

WHAT'S DIFFERENT ABOUT COMPLEX CASE MEDIATION

I. INTRODUCTION

The settlement of complex disputes frequently can be advanced by the employment of an independent mediator. The skills of the mediator must go beyond the creativity of a good negotiator, shuttling offers and counter offers between two caucus rooms. The processing of the settlement of a complex case involves custom-designed, rather than off the shelf, dispute resolution. A framework must first be created in which settlement may be facilitated. The lawyers for the parties are central to the success of this process. They need to cooperate to find someone whose management skills are innovative and flexible enough to encompass a complicated case. Advance planning of the many steps involved will pay dividends.

By complex litigation, I mean matters in which the monetary stakes are high, or there are multiple parties or constituencies, or there is intense media interest. Any of these situations typically needs multiple sessions to mediate to conclusion.

This article provides a rough timeline, based on my experience, of the steps that a mediator in a complex case might follow in working with the parties and their counsel to design a dispute resolution process and manage it to conclusion. In a post script, it also recounts my experience participating as a mediator/arbitrator in a class action settlement.

II. THE LAWYERS' CENTRAL ROLE

The role that the lawyers can play in making the mediation productive can not be over emphasized.¹ Likewise, the mediator should see her role as supporting and enhancing the lawyers' ability to represent their clients as effectively as possible.

The lawyers will advance settlement the most by keeping their own lines of communication open. Even if the animosity among the parties is great, the lawyers must not lose their own ability to dialogue. If they have laid the groundwork, the mediator has a much easier time of it.

The lawyers should discuss the type of mediator they need—and should carefully review the strategies they think will be most fruitful for settlement discussions. When looking for a mediator, the lawyers should have a preliminary conference call with a few candidates. Find out not only the mediator's experience in complicated or high stakes litigation, but also how much time the mediator has available to devote to your case. Get some references and call them. Once you settle on a candidate, begin with a telephone conference with the lawyers and mediator only to introduce the case and the participants

¹ Indeed, some would argue that the lawyers themselves may be able to use a mediator's cooperative style of dispute resolution to settle their case without employing a mediator. *See, e.g.*, Selig, *Mediation Principles*, AAA Dispute Resolution Jo. 72 (Feb./April 2002).

briefly to the mediator. Agree on a timetable for a first in-person session and what will be done by each participant to prepare for it.

Lawyers are used to supplying the court with a single document in the context of discovery disputes. That device can be modified for use in the mediation context. For example, whenever possible, I ask the parties to submit a joint statement of the case, with separate statements setting out the position of each side on critical issues. I also encourage the parties to share as much information as possible. Instead of keeping their mediation briefs confidential, they should exchange all that they can, and put the confidential information in a separate letter to the mediator only.

III. THE FIRST SESSION--LOGISTICS

The first session may most fruitfully be conducted with the lawyers and mediator only. Its purpose is to begin the design of the process now that the mediator has learned enough about the parties and the dispute to be helpful.

The types of processes to be designed depend, for example, on the number of plaintiffs and the number of defendants, whether class or individual actions (or both) are involved, and whether there are federal or state (or both) actions pending. Most cases need to be broken down into many manageable pieces, and on many dimensions. For example, if it's a construction case with many subcontractors, dividing the various parties into groups and figuring out the insurance nuances is a major first step.

The parties may need assistance in developing necessary information not only to share with the other parties, but to inform their own litigation risk analysis. The lawyers and mediator could as a first step agree on what information will be located, how, and where and with whom it will be exchanged. These agreements can be formalized, if desired, either in a mediator's letter or an order to all parties.

IV. USING EXPERTS

In complex cases, it is common for the mediator to encounter subject matter in which s/he has no expertise. In fact, I use that lack of knowledge as a strength by telling the parties and their counsel that I rely on their expertise. While it helps to be a quick study, the mediator who is too facile in professing knowledge about the subject matter should cause the parties to suspect bias.

Of course, the lawyers will assemble documents for the mediator to review, arrange a site visit, and provide other ways to acquaint the mediator with the subject matter. The mediator may also decide to seek the parties' agreement to employ the services of an independent expert to assist her. In one multi-party case involving the extent of required accommodations under the Americans with Disabilities Act, I suggested to the parties that they give up their already retained experts to the mediation process and allow them to be used to help create a solution. The parties' experts visited the site together with the parties, counsel and me to view the actual working conditions.

They conferred, exchanged ideas and came up with proposed solutions for the parties' consideration.

In an appropriate case, the expert can act as an advisor to the mediator, or even as a co-mediator. These possibilities can be discussed as early as the first session the attorneys have with the mediator.

V. STRUCTURING THE PROCESS

Another early decision is who should participate in the discussions and when. First, the mediator will want to determine whether all stakeholders in the dispute are already in the discussions. The mediator will want to ensure that all stakeholders have spokespersons. If a group of people with common interests does not have a lawyer to speak for it, the mediator can encourage the group to hire one, or at least to appoint someone to act as spokesperson. In some cases, a corporate party may pay for counsel to represent a group with adverse interests since settlement discussions may be thereby facilitated.

In cases with large groups of parties, the mediator can limit the number of people at the table so that a constructive dialog can happen. A course can be charted in which numerous subgroups work on different aspects of the matter. In later sessions, the group convened may change depending on the circumstances. The mediator may pick out a small group of people (after getting the consent of the group) to help draft a text or to list options, or take on some other limited task.

In my experience, it is the exceedingly rare case in which the participants in the mediation do not feel the need to justify their decisions to others—the boss, the division vice president, the Board, the spouse or family business partners. As the mediator, I want to provide to the participants the time and tools for this consultative process to occur.

The mediator might decide to structure the process to limit the need for very senior executives to attend many sessions, while keeping them apprised of the developments. At the outset, I secure their commitment to attend the sessions in which the most critical decisions will occur. Frequently we agree to let middle managers first lay the groundwork, participate in the information exchange and the develop alternatives. Those steps can be reported to the senior people during the time between sessions, allowing time for consultation and strategizing. This strategy may maximize their involvement when it counts the most. When it's time to "close," I get the actual decision makers there. The settlement process is speeded up if they don't participate from a distance since momentum grows as the session goes on.

Operating in a planned pace, session by session, has other advantages in driving toward settlement. The mediator helps the parties set achievable goals for each session. Reaching those goals build increases the confidence of the lawyers and parties in the process and in turn creates building blocks for further discussions. I find that if the

parties' representatives can get agreement on the easy matters first; they then can move to more difficult issues.

The mediator plays many roles, depending on the issues and participants in the case. The mediator may at some points be scribe and note taker, cheerleader and coach. The mediator is also the natural central repository for the proceedings, keeping the discussions on track, figuring out where the discussions have led and what the next step or steps might be.

VI. DEALING WITH THE COURT AND THE MEDIA

If all participants agree, the mediator can communicate to the court, and having the mediator perform this function is particularly helpful if the case is on a fast track. Of course, without the explicit agreement of the parties, the mediator would not advise the court (or anyone else) about the substance of the mediation. The California Supreme Court 2001 decision in *Foxgate Homeowners' Assoc. v. Bramlea California, Inc.*, 26 Cal. 4th 1 (2001) is a well-known endorsement of this rule. The lawyers should be aware, however, that the procedures of some courts seem to provide for the mediator to report to the court about the progress of the mediation.²

If the media is interested in the case, the mediator may be used as the spokesperson. All parties can agree that the mediator will issue all statements to the press, and refer all inquiries to her. The participants can develop with the mediator the general content of the messages. The mediator may deliver written or oral statements that fit the situation.

VII. COMMUNICATIONS BETWEEN SESSIONS

I have had a website, www.dispute-solutions.com, for several years and I continually experiment with ways to use it more effectively. In the process, I have greatly increased my use of the Internet, particularly email, in mediations.³ Parties expect those in business to use email and lawyers are increasingly comfortable with using the Internet to communicate and share files with their clients.⁴ A mediator who has demonstrated familiarity with the Internet probably also has the level of innovation and

² *See, e.g.*, U.S. District Court, Central District of California, General Order No. 01-04 (5/01) In the Matter of the Attorney Settlement Officer Panel, § 8, Sanctions for Failing to Comply with Requirements, and Attachment D; www.cacd.uscourts.gov.

³ For a good overview of the use of the Internet in dispute resolution, see Melamed, *Mediating on the Internet: Today and Tomorrow*, 1 Pepperdine Dispute Resolution. L. Jo. 11 (2000)

⁴ A recent decision of the United States Court of Appeals for the Ninth Circuit for the first time upheld the use of email to serve process on a defendant when no physical address could be found. *Rio Properties, Inc. v. Rio Int'l Interlink*, ___ F.3d ___ (9th Cir. 2002)(#01-15466).

creativity necessary to make a significant contribution to settlement efforts in a complex case.

In between session, I keep thinking about the case. Some of my best ideas come when the bigger picture comes into focus after a session concludes. When a session is over, I think about the roadblocks that seem to me to be appearing and strategize about how to reduce or eliminate them.

When cases are complicated, it's easy for comments made during a session to slide by without my having a chance to follow up then and there. Sometimes, I need clarification from one of the participants. Sometimes, I want to follow up to be certain that a promised piece of information has indeed been shared since the session concluded.

The mediator can seek permission to communicate directly with the parties between sessions, of course, but I find that it is less threatening for the lawyers if the mediator communicates through them instead. That way, they are in control of what is passed on to their clients, and how.

I see one important function of a mediator to coach the parties to put their perspectives forward in such a way as to best avoid alienating the other parties. The Internet is a great tool for that mediator function. As the mediation process continues, I send suggestions for strategies parties could consider based on what has already been revealed. For example, if a party representative expresses that party's unwillingness to make another offer because to do so would be "bidding against ourselves" I send out an article after the session to the party's attorney to assist the party in working through what might otherwise be an impasse to bargaining at the next session.

To stay in contact with the parties, I use the Internet to give "homework" to any or all sides, in separate messages. While email is quicker than sending snail mail, it is better than the telephone for follow up since it allows the mediator to frame each observation or proposal carefully and get the party's studied, rather than off the cuff, reaction to it. Another good bit of homework is a revision of a party's litigation risk analysis as a result of newly-obtained information or hypothetical scenarios posed by the mediator.

One important point for the mediator and parties to remember when using email is to get permission of the participants and to be aware of confidentiality issues. The use of email and the difference between using "reply" and "reply to all" should be discussed and understood by everyone. The mediator's email message should contain a confidentiality message as a footer, patterned on those found on fax cover sheets. It should state that the communication is confidential and direct any person who has erroneously received it to delete it and notify the mediator of the incorrect transmission.

VIII. OTHER ISSUES: AVOIDING THE LOSS OF MEDIATION CONFIDENTIALITY

There may be statutes impacted by settlement negotiations that stretch out over several sessions. One important consideration is confidentiality.⁵ In California, for example, Evidence Code § 1125 governs when the mediation “ends” and therefore impacts the confidentiality of mediation communications. Section 1125 provides in part:

“(a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied: ...

(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.”

In states with statutes such as California’s, the mediation confidentiality agreement signed at the beginning of the mediation should explicitly provide that the parties waive the restriction on confidentiality so that the communications, whether by email or otherwise, will remain covered by the mediation confidentiality privilege even if several weeks have elapsed since the last communication.⁶

IX. WHEN IT’S NOT WORKING

The parties need to know that the mediator is tireless; a “never give up” attitude is essential because the mediator is also a creative generator of ideas. Of course, it’s the parties’ case, but the mediator has to take some ownership of the settlement process. The mediator may enlist one or more of the participants to help in this process.

Sometimes, the answer is to reach agreement on a further process to decide some open issue first; in order to break open the rest of the case. The mediator may suggest that the parties convert all or a portion of their dispute to an arbitration, or find another process to decide the point on which they can’t agree. Sometimes, negotiations break

⁵ A related problem can occur in California with partial settlements reached in mediation. The same statute section provides:

“(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied: (1) The parties execute a written settlement agreement that partially resolves the dispute. (2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.” Either way, confidentiality will be lost, perhaps without the parties and the mediator knowing it.

⁶ Confidentiality and other issues affecting mediation are covered in the Uniform Mediation Act, passed by the Commissioners on Uniform State Laws in 2001. The Act was approved by the ABA House of Delegates in February, 2002. The full text of the Act is available at www.nccusl.org. Useful commentary is found in articles located at www.mediate.com.

down because someone's needs are not being met. A good mediator will go back over the terrain to see what has been overlooked.

If negotiations stall even after all of these efforts, the mediator may be well advised to call a "recess." Even then, the good mediator follows up and checks in with the parties periodically. I am surprised by the number of mediators who don't follow up with a phone call after the mediation is over to see if there is anything else that can be done. Situations change and when they do, that might create the opportunity to pick up discussions again. Some mediators do not charge the parties for follow-up phone calls--only for in-person sessions. Find out and let the mediator follow up if she wants to.

X. GET IT IN WRITING

There is a strong temptation at the conclusion of a lengthy mediation to let the settlement drafting wait to a later day. A good mediator will not allow this to happen. As the case begins to get close to final resolution, I frequently give as a task to the party sitting in one caucus room the task of writing the "deal memo," the essential terms of a settlement, leaving the unresolved terms and amounts blank. That document can be finalized when the remainder is agreed to. If the mediation has already stretched over several sessions, the document can be brought by the lawyer on a laptop computer, or at least on disk, ready to be updated at the final session. The scope of the releases and dispute resolution and attorneys fees provisions are also natural items to agree on at this point.

The wisdom of such a course is obvious to anyone who has had to renegotiate a settlement when one side backed out after the mediation. In California, consider Code of Civil Procedure §664.6, for example. If the deal memo provides that the parties agree that CCP §664.6 applies to the agreement, then the court may enter judgment on the settlement. Beware of trying to use this device if there is no civil action pending between the parties, however. A California appellate court found that the trial court did not have the power to enforce a settlement in the absence of pending litigation. *The Housing Group v. United National Insurance Company*, 90 Cal. App. 4d 1106 (1st Dist. 2001).

Do not assume that the mediator will do any of your settlement drafting for you. Many mediators, believing that this activity might be later construed as the practice of law, resist or refuse to draft settlement documents for, or even with, the parties.⁷ Check to see if the mediator is willing to be involved in the drafting of settlement language.

XI. POST SCRIPT: HOW THE SETTLEMENT PLAYS OUT

⁷ See, e.g., Resolution on Mediation and the Unauthorized Practice of Law, ABA Section of Dispute Resolution adopted 2/2/02), available at www.mediate.com/articles/

In a class action with thousands of individual claimants, a structure for dispute resolution after settlement of the common issues must also be designed. This is of the utmost importance, as a carefully thought-out system for dispute resolution enhances the opportunity for settlement of individual claims, thereby reducing the time and expense of the process. Most of these settlements categorize and value individual claims using a grid system.⁸

An instructive model comes from the life insurance class actions of the last 5 or 6 years. An important part of these settlements was establishing the structure for handling individual claims utilizing a nationwide panel of ADR neutrals. My experience in serving on one such panel is detailed here.

XII. ONE WORM'S EYE VIEW OF SETTling A COMPLEX DISPUTE

I served as one of a nationwide group of 20 panelists in the settlement of one of the many class actions challenging sales of universal life insurance policies. The parameters of the class settlement had been agreed to in advance. The company set up an internal claims resolution office to process the class members' claims under agreed-upon rules, rather than use an independent claims administrator.

The parties chose the neutral panelists from a list of qualified arbitrators provided by the American Arbitration Association. The panelists were trained collectively at a central location at which presentations were made by the lawyers for the class and the company. We were then assigned to hear and resolve claims arising out of certain geographic regions, for the most part. Most claims were heard by a single arbitrator. Large claims were handled by three-arbitrator panels.

The class member policy owners were allowed a period of time within which to file proofs of claim, with supporting documentation, if they had any. Those policy owners who refused to accept the standard settlement package for their type of policy, were required to file appeals. The policy owners also had access to a policy owner representative—*independent lawyers* paid by the company to assist them in presenting their claims. The system had what was incorrectly named a “mediation” component, followed by arbitration.

Once the appeal of the proof of claim was filed, the company responded to it and the file thus created was first evaluated by an internal company team. If the policy owner appealed that team's decision, the file was mailed to the arbitrator assigned to handle claims arising in that geographic area. (Other class action settlements have instead involved emailing the file to the panelist.) After reviewing the file, the panelist contacted

⁸ An example of the use of the grid system in a personal injury context can be found in the Settlement Facility, Dow Corning Trust, which covers claims due to breast and other silicone implants. Information on the details of the settlement, including all procedures for processing claims, can be found at the Trust's website, www.sfdct.com.

the claims administrator to set up a conference call among the policy owner claimant (and his or her own private counsel, if any), the policy owner representative, the company representative and the arbitrator.

The purpose of this first telephone conference was in large part to explore settlement. The policy owner representative and the company representative as well as the policy owner (and counsel, if any) were all on the call with the arbitrator acting as mediator. The parties were frequently at numerous different locations, so caucuses were possible only if the other participants put down their telephones for a predetermined period of time, then picked them up again. These sessions sometimes were quite lengthy, with offers and counter offers going back and forth for up to ½ hour.

The parties chose most intelligently in including this mechanism in their settlement. I calculated at the end of the process that 70 % of the 100 cases assigned to me settled at or within a few days after this conference. Other panelists reported similar rates of settlement at this stage. I think that there were a couple of overriding reasons for that high settlement rate:

- (1) **The importance of allowing a forum for venting.** The policy owners who cared enough about their loss not only to file a proof of claim but also to pursue an appeal of the first decision on their claim had one opportunity to tell their story to some neutral person whom they viewed as being in authority. That person was the arbitrator. The policy owner frequently did not have the documents necessary to support a claim for more generous relief on the grid. Nonetheless, s/he felt strongly that s/he had been misled by the statements made by the life insurance sales person or by the printed material received in connection with the sale. Once the policy owner vented to the sympathetic ear of the mediator/arbitrator, s/he was frequently willing to accept the offered settlement when reminded that, due to the lack of documents, the claim had been evaluated at a prescribed level with correspondingly prescribed relief.
- (2) **The limited relief generally available.** Except for unusual claims involving many policies purchased at the same time by corporations, agencies and other organizations, which as a result were able to bargain for a more generous or specialized recovery, most claims were awarded only limited relief. The categories had been clearly spelled out in the settlement documents and the arbitrators were given no leeway to introduce considerations of equity in their rulings. Once the arbitrator explained this to the policy owner, the policy owner usually decided to settle, since the amount to be gained by going ahead with the claim process was only marginally better than what the company offered in settlement at the first telephone conference.

If the case failed to settle at the telephone conference, the arbitration process continued and the parties chose a date and time for an in-person or telephone or documents-only hearing. The hearing procedures were also closely controlled by ground rules set by the parties when the class action settlement framework had been established. The in-person hearing lasted no longer than 20 minutes and the time allotted to each side was prescribed in advance. The arbitrator's decision was set out in a form letter following the agreed-on guidelines and there was no right of appeal. In this way, the company and the policy owner representative could both be sure of the arbitrator's decision, within a very limited range. If an arbitrator departed from the established range of relief, the parties had earlier agreed that the company could remove that arbitrator from hearing any further cases.

The claimants' representatives and the company both reported satisfaction with the procedures in practice. The settlement of all claims was concluded a little more than one year from the date processing began.

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