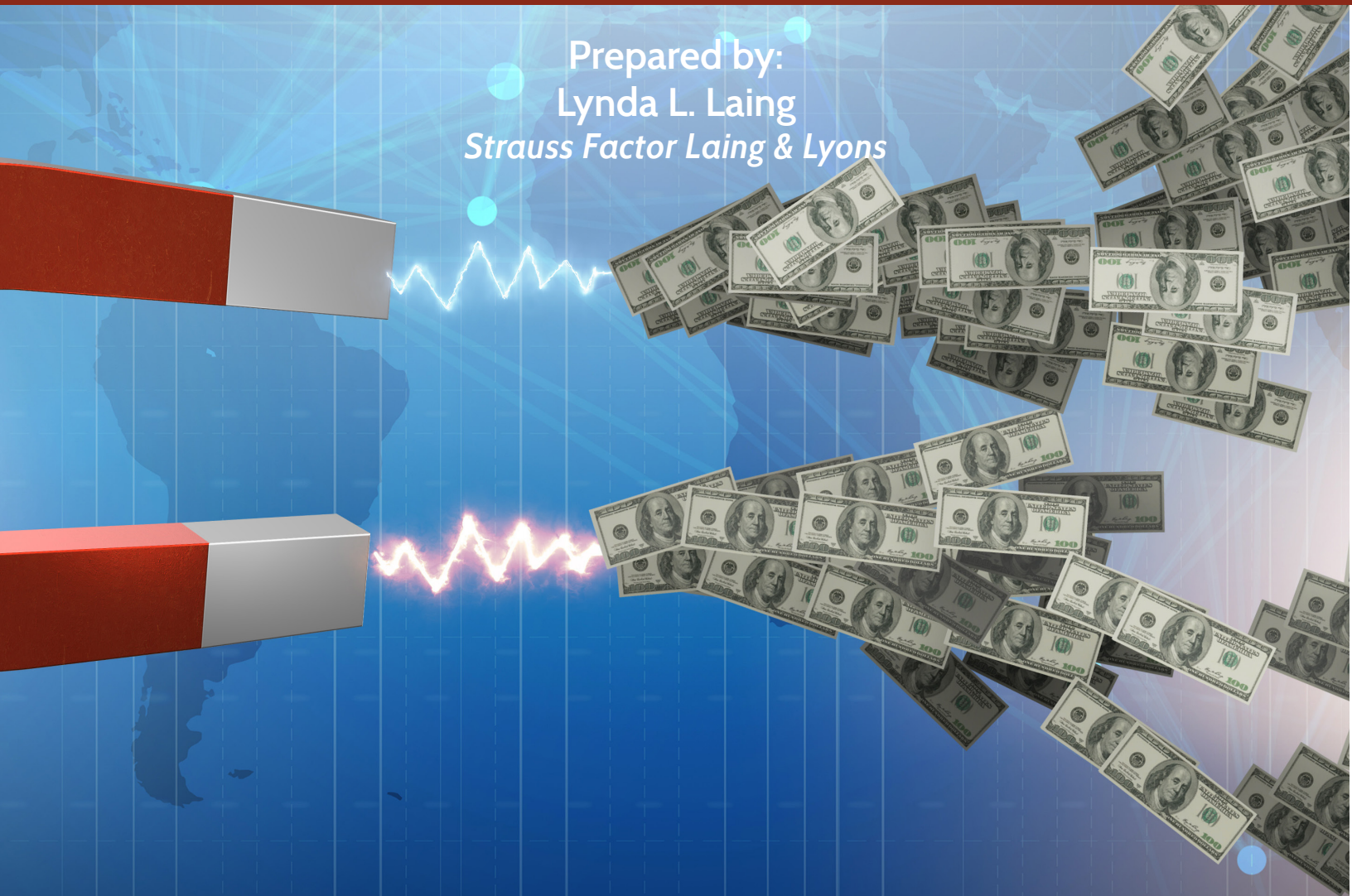


Responses and Procedures for Counterclaims: *Arbitration and Mediation*

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ARBITRATION AND MEDIATION

Arbitration and Mediation are ways to settling disputes between the parties and are considered Alternative Dispute Resolutions. Arbitration is a binding process that appoints 1 or 3 arbitrators to hear the facts of the case similar to a trial with cross examination. The arbitration will make decisions about evidence. The arbitrator will not try to settle the case. But the arbitrator will make a finding about facts and make a decision. Many arbitrators are retired Judges which have experience conducting trials

Mediations attempt to resolve disputes and the parties may sign written agreements concerning the outcome. Mediators do not find facts or write a decision. They listen to both parties and use discussions to achieve a resolution. Sometimes the Mediator will hear all the parties in a group, or they may separate the parties. The Mediator will tell the Party the strengths and weaknesses to their case in hopes of settlement.

Our court does use Mediators for smaller balance cases. If the Court recommends mediation, the parties must attend and try to resolve the case. The parties are not required to settle the case, but they must participate.

I use arbitration and mediation as a tool in my litigation to help resolve cases faster than a jury trial may take. Our State Court mandates a mandatory arbitration for all cases under \$150,000.00 in hopes that the majority of the cases resolve during or after arbitration. It is a non-binding arbitration with relaxed rules of evidence. Our Court System also has a yearly mediation week to also attempt to

settle cases. I find that the mediation process will not work unless both parties wish to resolve the case. With the mandatory arbitration, the parties have no choice, but I do settle about 90% of the arbitration we handle. Under our State Rules, the parties can reject the arbitration and proceed to trial.

However, most arbitrations conducted privately may be contractually required. If a party sues in State Court and the contract requires arbitration, the defendant can move to compel the arbitration and stay the underlying case. As a result, I review the contract between the parties, and recommend suit not be filed, if an arbitration clause exists. The client will benefit as they will not lose time or spend more in court costs while trying to proceed in state court.

Most contractual arbitrations require that either the American Arbitration Association or JAMS conduct the arbitration. Both have costs involved and have limited discovery allowed. The benefit would be the case would be lower attorney fees and the speedy resolution. The enforceability of an arbitration award should be considered as if the losing party does not pay, the prevailing party must file suit to enforce the award in State Court.

In order to enforce the award, the creditor must file a request to confirm the arbitration award in Court. Under our state rules, the debtor must be served with the request and the defendant has 20 days to answer the complaint. If no answer is filed, the Court can enter the award as a judgment.

When my office cannot use the State Court mediation or arbitration, we may raise conducting an arbitration or mediation in counterclaimed cases. Mediations are non-binding and if the client wishes to resolve the case, a Mediator may help. My clients like

mediation as they are informal and speedier than the court proceedings. Some clients want any settlement to be confidential and a Mediation can help rather than a public trial.

Some cases are better served by arbitration when a counterclaim exists. The cost to litigate may be greater than the debt sued upon. The counterclaim value may be greater than the amount sued upon. Both types may find arbitration will help especially if the dispute needs an arbitrator who has special skills in the area being litigated- i.e., construction law.

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