

## **DESIGNING THE MEDIATION**

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### **I Introduction**

A mediation represents a unique opportunity to bring conflicting parties together to achieve a facilitated resolution. For many conflicts, “getting to the mediation” is simply a matter of agreeing to mediate, identifying a mediator, and meeting on the day of mediation. However, the great majority of disputes need a certain amount of preparation. That preparation includes choosing a mediator; exchanging information between parties; providing the mediator with the position statements; and preparing yourself and your client for the mediation. In the area of complex or multiparty mediations, even greater preparation is required in “getting to the mediation.” This requires not only preparation of your side, but preparing with the mediator and your opposition.

Over the last several years I have had the opportunity of mediating hundreds of cases involving multiple Plaintiffs, multiple Defendants, and multiple claims. I have found that convening the parties in premediation caucuses, both jointly and separately, has been extraordinarily helpful in achieving the resolution. It is toward that end that I present “Designing the Mediation” for assistance to mediation advocates, their clients, as well as mediators.

### **II Identification of Parties to Conflict**

In designing a mediation, it is vital that all persons intended to be included in mediation be identified and a commitment be obtained to participate in the mediation. Such communications can certainly be done by one or more of the parties. It can also be done by and through the mediator or his/her staff coordinator.

Is it necessary for all the Plaintiffs and the Defendants to participate? Are there interested third persons who may not be parties but may have an interest in the ultimate resolution? It is certainly preferable to have present all persons (whether parties or not) who will play a role in the ultimate resolution. This includes not only Plaintiffs and Defendants, but insurers, lienholders, interveners, as well as spouses and family

members who may advise or support the decisions of the parties attending. If someone is going to criticize from afar, they may as well be present to be a part of the “give and take” of the mediation and to be exposed both to the opposing side as well as the mediator.

In some mediations, if some of the parties or interested persons cannot attend, it is possible to achieve a level of resolution among those who are attending. Such interim resolution can be a stepping stone to a future mediation or negotiation with the remaining persons or parties. Bifurcating a mediation may be helpful if different parties need to be dealt with at different levels.

In designing the mediation, it may be helpful that the Defendants be given an opportunity to caucus before the Plaintiffs arrive. In a personal injury or wrongful death case involving multiple Defendants, each Defendant may have a different role relative to the injury or death. Such differences will affect the individual Defendants’ view of the overall value of the case as well as their participation therein. Conferring with all of the Defendants at one time, prior to the Plaintiffs’ coming, can assist in expediting the mediation and avoiding unnecessary delay. At times I have advised that this premediation Defendants’ meeting occur a week or so before the mediation itself; at times I have advised that it should take place a couple of hours before the Plaintiffs arrive; and at other times I have allowed the Plaintiffs’ attorneys to make an opening statement after which they adjourn for a day during which time the Defendants confer among themselves. In this way the Defendants can coordinate among themselves as to a reasonable verdict analysis, reasonable settlement analysis, a reasonable first offer, and their individual participations in the first counteroffer as well as future counteroffers.

Such premediation caucuses among Plaintiffs are equally important. When a group of injured Plaintiffs are having to deal with limited coverage among Defendants, an agreement of participation among the Plaintiffs can be most helpful. Some Plaintiffs’ attorneys have been able to obtain a premediation agreement among large groups of Plaintiffs as to how they will participate in any offer. Such Plaintiffs can agree that no one will negotiate separately and that any offer received at any time will be shared according to a prearranged formula. Other groups of Plaintiffs may agree to pool and divide each offer according to what a majority of the Plaintiffs will agree on. Others will agree to negotiate separately (see Section VI below). Identifying all the Plaintiffs who will participate will aid the Defendants in being able to obtain complete resolution; therefore, bringing as many Plaintiffs to the table as possible may be critical to obtaining full dollar value.

Absence of a lienholder can be fatal to a mediation. Therefore, whether that is a worker's compensation carrier, a medical insurer, a lending institution, or vendor's lienor, such persons' presence may be vital to the ability to achieve a negotiated settlement. Inclusion of such interested third persons must be well thought out, communicated to the other side, and invited (not as an afterthought, but as a forethought) to the mediation.

### III Nature of the Conflict

In designing a mediation, separating material issues from nonissues helps expedite the negotiation process. Therefore, identifying whether or not the nature of this conflict is over only issues of liability, over issues of damages, over issues of both liability and damages, or over issues of counterclaims and cross-claims, will be helpful to the mediation process. Conferring with all sides on these issues is crucial. Plaintiffs may believe that it is a clear liability case with only complex issues of damages. The Defendants may assert that it involves crucial liability issues as well as counterclaims and cross-claims.

Accordingly, conferring separately with Plaintiffs and Defendants can assist in flushing out these issues prior to the mediation. Once I have met with each side, separately (and perhaps on more than one occasion), it is appropriate to bring them together through conference calls or premediation meetings to come up with an agreed upon strategy for dealing with liability, damages, as well as counterclaims and cross-claims. Such premediation communications assist in avoiding surprises at the mediation. They also help in working through these issues so that each set of parties can deal with the issues before getting to the mediation table. Finally, such premediation communications expedite the negotiation process once the day of mediation arrives.

### IV Identifying Mediation Parameters.

Mediation parameters include identification and agreement on place, date, time, and accommodations for the mediation. While this may seem fairly standard, in a complex mediation, it is crucial.

The place of the mediation must be able to accommodate all of the parties and their needs. You do not want to have multiple Plaintiffs or Defendants in crowded quarters or in rooms that are so close to one another so as to interfere with confidentiality. The place of the mediation must be able to accommodate any and all of the individual needs of all of the parties. Those who are physically challenged may have certain accommodations that must be taken into consideration. While in many mediations, the

location is at one of the parties' offices, neutrality may be an important factor that is not accomplished by such location. Accordingly, the mediator's region, state, city or office may be more appropriate than that of the parties. If it is an extended mediation over several days, the place of the mediation may need to include amenities such as recreation, restaurants, and areas in which the parties can "get away" over the course of several days.

The date and time of the mediation must be coordinated with an emphasis on effectively using each day without interference of travel or absentee parties or third persons. The ability to work entirely through the process without one of the parties or representatives having to leave to catch a flight at 3:00 p.m. may be important to the process. The availability of a supervising or supporting individual in a different time zone than the location of the mediation may also be crucial. Likewise, providing multiple days allows for longer working sessions in the beginning and can accommodate airplane travel on a separate day. Mediations with multiple Plaintiffs or Defendants can take place over a number of days isolating certain Plaintiffs or Defendants on each day. Certainly, the earlier days may involve negotiations that continue into the night; whereas the last day of mediation should be able to conclude comfortably so that resolution occurs prior to the participant leaving for out of town travel.

Accommodations are equally important. If the site is in someone's office, hotels should be close by for easy access. Meals should be made available during the course of the day (nutritious morning amenities to include coffee, muffins, bagels and fruit); selections for lunch should be able to meet a variety of tastes; afternoon snacks should include chocolate chip cookies, pretzels, and peanut M&M's to assist all in making the day more "user friendly" and amenable to achieving resolution. Close access to airports is, likewise, an important issue. Not only must the parties reach a resolution, they must draft a document evidencing their agreement. An airport that is not within 15 to 30 minutes can be a hindrance to completion of the process.

All of these "mediation parameters" should be identified, agreed upon, and coordinated before the day of mediation.

## V Premediation Exchange of Information

To the extent that the discovery process is not complete, it is vital that an expedited exchange of information takes place prior to the mediation. I have always taken the position that qualified mediation advocates with reasonable clients can evaluate reasonable goals, and can achieve common ground, if they are looking at the same information. Thus, documents should be orderly exchanged to the extent this has not been done previously. To the extent that statements or depositions must be obtained, they too must be done before the mediation (the parties should be urged to take only those depositions that are vital to the evaluation of the case).

If certain preliminary motions must be heard before the case can be reasonably evaluated, they also should be presented for ruling. Certainly dispositive motions may be a threat to one or more sides. However, if the result of such dispositive motion substantially impacts the values of the case, consideration should be given to what extent such dispositive motions should be filed, argued, or ruled on before the mediation process proceeds. The pendency of such dispositive motions, may, in and of itself, serve as an equalizer to the opportunity for reasonable resolution without obtaining a ruling.

The mediator should be prepared to involve himself/herself, as is necessary in the orderly exchange of documents, scheduling of depositions, and filing or tolling of necessary motions. The mediator's neutral position can facilitate not only a reasonable exchange of information, but also a process that will promote trustworthiness among the parties even before they get to the mediation table.

## VI Opening Statements and Negotiations

Opening statements can be crucial to the mediation process. If the Plaintiffs have one strategy and the Defendants another, these strategies may contradict one another and raise obstacles to the negotiation process. In the design of the mediation, the parties can confer with regard to their separate strategies and attempt to work together on the manner in which the opening statement will be constructive. It may be necessary for the Plaintiffs to be very factual; and, likewise, for the Defendants to identify, in an empathetic but objective way, all of their defenses. On the other hand, it may be more appropriate for there to be a general conciliatory tone set among all those speaking on behalf of their clients. Still on other occasions it may be best for the parties to not say anything and only allow the mediator to introduce the process. Finally, it may be best that there be no opening statement or session. In a complex or multiparty mediation, these

opening statement strategies should be designed by and among the parties with the assistance of the mediator before the mediation.

Among multiple parties, one issue will be whether or not the negotiation should be unified or diversified. That is, are the Plaintiffs or Defendants going to negotiate collectively or separately. Will there be diversified negotiations among different classes of Plaintiffs or Defendants? In some mediations while the Plaintiffs would like to negotiate collectively, the Defendants may insist on individual negotiations. Through premediation design, counsel and their parties can come to an agreement on the appropriate way to negotiate before they get to the mediation day. In this way the mediation, itself, is not interrupted or obstructed by differences in the manner by which the parties will negotiate. Working this out prior to the mediation will allow the mediation day to be not only expedited, but more cooperative.

Many times there are nonmonetary remedies that need to be identified in addition to the traditional monetary remedies. Understanding how important such nonmonetary remedies are in dealing with them prior to the mediation, may be crucial to the mediation itself. This can be accomplished both through premediation caucuses with counsel for the parties as well as with the parties themselves. These premediation caucuses will not only assist the mediator in identifying the nonmonetary interests of the parties, but will also help the mediator in achieving a higher level of rapport with parties before getting to the mediation day. This, too, is of great importance to the overall process.

In complex, multiparty cases, it is equally important to get all parties “on board” with how many moves it will take to get to their respective “goals” (reasonable expectation for resolution of the case). If one party believes they can get to their goal within two or three moves, but is not sure if the other side will get there in the same number of moves, such uncertainty interferes with the mediation strategies. On the other hand, if it is understood that each side will get to their goals in three to five moves, then an agreement on the designated number will allow each side to better prepare. Are the parties going to negotiate traditionally by offer or counteroffer, or is this negotiation going to be through simultaneous moves? Is this negotiation going to be through a double-blind method of negotiation, or are the multiple parties going to cooperate to combine their offers so as to present one unified number?

These negotiation strategies, which may traditionally be left confidential until mediation day, can be better dealt with before the mediation and allow the parties to come to the table with more confidence, trust, and cooperative attitude if designed prior to the mediation.

## VII Conclusion

Designing the mediation helps not only the parties, but their representatives, mediation advocates, as well as the mediator. It enhances the trust among the parties (which is a vital element to the negotiation process). It allows for a more fluent communication between or among the parties, while at the same time facilitating a more cooperative effort even before the negotiations begin. The mediator has the principal responsibility for introducing, encouraging, and/or facilitating such premediation design. The parties and their counsel should consider its value and potential in ultimately achieving resolution. Said design has been a critical factor in the success of many complex mediations. It can and will be a factor in your mediation if effectively utilized.