

## **MULTI-PARTY MEDIATION**

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### **INTRODUCTION**

Since 1981, I have had the honor of serving thousands of parties in mediations where resolutions have been achieved in approximately 95% of the cases. From simple two- party contract cases to complex sixty-five party products liability cases, the goal of resolution is always the same: allowing the parties to negotiate to a “reasonable ballpark” in which they, with the facilitation of the mediator, identify “home plate” and create for themselves the opportunity of a mutual agreement.

However, not all mediations are alike. Indeed, each has its own unique personality shaped by either, the litigating parties, their counsel, the law of the case or the facts of the case. While simple mediations can implement the general procedures of opening statements, caucuses, and written mediation agreements; multiparty mediations provide many unique elements and procedures that must be identified, and when appropriate, implemented to achieve total success.

This article will identify those unique elements and procedures. It is divided into the following sections:

- I. The Mediator(s)
- II. The Facilities
- III. Mediation Parameters Identified – Pre-Mediation Attorneys’ Caucus(es)
- IV. The Position Statements
- V. The Opening (Joint) Session
- VI. The Negotiations/Caucuses
- VII. The Reasonable Ballpark
- VIII. Home Plate -- The Mediation Agreement

These elements and procedures will be discussed through anecdotal examples to illustrate their use and effectiveness. These anecdotes are real mediations which have been fictionalized so as to preserve their confidentiality. The anecdotal mediations are as follows:

- A. 30,000 metal poles were allegedly defectively coated which caused premature aging and deterioration. The parties included the manufacturer and seller of the poles, the manufacturer of the chemical coating, the applicator, and the inspectors. In addition, each party was looking to their insurance carriers to assist them. The insurance carriers took the position that there was no coverage for such claims, in light of the absence of any death, injury or property damage having been incurred as of the mediation. These poles were manufactured over a six year period for which numerous insurance companies were involved. These poles were distributed throughout the United States. So long as these poles “fell in the woods” an anticipated breach of contract or breach of warranty action may result; however, if these poles should “fall on a school bus or land in a stadium,” catastrophic injury, death and/or property damage would result. The manufacturer and seller of the poles sued all other parties who, likewise, filed numerous counterclaims and cross-claims. Declaratory judgment actions were also commenced by and between the parties and their numerous insurance companies over issues of coverage. (Hereinafter referred to as “30,000 pole mediation”).
- B. Seven women were admitted to a community clinic for a routine bladder surgery. A new nurse was instructed to deliver marked bottles of the anesthesia to the anesthesiologist who in turn administered the anesthesia.

Unfortunately, the marked containers did not contain anesthesia, rather they contained detergent. Each woman suffered varying degrees of burns and destruction of their bladders and other internal organs. The clinic, attending physicians, nursing staff and their superiors were sued. (Hereinafter referred to as “multiple medical malpractice mediation”).

- C. An insurance company was the subject of a class action for selling “vanishing premiums,” “retirement plans,” and “savings plans.” Hundreds of policyholders opted out of the class action and filed individual suits in their respective state courts, joining not only the insurance company, but the local agents. While both economic damages and mental anguish were, for the most part, relatively small (less than \$10,000), the potential for punitive damages in any one case was substantial. (Hereinafter referred to as the “multiple insurance policyholder mediation.”)
  
- D. A teenager was killed while driving within the speed limit on the circumference road of a shopping mall. The deceased’s father filed suit against the owner of the shopping center, general contractor, paving subcontractor, architect, landscape contractor, and retail store tenant in the vicinity of the accident. Plaintiff claimed liability, jointly and severally, against all of the party defendants for the wrongful death of his only daughter. Under state law there was no contribution among joint tort feors; however, there were contractual indemnification agreements among certain party defendants. (Hereinafter referred to as the “multiple party wrongful death mediation.”)

- E. A residential development of garden homes suffered from allegedly improper drainage and allegedly defective workmanship in the construction of their garden home units. Twenty-eight property owners sued the owner of the development, as well as the two different general contractors who built the homes within the development. (Hereinafter referred to as the “multiple property owner mediation”.)
  
- F. Five employees of three companies were killed or badly burned as a result of an oil fire. Sixty-six defendants included not only the operating companies, but also sixty-three working interest owners of the oil field. While each owner had an acknowledged percentage interest, each owner had different levels of liability insurance coverage. It was made clear from the beginning that each owner’s contribution would be limited to their pro rata share (equivalent to their ownership interests). (Hereinafter referred to as the “multiple burn mediation”.)

**I. The Mediator(s)**

The selection of a mediator is critical to a multiparty mediation. The mediator should not be overwhelmed by the multiplicity of parties, counsel, issues or negotiating strategies. The mediator must be able to get control of the process as opposed to trying to get control of the parties. An organized procedure that has been adopted by the parties and their counsel can achieve this end. (See, supra, Mediation Parameters Identified -- Pre-Mediation Attorneys’ Caucus(es) at p. 10-13).

A team of mediators may be appropriate in certain multiparty settings. The first consideration should be the need to separately handle different groups of plaintiffs and/or defendants. In such case, a team of mediators may be able to better facilitate the separate groups.

In the multiple medical malpractice mediation, the seven injured plaintiffs were represented by different counsel. Each plaintiff needed to be separated from the other due to the fact that their injuries were different; and, accordingly, their settlements would not be uniform. It was necessary that each plaintiff be in a separate room and that the offers be separately communicated to each of them. At the same time, it was necessary that each party plaintiff and their family be kept apprised of the developments without too much time between each caucus. Accordingly, it was decided that there would be one lead mediator with two co-mediators. The head mediator would be principally responsible for the negotiations between the defendants and the plaintiffs' counsel, generally. However, the communication of specific offers to the party plaintiffs was done through the delegation of one co-mediator to every two or three plaintiffs. This kept the plaintiffs more fully informed on a more frequent basis and kept the process moving so as to enable the parties to accomplish full resolution of all cases within a twelve hour period.

A second consideration for a team of mediators is where a claim calls for a certain expertise, such as that of an engineer, an architect or a contractor. In the multiple property owners mediation, the mediator obtained the approval of the parties to hire an independent contractor to review the property damage claims of each homeowner. The mediator allowed the parties to agree on the identification of the contractor. The contractor was of vital help to the mediator, not only in verifying the specific items of damage alleged, but also in reaching compromises when conflicting degrees of damage or the costs of repair became a mediation issue.

It is imperative that mediation teams work together so that mediation strategies and communications are identical and in conformity with one another. This requires tight control and close coordination by and among the mediating team. It results in a more efficiently run mediation and one in which the parties are more meaningfully engaged in the process. Such an engagement is crucial to achieving resolution.

## **II. The Facilities**

It is imperative that the facilities for a multiparty mediation are accommodating to all parties and their counsel. There must be sufficient rooms for all parties collectively and individually as necessary. There must be a room sufficient to handle opening statements and other joint caucuses of all parties and counsel. There must be a room sufficient to house all defendants together so as to obtain unified or collective offers. For that matter, there must also be a room large enough for all plaintiffs to gather to the extent that such collective caucusing is appropriate among them.

At the same time, there should be a sufficient number of “break-out rooms” for defendants or plaintiffs to remove themselves from a joint caucus to meet privately over their individual positions. Finally, it is important to have an “attorney break-out room” so that the mediator can meet with attorneys or they can meet among themselves during different stages of the process.

During the 30,000 pole mediation, a separate room was established for the seller, the manufacturer of the chemical, for the applicator, and for the inspector. In addition, a room was established for all insurance carriers. There was also a joint caucus room where all parties, their insurance carriers and counsel met at various times during the course of this one week mediation. The climax of the mediation came in a joint session in which the mediator, having consulted with each party separately, identified a “mediator’s interim proposal” that ultimately led to the resolution.

In the multiple medical malpractice mediation, each of the seven plaintiffs had a room to themselves. The defendants had a joint room in which they all met. The defendants had three break-out rooms available for their individual caucuses, and the plaintiffs’ counsel had a break-out room separate and apart from their clients. The mediating team also had a room to facilitate their mediation strategies.

In the multiple party wrongful death mediation, the defendants were divided into group A and B defendants. In this case, unification of all defendants was not practicable, and, therefore, it was abandoned. Group A represented the major defendants while group B represented the minor defendants. Negotiations commenced with both groups. However, after several hours Group B was temporarily dismissed from the mediation while negotiations continued with Group A. Group A

negotiations were successfully concluded, contingent on resolution of Group B. Thereafter, Group B returned to successfully conclude their negotiations.

In addition to the facilities having sufficient rooms, the facilities should also have sufficient means of providing coffee, tea, cold drinks, as well as morning snacks, lunch, afternoon snacks and dinner. The mediation staff should be available to cater to these needs throughout the day and into the evening.

Mediation is a user friendly service, therefore the facilities and mediation staff are critical to providing friendly services in the midst of intense, complex negotiations.

### **III. Mediation Parameters Identified – Pre-Mediation Attorneys’ Caucus(es)**

Typically, the mediator, unilaterally or in conjunction with the parties, will define the parameters of the mediation. Usually, this only requires the setting of a date, time, place and the request to all parties or their appropriate representatives to be present with full authority to settle the case. Further, the request for position statements is a constructive source of insight, not only for the mediator, but for the parties themselves.

In a multiparty mediation, the identification of mediation parameters is more significant. The parties and their counsel are going to be one of a number of people in attendance. The dynamics of interaction among multiple parties raises the level of the personal and professional anxieties and complicates the negotiation strategies. The last thing that is needed in a multiparty negotiation is for each party to enter the mediation with different ideas as to how the mediation will be conducted or how the negotiations will proceed.

Pre-mediation caucuses can address these issues in advance of the mediation. For instance, will the defendants be bringing an insurance claims representative or an officer of the company? Will the injured plaintiffs be coming alone or will family be accompanying them, and what is the relationship of these people with the plaintiffs? Inquiries as to whether persons present will assist or

hinder negotiations are appropriate for discussion and for determining everything from the tone of the opening statements to the manner in which the negotiations will proceed.

Pre-mediation caucuses can also assist in getting opposing sides to agree on negotiation methodology. This is where the mediator can attempt to get some control over the process. By insisting that each party begin with an analysis of their case before they begin negotiating, the parties are urged not to establish offers or goals based on “what they want,” but rather what is a reasonable settlement based upon a courtroom or other relevant analysis. This will be discussed in more detail below in “The Opening (Joint) Session” at pp.16-22 . For purposes of this section, suffice it to say that if each side can agree on a general methodology of negotiation, then they can more effectively control their clients and maintain control of the process as they attempt to work towards resolution. The pre-mediation caucus can, likewise, assist the mediator in identifying the alignment of the plaintiffs or defendants and can determine if offers among multiple parties are going to be unified or presented separately.

Accordingly, a pre-mediation caucus or caucuses in multiparty mediations should be seriously considered. In its simplest form, the mediator can caucus with the attorneys and/or parties by a telephone conference. In its more complex form, the mediator may request a meeting with all counsel. Taken one step further, the mediator may unilaterally meet with each attorney and/or party representative to get their view of the mediation process and, thereafter, may call for a meeting or phone conference to outline the process based upon input from all.

This was, indeed, the methodology of the 30,000 pole mediation. The mediator met individually with each of the parties’ counsel to hear not only their view of the process, but also their view of the facts. The mediator accumulated the “common denominators” of the process and the facts and, thereafter, had a pre-mediation meeting with all counsel where he identified that to which they had separately agreed. One such concept of the agreement was the establishment of “a risk taker’s pool” with certain terms and conditions. Issues such as who is to be the risk taker, who is



going to contribute to the pool, and in what amounts or proportions, became the focus of the mediation for all parties.

In the multiple burn mediation, a pre-mediation caucus among all counsel devised the following strategy for the four day mediation: On the first day, all plaintiffs' counsel would make an opening statement, together with an opening demand. Thereafter, plaintiffs and their counsel recessed from the mediation while all defendants remained to caucus over their relationship to each other throughout the mediation and to devise an opening counteroffer. The second day would begin with the defendants making an opening statement to three of the five plaintiffs. Following these opening statements the defendants would communicate their first counteroffer to the mediator. The remainder of day two and three would be spent resolving these three cases. Day four would begin with an opening statement by the defendants to the remaining two plaintiffs. The remainder of day four would be spent negotiating with the two remaining plaintiffs.

In the multiple medical malpractice mediation, it was agreed in pre-mediation caucuses that both plaintiffs' and defendants' offers were to be presented in the aggregate. It was further agreed that plaintiffs' counsel would take that aggregate and divide it among their clients based on a formula to be agreed on. It was going to be up to the plaintiffs' counsel to consult with their clients as to the reasonableness of that division as the negotiations progressed. At the same time, the defendants had agreed in a pre-mediation caucus to present unified offers as long as they had a participation of all defendants.

In summary, the pre-mediation caucuses allow the mediation to proceed with everyone being on "the same wave length" of how the process will proceed as opposed to each party having their own vision as to how they want to proceed. As important as this is to the parties, it is equally important to the mediator(s) who is/are attempting to organize the means of achieving ultimate resolution.

#### **IV. The Position Statements**

Generally, I am a strong advocate for the submission of position statements by the parties prior to the mediation. I believe it is even more important in multiparty mediations.

Position statements have a dual purpose: First, they educate the mediator on the facts, issues and positions of the parties. Second, they allow each side to see those issues and positions of the other side which are critical to their individual evaluation and to their collective resolution.

Some advocate that position statements should remain confidential between a party and the mediator. I take the view that the more shared, the healthier the negotiations. The more each side knows about the other's position, the more effectively they will be able to achieve resolution. Understanding full well that some things must be and remain confidential, this can certainly be dealt with in a confidential addendum to the mediator, or a "blind p.s." that does not go to the other parties.

The last thing the mediator and the parties want, is to go to the mediation looking at different facts, different issues, or different positions, and find they are in no way ready, willing, or able to negotiate. I am convinced that if counsel and parties know the strengths and weaknesses of their case and appreciate the venue they are in, they can identify reasonable verdict/settlement ranges (See, The Opening (Joint) Session at pp. 16-22, and Negotiations/Caucuses at pp. 23-28), and with the help of an experienced mediator, they can achieve resolution. It is known as "informed consent." Take away the information necessary to make an "informed" decision, and you have failure.

This is especially true in multiparty mediations where numerous parties are setting forth their independent positions on various issues. "Where do I fit within my own camp (of Plaintiffs or Defendants)" and "where does the opposition truly see its strengths?" Thorough position statements can answer these questions.

I suggest that position statements include the following:

- a brief recitation of the facts that gave rise to the litigation;
- the present posture of the case (any matters pending in court or in any related litigation);

- any recent developments that may impact on the resolution of the case (confidentiality optional);
- the history of any efforts to settle the case including any prior offers or demands;
- a summary of the parties' legal positions and a candid assessment of their respective strengths and weaknesses (confidentiality optional);
- identification of parties, representatives and counsel who will be directly involved in the mediation discussions; and a confirmation of their authority to settle the case;
- description of any sensitive issues that may influence any settlement negotiations (confidentiality optional);
- the nature and extent of any prior or future relationship between the parties that may affect the mediation (confidentiality optional);
- the negotiating strategy of the parties and counsel (confidentiality optional);
- any suggested approach you would like me, as your mediator, to take in an attempt to settle the case (confidentiality optional);
- any creative solutions (confidentiality optional).

## **V. The Opening (Joint) Session**

Mediation, itself, begins with the opening (joint) session. For the mediator as well as the parties, this is a critical stage of the negotiations. The tone for conciliation must be set (at least by the mediator) at the same time each comes in to identify their opposing positions. As a general rule, the opening session should not be avoided due to the frailty of the parties or their issues. I have seen numerous occasions where the parties insisted on not doing an opening statement, and half way through the negotiations they regretted that they did not have an opportunity to directly exchange positions.

In the multiple medical malpractice mediation, the attorneys believed that to bring the seven women and their families in to hear the positions of the clinic and personnel would alienate the parties. Despite the urging of the mediator to the contrary, the negotiations proceeded without opening statements. After three hours of negotiations, the parties were over \$11 million apart, the

mediator requested a joint session to refocus on verdict/settlement range analysis. Within one hour following that joint session, the parties were \$2 million apart and proceeded toward resolution in a fluid manner.

At the very least, a joint session should allow the mediator to set the tone. Acknowledging the dignity of the parties and their positions, while acknowledging the issues between them, the mediator will stress that no one leaves the mediation “a loser”. Both sides “win” by either agreeing to agree or agreeing to disagree. So it is really a day or a series of days during which the question must be asked “can we agree despite our differences?”

The mediator can also change the attitude of the negotiations from “what I want” (whether it is to get or to give) to “what is reasonable in the forum provided.” To the extent that the setting is a courtroom analysis, it requires an analysis of a “reasonable verdict range”. The mediator’s monologue, in part, would be as follows:

The ability for all parties to understand how a jury comes to unanimity, allows you to appreciate that your negotiations are not pure “compromise,” but rather, are based upon the same compromising process that the “reasonable jury” will deal with in coming to a reasonable verdict. “What is reasonable verdict range?” A reasonable verdict range is a verdict which takes into consideration that among twelve jurors, four could absolutely agree with everything that plaintiffs say, while four can agree with everything the defendants’ say (whether it is on the issue of liability or on the issue of lower damages), while four are confused over testimony after hearing the jury charges. These final four jurors, after two hours of deliberation, finally agree on a plaintiffs’ verdict, but disagree with the amount proposed by the plaintiffs and insist on a “reasonable” level of damages. How do these three sets of jurors come to one unanimous decision (or other decision that results in a verdict)?

The “reasonable verdict range” is not the end of the analysis. Of course, it presumes a plaintiffs’ verdict; and many defendants will come into a mediation saying that there is a better than 50 - 50 chance that they will win the case outright (or at summary judgment). In addition, there is a cost to get to the finality of a trial and an appeal. Further, there is time and uncertainty in getting there and perhaps getting remanded on appeal for a new trial. Finally, there may be issues of collectability. In some cases, however, a reasonable verdict range will be the reasonable settlement range and in a few instances, it may even be less than a reasonable settlement range, where something can be bought in mediation that cannot otherwise be achieved in going through a jury process (the finality rather than the multiplicity of lawsuits; confidentiality; and the like).

Generally, however, the reasonable settlement range will have some diminished relationship to a reasonable verdict range. Thus, the parties must move from an

evaluation of the reasonable verdict range to the reasonable settlement range. The reasonable settlement range will take into consideration all of the extraneous factors beyond achieving an actual verdict. As a defendant may say “if I am going to pay the reasonable verdict range, I may as well go to the expense of a verdict with the chance of doing better.” So, to what extent should the reasonable verdict range be discounted, if any, to achieve finality at mediation? Out of this analysis, comes the reasonable settlement range and a reasonable goal within the settlement range.

As for a “reasonable goal”, this is a level within the reasonable settlement range that a party decides to achieve. It must be realized that this is a unilateral decision and thus, each side is going to have a “reasonable goal.” The chance that these goals are the same is small. It is more probable that these goals will be different. The question is not so much whether they are different, as is whether or not they are in a reasonable range of one another. Of course, the plaintiffs want the defendants’ reasonable goal to be on the high side of the reasonable settlement range, while the defendants want the plaintiffs’ reasonable goal to be on the low side of the reasonable settlement range. Resolution requires that the respective goals be set at a reasonable level within the reasonable settlement range. The key to the negotiations will be whether the parties can make reasonable moves in relation to the goals they are striving to achieve.

The attainment of these goals will create the proverbial “reasonable ballpark”: One side creates left field, another side creates right field, and so on and so forth. If the parties can create a reasonable ballpark, the job of mediator is to assist the parties in identifying “home plate.”

The above monologue of the mediator sets the tone from which the parties’ counsel make their own opening statements with a tone of advocacy with a touch of conciliation. This becomes the equation for healthy negotiations. A joint session may need to be reconvened during the course of the mediation to refocus on the process established by the mediator.

The opening statements in a multiparty mediation take on a number of different forms. However, the commonality of all such opening statements is that they must be personable to all opposition, cause all parties to rethink their positions and let all know they have a stake in the ultimate resolution by weighing the risks of proceeding to trial and the opportunities of a reasonable negotiation.

The plaintiffs’ counsel has a unique role in the opening session of a multiparty mediation. Generally, this is the first time the defendants’ representatives have met plaintiffs’ counsel. The defendants may be represented by claims representatives or company representatives. This first impression is crucial to the mediation due to the fact that one of the elements of the defendants’

evaluation will be the quality of the plaintiffs' legal representation. Thus, an articulate and well thought out presentation is very important to the success of the plaintiffs' case. I have heard many mediations where the opening statement, itself, added to or detracted from the value of the plaintiffs' case.

The plaintiffs' statements must be personable with eye contact being made to the company or insurance representatives. The plaintiffs' statements must be thorough yet concise. Remembering that the defendants, through committee or board, have reviewed all of the facts given to them by the defense counsel, the most controversial facts or issues as well as evaluation should be dealt with.

There are various aids that can be used by plaintiffs' counsel. They include videos, booklets/books, blowup charts, and enlarged deposition testimony. Recalling that mediations are not formal presentations of testimony, a video can be effectively used to view the plaintiffs in their own surroundings, can allow the plaintiffs to say what is on their mind and heart, and can show scenes that may otherwise be difficult to recreate in a courtroom. Videos can also be used to have expert witnesses or lay witnesses tell what they opine or otherwise know. These videos are presented in a "20/20" or "60 minute" magazine format.

In the multiple burn mediation, the enlargement of photos of the terrible injuries allowed for the re-creation of not only the pain and suffering of the plaintiffs, but also their families. The human dynamics of not only the plaintiffs' perspective, but those of the attending physicians, graphically depicted the agony experienced.

The defendants' counsel has an equally important challenge in a multiparty mediation. He/she must likewise be personable, but in a different way. In a personal injury, wrongful death case, his/her audience is typically neither a professional nor business person. It is the injured or aggrieved party sitting with a lot of emotion in an unfamiliar and thus uncomfortable setting. The goal is not to get the plaintiffs to see that they are wrong and should never have filed their action; rather, the message conveyed must be that of regret and apology for the accident, empathy for what the plaintiffs have gone through, while urging the plaintiffs to appreciate that there are reasonable

defenses that may negate liability or minimize damages. While plaintiffs' counsel may have oversold expectations of the plaintiffs, it is up to the defense counsel to gently bring the plaintiffs back to reality. The key is reaching the plaintiffs, so that when the expectations of the plaintiffs are not achieved ("no, this is not a million dollar case") the idea of considering a lesser amount is neither unreasonable nor unacceptable.

Defense counsel, like plaintiffs' counsel, can effectively use aids such as videos, documents and charts. A defendants' reconstruction presentation can be very persuasive. The display of a clear and unambiguous contract term can cause the plaintiffs and plaintiffs' counsel to question the admissibility or credibility of contradictory oral testimony. The enlargement of the plaintiffs' deposition testimony or the deposition testimony of a key plaintiff's witness, can cause the plaintiff and his/her counsel to rethink the strength of their offense.

In the multiple party wrongful death mediation, an empathetic set of defendants' counsel was able to effectively reach the plaintiff in a way that ultimately made the difference in achieving resolution.

In the multiple insurance policyholder mediation, the policyholders were moved by the mediation admissions of the insurance company. In fact, the opening session established the "seed" by which an insurance relationship was revived and policy relief extended which, when coupled with limited monetary relief, made resolution possible.

In a multiparty context, the opening or joint session will also identify relationships among groups of plaintiffs or defendants. This may be accomplished in a separate joint or open session among all plaintiffs or all defendants. How does one plaintiff's liability and damages stack up against the other? How unified are the defendants, and will the multiplicity of comparable or contradictory positions be of disadvantage or advantage to the plaintiffs. And, as importantly for the mediator, how will that "reasonable jury" weigh the strengths and weaknesses identified at the joint session.

## **VI. The Negotiations/Caucuses**

In a multiparty mediation, the parties do not have time to arbitrarily throw out offers and counteroffers. The ability to “rationalize” and “legitimize” offers is critical to the success of such negotiations. As an example, when the multiple medical malpractice mediation was floundering with arbitrary offers and counteroffers, the ability to get the parties to identify the reasonable verdict ranges and settlement ranges, brought their negotiations immediately to the “reasonable ballpark.” Thus, it is imperative that the parties attempt to identify those ranges before numbers are arbitrarily thrown out.

Neither the reasonable verdict ranges nor the reasonable settlement ranges are necessarily communicated to the other side. In fact, they are generally kept confidential. There are times, however, when one side or the other will insist on the disclosure of their reasonable verdict range to let the other parties know where it stands. (Generally, if a reasonable verdict range of defendants is at one level, they are certainly not going to exceed that level).

The request of the mediator in the multiparty negotiation process is to stress that the parties make reasonable moves in relation to their reasonable goals and that reasonable goals should be contained within their reasonable settlement ranges (which should have a meaningful relationship to the reasonable verdict ranges). This is one way of establishing legitimacy.

It is also one way to focus the discussion on evaluation, as opposed to revisiting all of the factual issues previously raised in the opening statements. While this jousting will still go on to some extent in multiparty negotiations, the ability to work through the facts and the law and deal with evaluations can expedite the negotiations. This is another reason why more thorough disclosure in position statements can aid the multiparty negotiation process. By fully identifying the facts and the law in the position statements, the distinctions can be dealt with in opening statements and, thereafter, they can be set aside as the parties begin to negotiate.

Again, legitimacy is the key and the sharing of one’s verdict analysis can aid the legitimacy of a party’s position or move. The verdict analysis may be those of other like or similar cases



(whether plaintiffs' verdicts or defense verdicts). Likewise, settlements in like or similar cases can be of some persuasive authority. Prior verdicts and settlements are to mediation what mandatory and persuasive decisions are in the appellate arena.

Other areas of legitimacy include evaluations of the elements of the case: The ranking of the plaintiffs, defendants, plaintiffs' counsel, defense counsel, judge, and jury venire. Each of these will add to or detract from a plaintiffs'/defendants' verdict. More importantly, these elements will add to or detract from the reasonable verdict range analysis prompted by the mediator.

One unique aspect of multiparty negotiations is the ability for multiple defendants or multiple plaintiffs to mediate with and among each other. For instance, where six defendants are having to evaluate their respective positions, is it not inappropriate for them to consider, "what is the overall reasonable verdict range?" Thereafter, what is the reasonable settlement range and a reasonable goal for the group as a whole?

The mediator can be a vital tool in facilitating that joint dialogue. The more dialogue jointly exchanged, the healthier the relationships will grow among the defendants. If necessary, the mediator can allow the defendants to caucus separately to make their evaluations. Once the defendants have collectively identified a reasonable goal, the question then becomes what is their respective relationships toward that goal. If that can be agreed on among all defendants, then the mediation process can begin to flow between the plaintiff(s) and the defendants without undue delay caused by infighting as to what contribution each defendant should make on any particular move. In the ideal situation, all defendants are moving toward one goal with a known and agreed upon relationship of contribution toward that goal.

Multiple plaintiffs have a similar yet different analyses to make. First, it is seldom that they are all aligned in the same litigation. Generally, they are before a different judge, in a different venue, and in separate cases. Thus, they are in need of defining different (or at least independent) reasonable verdict ranges for themselves and not collectively. This is not to say that plaintiffs' cases

are not at times consolidated or that plaintiffs are not joined in the prosecution of their cases. When they are, their analyses will be similar to the defendants' analyses as set forth above.

What the plaintiffs' must identify in a multi-plaintiff setting is the relationship of their injuries one to another such that as they are getting counteroffers from the defendants, they know among themselves how to divide and apportion an aggregate offer. A similar analysis unfolds: what is a reasonable verdict range, what is a reasonable settlement range, and thereby, what is a reasonable goal for the plaintiffs collectively. How does A's claim relate to B's, and how do A's and B's claims relate to C's.

Whether they are different verdicts or the same, how do these collective verdicts relate to the policy limits and/or the collectability of a judgment against the defendants? Such restrictions will bring plaintiffs together to work for their common good, realizing that their individual interests are maximized by working together. The last thing that any plaintiff wants to see is the other plaintiff achieve all of the policy limits, leaving nothing for him/her. On the chance that he/she may get to trial first, why not work together so that all can achieve a reasonably successful result?

When dealing with multiple plaintiffs, some defendants will want to negotiate "in the aggregate." That is, "we will pay you the total sum for all of these cases and we will let you divide it up". This is certainly contingent on the plaintiffs being willing to deal in the aggregate (which assumes that the plaintiffs have an agreement among them as to how to apportion the aggregate offer).

When groups of plaintiffs or defendants are not amicable, or willing to negotiate together, it is sometimes necessary to work separately with different groups of plaintiffs and defendants. At times it requires one defendant to make an offer conditioned on the resolution of all claims. Similarly, plaintiffs may take the position that pro tanto is not possible and therefore acceptance of offers of one group of defendants is contingent upon the acceptance of offers with the remaining groups of defendants.

In the 30,000 pole mediation, no resolution could be achieved until a total aggregate sum was achieved. Thus, while some defendants were willing at an early stage to put up their proportionate shares, it was not until all parties acknowledged their proportional share that the “risk takers pool” was filled and resolution achieved.

In the multiple party wrongful death mediation, resolution with group A was conditioned upon resolution with group B. While group A represented the more substantial claims and resolution had been achieved at an acceptable level, this was not finally accepted until group B had achieved resolution. Had group B not achieved resolution, plaintiffs were not obligated to accept the resolution of group A.

In the multiple burn mediation, the plaintiffs had agreed on a formula whereby they would pool their medical expenses, pay their attorney fees and litigation costs and the balance would be equally divided among the three plaintiffs. At the same time, the defendants had operating interests’ and working owner interests’ relationships to be honored. Some of those defendants had certain policy limit restrictions. Once the primary defendants put up their policy limits, it became a question of whether the working interest could achieve an acceptable level among themselves and with the plaintiffs. Again, resolution was achieved.

In the multiple insurance policyholder mediation, the insurance company established a legitimate criteria for paying claimants: A grid was established in which claims were evaluated from “good” cases to “poor” cases. The company’s attorney explained the grid to each party or his/her attorney. Each case was negotiated with the grid analysis. Over 300 cases were mediated and more than 275 were resolved.

In the multiple property owners’ mediation, the attorneys for all parties caucused after several hours of debate over liability, mental anguish and punitive damages. The mediator got them to identify a reasonable formula to apply to each property owner: each property owner would be entitled to the cost of repair, plus 35% attorney fee, plus \$2,000 costs.

## **VII. The Reasonable Ballpark**

The above discussion assumes that each multiparty group is making reasonable moves in relation to their reasonable goals. In 99% of these cases, the reasonable goal of the plaintiffs is not the same as the reasonable goal of the defendants. Then what?

As suggested earlier, these reasonable goals create the proverbial “Reasonable Ballpark.” If these goals are unreasonably evaluated, the ballpark may not be established. A wide settlement range among opposing parties will create a large “ballpark”; a small gap will create a smaller “ballpark.” Assuming the identification of the ballpark – large or small – where is resolution? It is found at the proverbial “home plate.”

There are three ways to “slide” safely into “home”:

(1) The multiple parties may continue to negotiate beyond their goals. Where the prior negotiations have moved well, this is not difficult. Where there has been a struggle to find the ballpark, this may not be practical.

(2) An attorneys’ caucus may be helpful where further movement by the multiple parties is not likely. The attorneys can agree either to discuss further movement openly with other counsel, to discuss further movement confidentially with a mediator, or to simply agree to get back with their clients to continue the process. In either event, getting the attorneys together outside their respective rooms can be a “breath of fresh air” to the attempt to find home plate. If the attorneys wish to discuss further movement openly with one another, that should be encouraged. To the extent that they do not, the idea of meeting confidentially with the mediator, either with or without their clients, may assist in finding where home plate may be located.

If the mediator sees a common home plate being identified, he/she can let the negotiations proceed. However, if they are different, there is a third alternative to sliding home, the “mediator’s proposal.”

(3) The mediator’s proposal is a resolution concept that the mediator creates knowing (confidentially) where each party can be drawn. Certainly, if one side is at \$1 million and the other

side is at \$750,000, it would not be appropriate for the mediator to propose either \$751,000 or \$999,000. Rather, the mediator must choose a level that represents common ground. Common ground may be mathematically equal distance between the parties, or it may be at some other level. It may include some other non-monetary proposal that may have been confidentially shared and known to be of common interest and it may include some other components of resolution (such as tax advantages, confidentiality, or terms of payment).

How does the mediator achieve acceptance of a mediator's proposal? This is done by an exercise known as "all yeses or all nos." That is, the mediator will make his proposal to all parties, either collectively or separately. He/she will request responses to be given to him/her confidentially. The mediator will get responses from all parties. The responses will not be known to anyone other than the mediator. Once the mediator receives all responses, he/she will identify either all yeses or all nos. A no from either side will result in all no's being disclosed. The only way resolution is achieved is if the mediator receives yeses from all parties.

Thus, it can be seen how critical it is for the mediator to identify a resolution that is perceived to be common ground for all parties. This is the test of the mediator's skill.

What happens if the mediator gets one no? The question is better answered "What happens if the mediator truly gets all no's?" In the latter event, truly the mediation is over. In the former event, it may be possible for the mediator to keep the negotiations alive if the negating parties will identify how close to the mediator's proposal will they go. Thereafter, the mediator will need to see if the other parties will reconsider and accept. This exercise is not intended to have this secondary negotiation, but it is available to the mediator if it can achieve resolution.

Of course, in multiparty negotiations, obtaining acceptance of a mediator's proposal is all the more complicated. It requires multiple parties to move beyond their mutually agreed goals. Many times it requires realigning of percentages of participation, whether they are paying or receiving.

This process of getting to home plate in multiparty negotiations requires the mediator and the parties to get a "second wind" and have the patience to work through new levels of resolution.

In reflection, it can be seen how important it is to move through the negotiation methodically and smoothly so when goals are reached that are not compatible with resolution, resolution can still be achieved. This can only be successful when the parties have not begrudged each other to move toward their goals, realizing that getting to those goals requires additional negotiations to home plate.

### **VIII. Home Plate – The Mediation Agreement**

Just like in the two party mediation, the mediation agreement in a multiparty negotiation is vital. The delineation of each party's commitment and participation in the resolution must be memorialized. From the identification of monetary sums and payment terms, to the identification of who is paying what should be addressed. At times, the parties (or their counsel) will insist on not disclosing who is getting what among the plaintiffs, or who is paying what among the defendants. While the opposing sides do not need to see this distribution, it is suggested that a written, supplemental mediation agreement be entered into among defendants or among plaintiffs to identify the distribution. To the extent that the payment is to be characterized as payment for personal injury as opposed to fraud and misrepresentations, this should, likewise, be identified in the mediation agreement.

The terms of the release should be set forth as generally or as specifically as is required. Standard provisions in releases are well known in the local communities of attorneys. However, terms such as confidentiality, indemnification, and waiver of subrogation claims should be set forth. While one side may draft the release agreement, the other side should be given the opportunity to review and approve it. Thereafter, all parties participating in the release should be required to sign it and that requirement should be set forth in the mediation agreement.

Dismissal of the case with prejudice or such other judicial disposition should be set forth with the identification of the respective parties to pay their own or each other's court, litigation, and/or mediation costs.

The mediation agreement should be read by all parties and both the mediator and the attorneys should be available to answer any questions. Before the parties sign the agreement, they should be asked if they understand the terms and whether or not they are satisfied with the terms. So long as they answer affirmatively, all parties and their counsel should sign the mediation agreement. To the extent that any changes or modifications have been made in the drafting of the mediation agreement, those changes should be initialed by all parties and counsel.

The original mediation agreement should be left with the mediator, while copies of the mediation agreement should be distributed to all parties and their counsel.

The court(s) will simply be advised that the mediation was successful to the extent that a mediation agreement is achieved. The court will be advised that the attorneys of record will be forwarding the appropriate dismissal documents in due course. The mediator should remain available to the parties should any conflicts occur in concluding the terms and conditions of the mediation agreement.

## **CONCLUSION**

From the mediator to the facilities and from the position statements and opening sessions to the negotiations and home plate identification, multiparty negotiations are an art. The requirement of “met expectations” must be set in motion at the very beginning. Legitimacy and reasonableness must be a thread that ties the position statements to the opening sessions and the opening offers to the reasonable goals. The reasonable goals must be flexible enough to achieve home plate and home plate must be acceptable to all.

The very essence of multiparty negotiations is the totality of benefits to the parties, the attorneys and the courts. Consider: in one mediation multiple parties, allegations, defenses, and interests are being resolved in lieu of multiple motions, trials, and appeals, not to speak of the time and expense of those processes. In the same way that a ballplayer rounds third and heads for home

with the determination to win, so do the mediator of a multiparty negotiation must have the drive and courage to persist and resolve.

Respectfully Submitted,  
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