

Mediator's Corner



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Active Settlement Construction

by [Anne M. Lawlor Goyette](#)

Each player has its own goals. The property owner wants maximum funds to repair defects and cover losses. The builder disputes both plaintiff's repair scope and associated costs and seeks to pass plaintiff's claims onto subcontractors. The subcontractors concentrate on minimizing alleged damages and shifting responsibility. The design professionals distinguish between construction errors and design issues.

A mediator can steer these players towards resolution by preparing them for meaningful settlement discussions in advance of the mediation.

First, discuss with the participants the necessary parties and their roles at the project. All attorneys should read their clients' contracts prior to the mediation and determine if there is any applicable attorney fee, duty to defend, indemnity or limitation of liability provision.

Second, assist the parties in sorting through any coverage issues. If there is an insurance issue that may impede settlement discussions, who are the decision makers and what information do they need to address the issue? Is additional carrier participation needed? Have the carriers reached a time on risk agreement? Are there any outstanding additional insured issues? Many times, insurance-related issues can be resolved through a conference call between the mediator and carrier representatives; at a minimum, these calls identify decision makers and facilitate carrier analyses *before* mediation.

Finally, encourage the participants to develop a settlement strategy. Will the parties share expert information to determine areas of agreement and disagreement and assess overall case value? As far as structure, will plaintiff only consider a global settlement? Will the lead parties allow peripheral party settlements? Can players with additional insured endorsements settle early? Will the lead parties consider settling around an unprepared or "problem" player? Who will attend the

settlement conference with authority to finalize any settlement agreement? When will lead parties serve settlement demands?

Moving players towards settlement in a complex construction defect case is not easy. The process involves multiple players with variable and changing goals. Factual disputes, conflicting legal theories, late claims, missing parties and recalcitrant carriers create additional challenges. Nonetheless, a mediator can steer these players towards resolution by actively preparing for meaningful settlement negotiations in advance of the mediation.

* Construction defect cases typically involve large numbers of parties, attorneys, insurance companies and experts.