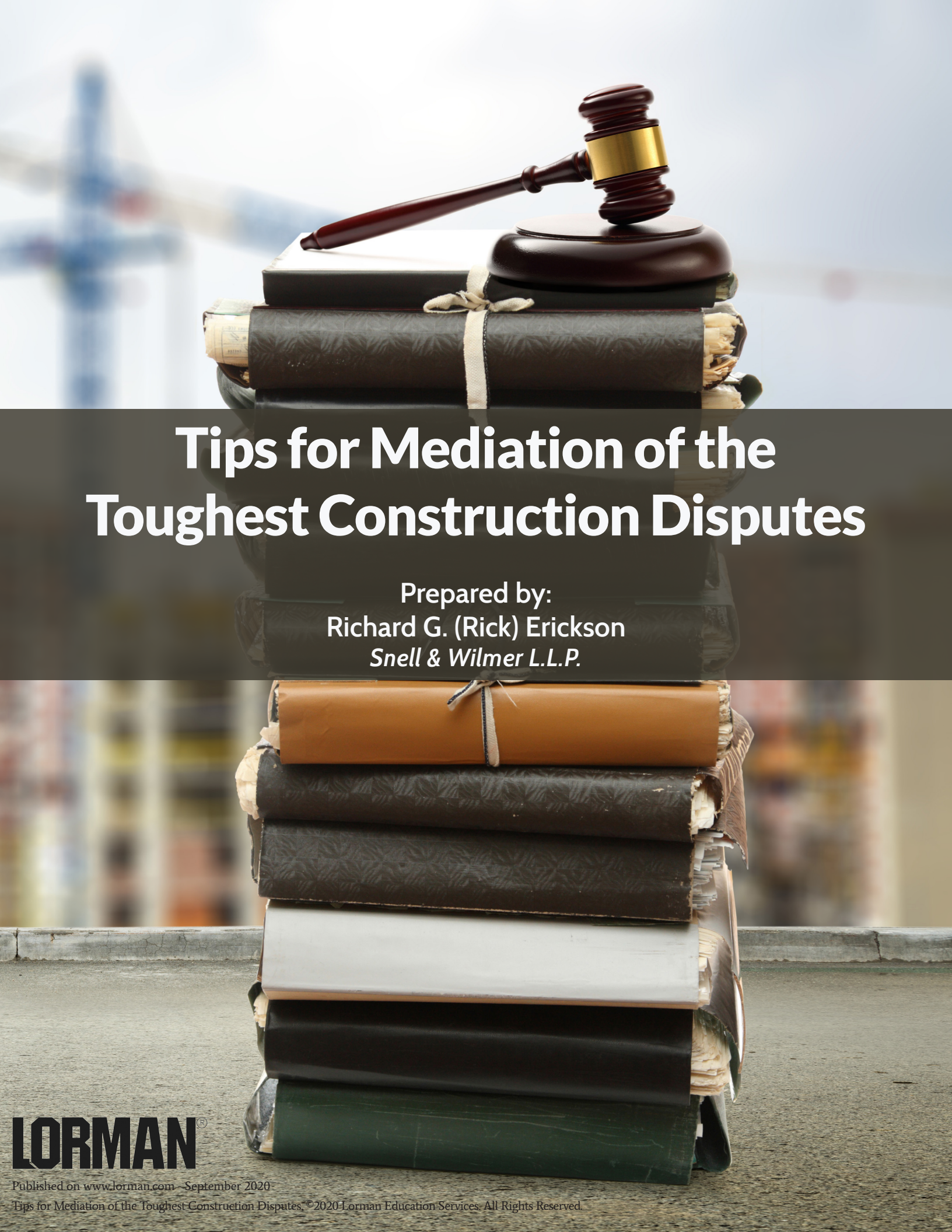

# Tips for Mediation of the Toughest Construction Disputes

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# Tips for Mediation of the Toughest Construction Disputes

*Written by Rick Erickson*

Settlement of a complex construction dispute at mediation can mean the end to sleepless nights for our clients. Resolution at mediation avoids the unpredictable risks and inordinate costs of seeing a dispute through to the merits. But mediation often can be as daunting as seeing it through to the end. Parties play poker with the odds of winning and losing, uncertainties abound, and the mediator has no power to decide the parties' fate.

There are ways, nevertheless, to enhance meaningful negotiations and valuable use of the mediator's time to settle the case. Judicial Arbitration and Mediation Services, Inc. ("JAMS") defines mediation very simply as "a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences." Whether the mediator is privately retained or retained through JAMS, the American Arbitration Association ("AAA") or another forum, mediation of a construction dispute typically arises out of form contracts requiring mediation before binding dispute resolution. *See*, e.g., AIA Document A201–2017 General Conditions of the Contract for Construction § 15.3; ConsensusDocs 750 Standard Agreement Between Constructor and

Subcontractor § 11.3.2. Alternatively, mediation is sometimes agreed upon after the dispute arises, even if not required by the underlying contracts.

Most, if not all, mediation forums and contracts require confidentiality. *See*, e.g., AAA Construction Industry Arbitration Rules and Mediations Procedures M-11 ("The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.") The confidentiality of mediation allows clients to vent emotionally without consequence, experts to opine freely, attorneys and clients to engage privately (ex parte) with the mediator, and key witnesses to talk informally, all without disclosing to the opposing party the anticipated plan for a hearing or trial on the merits.

However, many times, despite the benefit of confidentiality, the complexities underlying a construction dispute and the often-huge divide in negotiable terms or settlement amounts makes a resolution seem very difficult. The parties may be then tempted to waive the mediation requirement altogether and head straight to a binding decision on the merits instead. The parties may feel it makes no sense to spend time and money on mediation they feel is destined to fail. After all, if the parties are approaching mediation, it usually means they are already at an impasse after

exchanging offers and finding they cannot resolve the dispute on their own.

The best mediators are, nonetheless, well trained and experienced to turn impossible and stubborn into practical and reasonable. Their reputation as mediators depends on wins—getting cases settled. There are many mediators who can propose creative solutions that the parties and counsel may not think of themselves. Investing in mediation may also pay off in other ways, such as receiving an independent evaluation of the case by the mediator, discovering key records and facts, and identifying the best available evidence or testimony to prove core issues at arbitration or trial.

Once mediation is pursued in a hotly contested case, consider these tips to get the most out of mediation, even when the parties show up determined to have it their way and seem stuck in an unresolvable impasse:

**1. Prepare for a Haircut.**

No one really leaves a successful mediation feeling victorious. Despite the relief of being done with the expense of litigating the merits seemingly without end, the settlement terms may be less than the parties' bottom line. Prepare clients for the mediation process and provide a frank evaluation of the risks. This will prepare clients for the many hours of touch-and-go negotiations that may exhaust and frustrate all involved. Prepare clients for insulting offers, hours without hearing from the mediator, surprise

flips in anticipated testimony by key witnesses and experts, and ostensibly impractical terms in proposals from the mediator. Most of all, clients should understand that both sides may leave unsatisfied with the mediation result. If expectations are too high and no one is discussing the pain from compromising, settlement odds go way down.

**2. Budget More Than Less Time to Negotiate.**

Mediation is often about momentum. If the parties are getting close in terms of agreement, often, the worst approach is to take a break. The best mediators will capitalize and press when the parties are finding their way to compromise and conciliation. It is important, therefore, to consult with the mediator on how much time they need based on the claims, counterclaims, third-party liabilities and other issues that will consume time. If you need extra time, start earlier and stay later to maintain momentum and prevent buyer's remorse from setting in. If absolutely needed, allow for and schedule an extra day, even if that means paying for a day the parties may not ultimately need or use. Many mediators will cut the parties a break if they overestimate time and days required. It is more difficult, however, to ask the mediator for another day or more time at the last minute.

**3. Put Your Mediator to the Task.**

The best mediators are expensive for a reason. Make them earn their fees. Ask them to show their neutrality right away. Have them find a way to circumvent the deal

breakers. Help them to soften the toughest personalities involved. Respect their experience to really focus both sides on the risks in going forward. Allow the mediator to identify the weak and strong links in proving the facts credibly. Call them ahead of the mediation to suggest a meaningful plan but listen to and heed their advice on preparations and strategy. Give them all the tools they need to achieve the result your client wants. If the mediator does their job well, the case is much more likely to settle, but all parties have to see the mediator as a team player and not a biased enemy.

**4. Let Your Expert Take the Lead.**

Mediation may be the point in dispute resolution when the parties have heard enough from the lawyers on the facts. Mediation may be an opportune time for the lawyers to say less. Like juries, judges and arbitrators who prefer proof over legal argument, a mediator may find more settlement value in hearing more directly from the key witnesses. Especially if the merits will depend on a technical interpretation of the facts and expert testimony will carry the day, favorable expert opinions should become a focal point at the mediation. Take the time to consult with your expert(s) on their role at the mediation, budget for them to attend and present their opinions to the mediator, and consider whether the opposing party and counsel should also hear directly what the expert has to say in your client's favor. Your expert's work product may either contribute to a settlement or will transcend to the expert's presentation

later on at a hearing or trial. It will likely be money well spent, either way.

**5. Get Angry Out Early.**

By the time parties agree to mediate, they may have already spent considerably for depositions, written discovery and document production and to posture their cases on the merits. The costs leading up to and including mediation are generally a thorn to all players who believed they would profit from the project. Tempers may flare in construction disputes because the project leaders (architects, project managers and executives, etc.) take claims personally, and some feel genuinely cheated from taking any losses on the project. Trust the mediator to manage tempers and comments fueled by angry circumstances. Sometimes, mediators start with a joint caucus including all party representatives and counsel to allow for an opportunity to clear the air of issues that anger the parties. The mediator may agree that particularly heated matters should be unleashed at the beginning, if at all, so the parties can focus better on productive negotiations for the rest of the day. Other times, having the parties start mediation together can backfire if comments become acerbic and obstructive.