



**2016 CLM Annual Conference
April 6-8, 2016
Orlando, FL**

**“PROS AND CONS OF MEDIATING, ARTIBRATING AND LITIGATING
CONSTRUCTION CLAIMS”**

Fact Pattern/Mediation Scenario:

Plaintiff is a School District alleging over \$3M in various construction defects, including mold damages. Rulings on Motions regarding timeliness of suit are expected one week after mediation date and it is expected that they could go either way. The matter involves a General Contractor defendant and multiple subcontractors, all of whom are pointing the fingers at each other. The General Contractor is being defended by two primary carriers, one of which is a standard CGL policy and the other which is a CGL policy that INCLUDES mold coverage. While tenders have been made to subcontractor Additional Insured carriers, not one of them is funding the defense of the General Contractor which totals \$500,000 going into this mediation. Discuss the following:

- 1) What particular strengths are you looking for in your choice of mediators?
- 2) What are some of the challenges that could “sink the ship” and hinder your ability to settle this matter? How can they be dealt with ahead of time so that productive negotiations can take place?
- 3) Based on the limited facts provided, is this a good case to settle at mediation? Is this a good time to settle?

Discussion Issues:

One of the biggest drawbacks to arbitrating cases is where you have significant coverage issues. Those issues aren't subject to the arbitration agreement, the parties in the underlying case will never voluntarily agree to let the coverage lawyers participate or to submit special interrogatories to the panel. As a result, the arbitration award is often a blanket general decision which can then be converted to a judgment in any court and leaves those challenging coverage in a very precarious situation.

Fact Pattern/Mediation Scenario:

Plaintiff was a teenaged passenger in a limousine out with friends for prom night. Plaintiff tried to exit the limo when it was in motion and was seriously injured and lost a limb. Plaintiff sued the limo company for a substantial sum of money, and this quickly became a very high profile case in the community.

At mediation, it was determined that the insurance coverage available, and the limo company's assets were significantly below the Plaintiff's demands. Also, there was evidence that Plaintiff was drinking at the time so that her judgment likely was impaired, and there was the issue of underage drinking to be considered. There was no evidence that the limo driver was aware of Plaintiff's attempt to leave the vehicle while in motion, which suggested that the limo company may not be found at fault at all.

Defendant's lawyer recognized that this was an emotionally-charged case, and there was potential culpability on Plaintiff's part. In light of circumstances, Defendant's lawyer directed the Mediator to inform the Plaintiff of the Defendant's true concern over Plaintiff's injuries, as well as Defendant's financial situation, so that they could come to a settlement that could be enforced and avoid protracted and expensive litigation, which would also expose Plaintiff to ongoing "injury" in not being able to truly move forward in life until the matter was resolved.

At the Defendant's attorney's direction, the Mediator reminded Plaintiff of the facts in the case: 1) there was evidence that Plaintiff had some, if not all, culpability in the matter; 2) Plaintiff's demands were not reasonable in light of the insurance coverage and Defendant's financial situation; 3) a quick settlement would allow Plaintiff to recover some compensation for the injuries and allow the parties to move forward in life; and 4) Defendant truly felt sorry for Plaintiff's injuries. To further emphasize the Defendant's willingness to resolve the matter quickly, Defendant offered to take out a personal loan to assist in compensating the Plaintiff, and Defendant's attorney offered to reduce legal fees. At the end of the mediation, the parties sat down at a table together and were able to provide the emotional and monetary closure necessary for the legal matter.