

In 2001 I mediated my first case as a young lawyer with just enough knowledge to be dangerous.....to myself most likely. Over the past 14 years I have observed the process and it's uncanny ability to resolve the previously unresolvable. Lately I have noticed the indirect, less tangible benefits. That said, a review of the past 15 years leaves me with a few criticisms.

## Mediation

The legal definition of mediation is as follows:

“A settlement of a dispute or controversy by setting up an independent person between two contending parties in order to aid them in the settlement of their disagreement.”

That independent person, the mediator, is typically a lawyer removed from the parties and case prior to mediation. He or she wears many hats during the process. One should be a capable listener who possesses other qualities such as man management, a calm demeanor, and the ability to remain neutral in both mind and exterior actions. While it is argued that a mediator should not be an advisor, I think the two can coexist if practiced in an artful manner.

### Advantage of Mediation Part 1: Cost

This should come as no surprise. Trials are very expensive in all practice areas. Within complex construction defect matters, the time preparing witnesses and evidence alone can annihilate a litigation budget before the trial has begun.

These trials take weeks. Mediation can be concluded in as few as a couple of days.

### Advantage of Mediation Part 2: Control

Some people refer to this principal as predictability. I don't know if a mediation is always a predictable endeavor, yet I find it leaves less to chance than a resolution which involves 12 strangers who have spent too much time away from life and reality. Even the most unfavorable mediation outcome requires the parties, rather than strangers, to dictate outcomes.

### Advantage of Mediation Part 3: Venting

Lawyers are guilty of forgetting that there can be value, in the form of personal satisfaction, derived by a client who has the opportunity to air their hurt, anguish etc. In construction defect matters this can be best illustrated by a homeowner providing specific instances of inconvenience due to the alleged defective construction.

Contractors often feel affirmed as their reputation is put on the line. Having the ability to tell a crowded room, “Hey, I am a quality professional and human being. I take these allegations seriously and I feel that I was kept out of the loop when problems were mentioned.” This

helps the insured contractor as he more than likely has not been in any contact with the Plaintiff since initiation of suit.

## Ways We Can Improve

### Suggestion 1: Light Judicial Involvement

This might be more idealistic than realistic but mediations would be aided with some judicial monitoring. In South Carolina the court administration is pretty hands off, with the exception of requiring contested civil matters participate in some form of ADR within the first 300 days. If there were more formal requirements to report back to court post mediation, it might allow an insurance coverage issue to be fast tracked for judicial ruling. Having a conference call which allowed the Judge or a law clerk to document the issues impeding settlement might allow for these to be addressed sooner, rather than two years later.

### Suggestion 2: Multiple Days

This is self explanatory. Attempting to settle a large, complex case with multiple defendants is simply too much of an endeavor and typically fails. Further, I would argue that these one day events are viewed by lawyers as wasted efforts prior to attending mediation and thus less effort is initiated prior to the event. If, for instance, a two day mediation is scheduled 90 days in the future there should be none of the common impediments such as securing settlement authority after fully evaluating your position and exposure.

### Conclusion

Complex construction defect suits are perfectly posture for the mediation process. Without mediation, these suits would not be resolvable due to the numerous parties and issues. Trial judges and court administrators would be the equivalent of sheepherders without it as babysitting the parties, jury, lawyers etc would be rendered impossible. All that said, the process can be improved and tweaked in slight ways which would only make mediation a more satisfying and successful means of resolving disputes.