For this to work, the mediator must be dogged, energetic, and experienced (see answer to Question 2).

8. Question: Do “collateral concerns” dictate the outcome?

Answer: Yes.

Questions such as the financial condition of the parties, ongoing business with each other, reputation in the industry, insurance, whether or not the resolution is dependent upon political considerations (such as board approval), and other similar factors form the critical backdrop to any mediation. They will influence the amount, timing, and nature of the consideration paid to settle. All too often, participants are so focused on the “merits” of the claim that they fail to discern these background realities.

“The way is to avoid what is strong and strike at what is weak.” (Sun Tzu, *The Art of War*) Unfortunately, the parties and their lawyers often lose sight of this fundamental concept. This myopia can be exacerbated by the hidden agendas they bring to the process. Thus, the mentality of the “seeker of justice,” the “gamester,” the “Greek tragedian,” the “victim,” and a host of other personality types can seriously frustrate the process.

To begin with, mediation’s goal is to settle the case. Thus, the parties will not get justice; they will get a settlement. Time spent in cathartic outpourings may be beneficial for the psyche, but are enervating. Similarly, the lawyer who uses mediation simply as a discovery tool is not entering the

process in good faith. Moreover, in 99% of the cases, there really is nothing more to learn. Most mediations are commenced only after the parties have incurred substantial fees and costs “discovering” the other party’s case. Furthermore, in construction cases, everyone pretty much knows what happened. The lawyer who attempts to “game” the mediation is wasting everyone’s time. Finally, a small amount of emotional purging is always part of the process. Thus, the “victim” and the “tragedian” must have their moment on center stage. However, this must be limited, as such exercises are energy vampires.

9. Question: Are there ethical rules for mediation?

Answer: Yes.

As with any system, there is a governing body of law. In this case, it is the *Uniform Mediation Act* (“UMA”). In depth discussion of the UMA is beyond the scope of this article.

However, note that full disclosure by the mediator of all prior contacts with the parties and/or their lawyers is mandatory. Parties typically want an experienced construction lawyer as a mediator. However, there is a paradox involved. It is virtually impossible to meet that job description and not be acquainted with 90% of the lawyers and 80% of their clients. This is one of the great ironies in the process. Keep in mind that mediators are hired to be neutral third parties and are ethically bound to maintain neutrality. Plus, it is bad for business to be perceived otherwise.

10. Question: What is the most important rule?

Answer: Neutrality.



Randall L. Erickson is a senior partner in the Irvine office of Crowell & Moring and chair of the firm’s Construction group. He currently serves on the Large and Complex Case panel at the American Arbitration Association, is a Public Works Contract certified arbitrator, and a Dispute Resolution Board Foundation member. The author wishes to express his appreciation to his colleagues Chris Friedt and Van Nguyen for their contributions to this article. Opposing viewpoints are welcome. Please note: Many of the citations are guideposts only, and in-depth study of these works was not the intent of this article. Mr. Erickson can be reached at Crowell & Moring by email at rerickson@crowell.com.