South Carolina Bar

2017 South Carolina Bar Convention

Dispute Resolution Section Seminar

Thursday, January 19, 2017

presented by
The South Carolina Bar
Continuing Legal Education Division

SC Supreme Court Commission on CLE Course No. 170438

South Carolina Bar

Organizing and Structuring Mediations for Complex Multi-Party, Multi-Issue Lawsuits

Lawrence Watson
Maitland, FL

SOUTH CAROLINA BAR
CONVENTION

ADR Section Program
January 19-22, 2017
Greenville, South Carolina

Planning, Organizing, Formatting and Executing The Mediation of a Complex, Multi-party, Multi-issue, Lawsuit©

Lawrence M. Watson Jr.
Upchurch Watson White & Max Mediation Group
1066 Maitland Center Commons
Suite 440
Maitland Fla. 32751

Planning, Organizing, Formatting and Executing
The Mediation of a Complex, Multi-party, Multi-issue, Lawsuit©

Lawrence M. Watson Jr.
Upchurch Watson White & Max
1066 Maitland Center Commons
Suite 440
Maitland Fla. 32751

Introduction

This article will examine procedures mediators and trial counsel might use in organizing and formatting the mediation of complex, multi-issue, multi-party lawsuits. More often than not, planning and structuring the mediation of these sorts of disputes will be case specific; the unique nature of the participants and their particular issues will ultimately dictate how their mediation proceedings should be structured. There are, however, some general concepts that might prove useful in approaching these cases. The suggestions made here simply reflect "some" ways, certainly not, "the only" ways, to organize these mediations.

Additionally, while the title here suggests we are considering "complex" lawsuits, the subject matter complexity of the dispute is not always a significant factor in making the mediation of the case difficult to manage. Often the subject matter of multi-party, multi-issue disputes will be technical or specialized. That fact in and of itself, however, does not present unusual problems in structuring and formatting a mediation session for the case. Subject matter complexity is usually a matter of nomenclature; understanding the buzz words, and the language of the field. Subject matter complexity can be neutralized by good pre-mediation submissions from the parties or independent advance review by the mediator. Good mediators need to be quick studies who get past the complexity of the subject in dispute and deal with the gist of the core issues in the case.

The major problem for conducting a productive mediation session for larger civil lawsuits is the "multi-party" and, "multi-issue" aspects of dispute.

Multi-party disputes involving several parties with independent interests and concerns present challenges to mediate which include:

- Engaging and logistically handling each party - often with an entourage of lawyers, experts, insurance adjusters and advisors.
- Allotting appropriate time to be spent with each participant.
- Defining procedural pathways focused on individual needs while still keeping the group in line and everyone moving toward the same goal.

Multi-issue disputes involving a plurality of arguments present challenges to mediate which include:

- Recognizing the interrelationship of a multiplicity of disputes, how they connect or stand alone.
- Defining, prioritizing and initiating an appropriate flow of negotiations or, "negotiation pathways", to properly sequence issue resolutions.
- Understanding essence of the various positional debates; the interests and concerns in conflict, and the possible concessions available to lead to resolution.

While subject matter complexity can be a factor, the number of people involved, and the number of issues presented will generally drive how we plan and organize the mediation of complex multi-party, multi-issue disputes.

To put the following organizational steps in perspective, we will use a model case - the, "Boggy View Condominium Construction Defect Litigation" - to serve as example. A construction defect lawsuit serves as excellent model for discussing how to organize and structure the mediation of a multi-party, multi-issue case because this sort of case will involve one or more main claimants seeking relief from several principal defendants who, in turn, not only assert defenses and counterclaims against the claimants, but also actively pursue third party claims for indemnity or contribution from third parties as well. To add to the mix, these cases also routinely feature liability insurance companies which add additional parties with their own issues involving coverage and indemnification obligations.

With that said, we begin at the beginning . . . when the case first reaches the mediator's office.

Getting an Early Start - Initiating Preliminary Contact with Counsel to Gather Case Information and Assume Control of Planning the Mediation Program

Having the mediator make prompt personal contact with the lawyers to gather basic information and get involved in the planning process is a critical first step in successfully structuring the mediation of multi-party, multi-issue disputes. A mediator's case intake procedures should provide an alert when a multi-party dispute first appears; flags should be raised to get the mediator directly involved as quickly as possible. Suggested appointments for telephone conferences between counsel and the mediator should be made even as the initial inquiries are being answered. In cases with 10 parties or less, an effort should be made by the mediator to personally speak with the lawyers for each party. In larger cases, it might be advisable to select and speak directly with select counsel involved with claimant group, the defendant group and the third party defendant group.

There are two objectives for making this prompt initial contact; gathering the basic information about the case which will be necessary to structure a meaningful mediation program, and taking control of the organizational effort.

Taking control of the organization is a relatively easy task. In the process of getting an overview of the claims, defenses, counterclaims and third party claims the mediator might ask, "Why not let me and my office help organize and structure this mediation?" Most of the time, the lawyers involved in these cases are delighted to let the mediator take the lead in planning, organizing and scheduling the mediation session. Trial counsel can be competitive, argumentative and mutually distrustful of each other. This often results in poor communications and a refusal to accommodate. When they are able to speak with each other, trial lawyers frequently focus on their own clients, their own needs and their own definitions of the controlling issues. They rarely evidence an overwhelming concern for the needs of all parties to the dispute. The absence of a cooperative cohesive attitude in

planning results in a stalled process. It may not be the best idea to leave it to trial counsel plan and format the mediation program.

As to the base information necessary properly structure the mediation session, there are a number of topics to uncover.

Chart the Transactional Relationships.

Before getting into the details of the dispute, it's helpful to understand how business transaction underlying the lawsuit was supposed to look. Who are the players? What are their contractual relationships? What were their intended duties, responsibilities in the transaction? What was intended risk allocation? What insurance protections in were place?

In our model Boggy View Condominium Case we might thus see a Relationship Chart as described in Figure 1.

Figure 1 Boggy View Construction Project Transaction Relationship Chart**.**

Chart the Claims and Defenses Making up the Lawsuit.

Once the intended transactional relationship is understood, we begin an analysis of the dispute as it has been established in the lawsuit. What disputes are we attempting to reconcile? In summary form, chart the main claims, the defenses and counter-claims raised, as well as any cross claims, third and fourth party claims asserted. Develop a general understanding of the factual basis for liability claims – what went wrong? What is the nature of the damages claimed? What

factual defenses and avoidances have been raised? Importantly, the mediator should also identify and chart any collateral issues involved in the dispute which will also need to be addressed in dealing with the primary claims. For example, have insurance coverage issues been raised? If so, are coverage denials the subject of related declaratory judgment actions? Are there related third party lien foreclosures? In our model case we may thus see a "Litigation Claim Chart" as depicted in Figure 2.

Figure 2 Boggy View Litigation Claim Chart ("CC" – Counterclaim; "TPC" – Third Party Claim; "DJ" – Declaratory Judgement Action; "FPC" – Fourth Party Claim)

A word about charts . . .

In multi-party cases, simply keeping track of the players can be a daunting experience. The preparation and use of graphic hierarchy charts identifying the parties, their lawyers, their contact information and their overall positions in the dispute can give the mediator an invaluable "high altitude view" of the case. Kept

as a ready resource in the file, these charts not only instantly identify the players and their relationships in the controversy but, as will be discussed later, can suggest "negotiation pathways" for reaching an overall resolution of the claims.

Mediation Services Engagement Letter

In multiparty suits, it is never too early to secure a clear understanding of the terms and conditions of engagement for the mediation services to be rendered. Once the mediator generally understands the nature of the dispute and who is involved, terms of the engagement for mediation services should be formalized. A critical starting point in this regard is to confirm exactly who is in lawsuit and who will be participating in the mediation program. It is not always sufficient to rely on a service list sent over by someone's office. More often than not, the case will have been pending for some time before it reaches the mediator; parties will have been dismissed, dropped, and added. Confirm that you have a current list identifying the parties to the lawsuit and verify, by direct contact if possible, who will be participating in the mediation.

Once an accurate list of participating parties and their counsel is obtained, make sure each participant receives written terms of the mediation engagement.

All experienced mediators have a standard engagement letter containing terms and conditions of their agreement to provide mediation services. In multi-party, multi-issue engagements, however, there are at least two unique but essential provisions which may not be found in routine mediation engagement documents.

First, make it clear exactly who will be paying the mediation fees and costs and how they will be divided among the parties. The allocation of mediation fees and costs often becomes an issue in multi-party disputes; an issue which can be readily avoided by simple advanced attention.

Start with the premise that the mediation bill will be divided equally among, and paid by, each "mediation participant" with the engagement letter defining exactly who is a, "mediation participant". One good working definition is, "any entity with an independent position advanced in the dispute". If the mediator

becomes engaged in facilitating negotiation of a position unique to one party, that party is a "participant" who will be getting a share of the bill. Another less formal working rule – if they have their own lawyer, they get their own mediation fee bill.

In determining who will be paying a share of mediation fees in multi-party lawsuits, there are danger areas which always warrant advanced inquiry and resolution. For example:

- An insurance carrier with separate counsel who is asserting insurance coverage issues – typically not a named party to the lawsuit, but often a critical component of the settlement negotiations. Are we mediating a coverage issue between the carrier and the insured as part of this dispute?
- Multiple entities with common ownership, i.e., a sales company, marketing company, development company, management company, etc.; all under one owner. While each entity may be a named party, the common owner is effectively taking one role in the settlement negotiations. Are the named parties really advancing independent positions?
- "Distant" third/fourth party defendants, i.e., relatively small players in overall dispute with marginal roles in the settlement negotiations. Are they "active participants" in the mediation process?
- Parties settling out early.
- Parties, or subsets of parties, settling out late following "downstream" mediation services from the mediator.

Secondly, it should be made clear in the engagement letter that a broad scope of mediation services involving a broad group of participants will be involved in the mediation program. Before the session begins there will be substantial pre-mediation organizational activities that can involve a limited number of parties or sub-sets of parties. Generally, the fees incurred in these efforts will benefit all parties and should be shared equally by all parties. During the mediation session, there will be always be mediator face time devoted to a greater number of participants. Consequently, there will be significant mediation session time spent that no one participant will witness first hand. That session work,

however, benefits everyone and, again, the fees incurred in these efforts should be shared equally among all parties. Finally, there will most likely be post mediation follow up activities which may directly involve only a few of the parties in the dispute. Depending upon the scope of those follow-up mediation services, the fees and costs incurred might also be shared by everyone.

To elaborate further on the post mediation session services, mediation of multi-party, multi-issue cases frequently involve follow-up sessions involving a limited number of parties to the lawsuit. It thus becomes necessary to make it clear how mediation costs and fees for follow-up sessions will be allocated and paid; evenly across board among all parties, or only among the participants directly involved. As a general rule, if a global resolution of all claims is dependent upon the success of resolving subsets of claims in the follow-up sessions, it might be said that all parties are benefiting from that follow up work, and all parties should thus participate in paying the mediation fees and costs incurred for that work. If, on the other hand, some claims have been finally resolved in the initial mediation session, and only lingering claims are being addressed in the follow up sessions, then clearly the parties to the follow up sessions should be solely responsible for those mediation fees and costs.

Pre-Mediation Organizational Meetings – The Mediation Steering Committee.

After solidifying the terms of the mediator's engagement, planning the mediation session should begin. In mediating multi-party, multi-issue lawsuits, advance planning is essential.

In some situations, it might be sufficient for the mediator to unilaterally announce when the mediation session will take place, what the agenda will be, define the process for meeting that agenda, and direct the parties to respond accordingly. In a majority of cases, however, counsel for the parties will want to have a say with respect to how the mediation session will be conducted. This will call for pre-mediation organizational meetings between the mediator and counsel and an immediate challenge for the mediator to get everyone on the same page with respect to how the mediation session will unfold.

There are a variety of options for holding these meetings. The mediator may choose to arrange separate meetings with different subsets of the parties; plaintiffs as group, defendants as group, third party defendants as a group etc. In cases where the numbers would allow it, pre-mediation planning sessions might be held with counsel for all parties at once, although the logistics for convening meetings with a larger group of lawyers can be formidable.

In larger cases - 15 or more parties – the mediator might consider forming a "Mediation Steering Committee" consisting of 4-5 lawyers representing key parties to the dispute. This avoids or minimizes problems in assembling and scheduling multiple counsel for the pre-mediation planning sessions.

In the Boggy Creek lawsuit, for example, the Mediation Steering Committee membership might thus include one lawyer from the claimants (owner, prime contractor), one or two from the defendants or third party defendants (major subcontractors) and one lawyer representing the cross defendants (designer, suppliers). Alternatively, the Mediation Steering Committee might include lawyers representing the parties who are biggest players in outcome of the dispute (biggest potential dollar loss or gain), or who are the biggest players in the transaction.

The best process for creating the Steering Committee is for the mediator to privately solicit the selected lawyers to participate with direct invitations. Once the core membership is committed, an announcement of the formation of Mediation Steering Committee should be made to all parties in the lawsuit along with an open invitation for anyone else to join in if they wish. Once the Committee schedules it meetings and develops a topical list of the planning decisions to be made, an open invitation might again be extended to all other lawyers for their participation and involvement. While the Steering Committee's meetings and activities are thus open to input from all, its operation will not be driven by finding a time and place acceptable to every lawyer in the entire group.

To help facilitate acceptance of the decisions made by the Steering Committee, the mediator should use a "newsletter" approach to all parties in the dispute announcing decisions made, the agenda of any future meetings to be held and, again, inviting input. By having the Mediation Steering Committee function in

a transparent process with full communications to all, the process decisions made for conducting the mediation session are generally accepted by the entire host of affected lawyers.

As noted, a "Mediation Steering Committee" can be formed and developed simply through the efforts of the mediator working with some of the lawyers representing key players in the multi-party lawsuit. In some very large cases, however, it might be advisable to have the Court appoint and empower a Mediation Steering Committee. This can be accomplished by enlisting counsel to secure, by stipulation or motion, a Case Management Order creating the Committee and judicially directing the Committee and the mediator to make mediation "process decisions" with an available appeal to the court if anyone dissatisfied with the decisions made.

Many dispute resolution professionals will question how much control a mediator should have over the mediation process. Some contend the overriding concern for protecting the parties' self-determination in mediation should extend to procedural decisions about the process itself. An orderly and inclusive mediation of multi-party, multi-issue cases, however, requires central process control – a benefit that becomes difficult to achieve without singular decision making power. At some point, and at some level, someone needs to be in charge. If the mediator (or the Steering Committee) in charge maintains a level playing field in process decisions, exercising this level of control is usually not a problem.

Pre-Mediation Organizational Meetings – Setting the Goal

Face to face planning meetings usually work far better than telephone conference meetings. Attendance can be limited to counsel, but having key party representatives (including insurance adjusters if possible) in attendance is invaluable. Securing party "buy in" to the mediation process in advance is as, if not more, important than having all counsel accepting the process decisions. Not only does party buy in save time, money and potential process disruption, once party representatives understand first-hand how the mediation process is supposed to work and have a personal, direct investment in the planning of the session, issues

with adequate preparation and appropriate authority at the mediation session tend to never materialize.

The mediator should prepare an organizational meeting agenda that includes a check list of topics to be resolved. The agenda should be distributed in advance with an invitation for input on any other topics the participants want to have covered. Depending on the size of the case and the number of persons attending the meeting, expect a minimal half day duration. A neutral, accessible site is preferred.

At the outset, it will prove helpful to collectively establish a clearly achievable goal for both the mediation itself and the pre-mediation planning exercise. The goal to be achieved in mediating these cases is not necessarily to, "make a settlement happen"; the definition of success for these mediations should not be established as entering into a final settlement agreement. If a settlement results from the mediation program, fine. There are, however, many other readily achievable benefits that can come from an effective mediation program that might better serve as a planning focus point.

In simplest of terms, the parties have two options for resolution of their dispute. The dispute can be adjudicated, or the dispute can be reconciled. If the dispute is to be adjudicated, each party will convene before a third party neutral and engage in a positional debate as part of a fault finding exercise to determine who is right and who is wrong based on applicable standards. The outcome of the adjudication is a judgment, award, verdict, or ruling that resolves the dispute. If the dispute is to be reconciled on the other hand, each party will make mutual accommodations to meet or address defined individual interests and concerns. The outcome in that instance is an agreement, an accord, or an understanding that resolves the dispute. The point here is simply that the parties have choice to make; they can adjudicate their dispute, or they can reconcile their dispute.

At the close of the mediation session, the decision makers who must choose the resolution option - want and need to make an intelligent, fact driven, decision. To fulfill their duty to themselves or their constituency, they want to choose the resolution option wisely. Good decisions are based on good data. Accordingly, we

need generate as much factual data as we can get on both the adjudication and reconciliation options.

The mediation planning goal, therefore, would be to format and structure a mediation session that will provide the parties the best factual data possible on the two dispute resolution options; to put parties into a position to make an intelligent, factually driven resolution choice.

The specific information needed to understand the adjudication option focuses on the "positional debate" to be staged. What are the principal, determinative issues in that positional debate? What is the "center of the case"? What are the contentions to be asserted by each side and an overview of the data to be presented in support of those contentions? What is the range of possible outcomes? How long will it take? How much will it cost? What is the impact on future relationships? What are the collateral consequences of an adjudication proceeding?

The data necessary to understand the adjudication option is usually developed in opening presentations. Opening presentations should thus be planned and formatted in a manner to best present the factual data necessary to appreciate the nature of the debate to be staged. The goal in the opening presentations is not to win the argument, but to understand it. [1]

The specific information needed to understand the reconciliation option includes the actual underlying interests and concerns each party has in conflict and the accommodations that can be made to deal with those interests and concerns. While this usually translates into arriving at a final acceptable dollar amount for

[1] A disturbing current trend in mediation practice is the pressure to eliminate opening presentations altogether. A full discussion of that trend is beyond the scope of this article. Suffice to say, while there may be some argument for minimizing, or even eliminating, opening presentations in smaller cases, in multi-party, multi-issue disputes opening presentations are an essential part of the mediation process. The commonly expressed fear of driving the parties further apart with emotional arguments can be cured with pre-mediation commitments to maintain objectivity. The notion that opening presentations are not necessary because the parties already know everything about the case is, more often than not, simply inaccurate in these sorts of disputes. While each party may be familiar with their specific piece of the debate, rarely has anyone seen or gained an accurate impression of the nature of the overall dispute – a compelling piece of data in understanding the adjudication option.

settlement, other non-economic factors are often involved. It is also important to identify and understand the outcomes available in reconciliation that would not be available in adjudication. Such things as letters of reference, referrals, voluntary audits, financial verification procedures, future business opportunities, trade accommodations, discounts and even simple apologies should all be explored and developed.[2]

Data on the reconciliation option is usually developed in caucus sessions.

With that goal established, therefore, the pre-mediation organizational focus will be to plan, structure and format the mediation session to develop the information necessary to give the parties basis for making intelligent, fact driven choice between adjudication and reconciliation. Don't push settlement, push information.

The fact of the matter is . . . in complex, multi-party, multi-issue lawsuits, good information will usually push the settlement. More often than not, aspects of commercial certainty, cost containment, precedent, time factors, and the inherent difficulty in adjudicating these kinds of lawsuits will generally drive the parties toward selection of the reconciliation option to resolve these disputes.

Pre-mediation Organizational Meetings – Shape of the Table Issues

Logistical details, or "shape of the table" issues, should be agreed upon early in the mediation planning phase.

*Location – facilitie*s: The location of mediation session will be driven by the space requirements for opening presentations and caucus sessions. After establishing a probable attendance count for the mediation session, the size of a room necessary

[2] It goes without saying that a realistic evaluation of adjudicating the dispute - measuring the risk and reward involved in going to trial, defining the potential exposure and consequences of an adverse outcome, understanding true costs in time and money - are all important parts of the thought process in developing a reconciliation option. In the relative safety of a confidential caucus session with neutral mediator leading the conversation, these aspects of the dispute should be surfaced and realistically examined. Simply evaluating the litigation exposure , however, does not need to drive the entire caucus discussions. Settlement agreements need not be motivated by a simple fear of losing at trial. As noted, developing a viable, compelling reconciliation option can involve other things to consider as well.

to accommodate all party representatives and their respective counsel for the opening session component of the mediation can be established. Following that, how many break-out rooms will be necessary to handle the caucus sessions? How will food and refreshments be handled? Is there accessible parking and access after normal working hours for late night work? Large law firms may have adequate facilities to handle multi-party mediations cases. If not, hotels or conference centers might be utilized.

While these factors might seem obvious to many, it is surprising to see how many mediations are scheduled without sufficient attention to requirements for simple accommodations.

Pre-mediation submissions. A schedule for submitting Mediation Statements to the mediator, their length, and whether they are to be private, shared, or both should be agreed upon in advance. Where possible, the parties might agree upon submitting a joint set of key exhibits for the mediator's review in addition to separate Mediation Statements.

Resolve authority issues. Ideally, party representatives to a significant mediation should have full authority to enter into a final and binding settlement agreement under any terms and conditions – without the need for further consultation. As described in the Florida Rules of Civil Procedure, for example, party representatives attending a court ordered mediation should be the, "final decision maker with respect to all issues presented by the case"[3] In cases of insurance adjusters attending mediations on behalf of an insured, one would expect to see a representative of the carrier with full authority to pay policy limits or the plaintiff's last demand, whichever is less. [4] Unfortunately, corporate and insurance representatives often attend mediation sessions without full authority to settle and often with significant limitations on authority in place. If the absence of authority, or serious limitations on authority come as a surprise to everyone else at the end of a long, intensive mediation session, significant setbacks to ever reaching a reconciliation can occur. Invariably, someone will feel misled and deceived, giving rise to questions of good faith.

[3] FlaRCP 1.720(c)
[4] See, FlaRCP 1.720(b)(3)

Part of pre-mediation planning for multi-party, multi-issue mediations should therefore include a forthright discussion about who will be attending the mediation and the authority they will bring. Any limitations of authority should be confronted and acknowledged and resolved before the session is convened.

In cases involving governmental entities with sunshine law restrictions on their decision making powers, full details of all steps necessary for securing final approval of any settlement agreement reached should be discussed and understood.

Co-Mediators. As the scope and content of the mediation session begin to come into focus, a discussion might be had concerning the need for a co-mediator. In many instances the sheer number of players and volume of component parts to a global reconciliation will warrant more than one person facilitating claim resolutions.

Closure Requirements. No pre-mediation planning session should be completed without a detailed analysis of the scope and content of any settlement documents that would be necessary in the event a reconciliation is reached. Counsel for all parties should implement procedures for the advance preparation, review and approval of settlement agreements including release and dismissal forms, indemnity provisions, confidentiality terms, lien releases, mutual non-disparagement terms, as well as any other special conditions to accompany resolution of the case. In multi-party cases, one or more volunteers might be selected from among counsel to draft and circulate proposed settlement documents for general approval as to form before the mediation session commences. As will be discussed later, this simple step will save valuable session time and avoid potential road blocks to a complete resolution of the dispute.

Planning for Opening Sessions – Understanding the Adjudication Option

Scope of Opening Presentations. Opening presentation planning begins with a general agreement on the kind of information that will be needed for counsel and their clients to fairly consider the "positional debate" that will highlight their adjudication option. Opening presentations are the best opportunity for everyone to

reach an understanding of what the lawsuit will entail. Due to limitations of time, however, focus should be placed on surfacing only the factual contentions that make up the controlling issues in the dispute - the, "center of the case" – as opposed to process debates and inconsequential arguments. A general consensus can be reached in this respect by careful issue refinement exercises facilitated by

Once a topical outline of the data to be presented by each side is established, reasonable time should be allocated to allow each party to fairly provide an overview of their side of the positional debate. It is not necessary to exhaustively explore every conceivable argument each party may wish to make at trial in the opening presentations. As a general proposition, however, if the basics of the positional debate are not fully aired in the opening session phase of the mediation, if any party leaves the opening session feeling their respective side of the argument has not been fully expressed, those parties will continue advancing their positional arguments in the following private caucus sessions with the mediator. In multi-party mediations, controlling caucus time is critical. When a mediator gets tied up in caucus with one party extolling the merits of their positional debate rather than recognizing vulnerabilities and exploring reconciliation options, valuable caucus time with other parties is lost. Caucus session time should not be wasted in voicing aspects of the positional debate that were not expressed in the opening session.

Use of Experts in Opening Presentations In many disputes the controlling issues will center on testimony to be provided by experts. In those cases, an appreciation of the adjudication option might well include a preview of counterbalancing expert presentations; how well they are delivered, how persuasive they sound. Some consideration, therefore, should be given to whether the parties might want to provide direct input from experts during the opening presentations. While using experts in mediations can be helpful, however, it should be undertaken with caution. When opposing experts opine in each other's presence, they tend to stray into cross examining each other with technical debates over methodology rather than presenting positive conclusions. This can be confusing and diversionary. Further, some more forceful experts tend to go beyond simply presenting opinions and inject themselves into the parties' negotiations. If allowed, they can end up

taking over the mediation session.[5] If experts are to be used, therefore, some consideration might be given to limiting their participation to simply providing information during the opening sessions.

Tone and Demeanor in Opening Sessions. Ground rule agreements should also be reached on the appropriate tone and attitude to be adopted in the opening presentations. In most commercial disputes, a factual, objective approach with a direct and informative delivery will be far more successful than confrontational or unduly argumentative presentations. Emotional accusations, ad homonym attacks should be discouraged. Again, the goal here is sharing information – not winning arguments or attempting personal intimidation. With that said, however, it should be remembered that a key function of opening presentations in the mediation of many cases can giving the parties an opportunity to vent – to the mediator or to each other. In planning the mediation opening presentations the question of whether the specific case is one in which party participation for this purpose would be productive should be explored. Where appropriate, maintaining flexibility for the parties to air their concerns could be productive.

Discuss and agree upon the opening presentation equipment that will be needed; power point projectors, screens, exhibits, easels, flip charts etc. Be sure arrangements for the utilization of those devices are made.

In additional to setting rough time limits for each parties' direct presentations, explore whether time should be allocated for rebuttal presentations. Establish general ground rules for questions during the presentations – "clarifying" questions can be helpful in understanding what is being said, attempts at cross examination can be harmful.

Many times it may prove helpful to break out sub-groups for private opening presentations to explore aspects of the adjudication option that might best be discussed among a few rather than the many. If appropriate, time should be allowed for this contingency as well. (See discussion below, "*Setting the Mediation Session Agenda*", footnotes 6, 8)

[5] In some instances, the parties and their counsel may consciously prefer to allow their respective experts a broader level of participation in the mediation process.

Planning for Caucus Sessions – Developing the Reconciliation Option.

Caucus sessions are used to develop the reconciliation option – to develop and define the deal. Caucus sessions should be focused on defining the respective parties' interests and concerns in the dispute, and identifying accommodations they are willing to make to each other in order to deal with those interests and concerns. In commercial settings, this usually takes the form of principled negotiations – bartered steps toward a mutually acceptable accord.

While parties may have pre-determined overall settlement goals, the precise terms of the deal which will evolve through the negotiation process are usually not predictable. For the most part, the final deal arising from a mediation session in multi-party, multi-issue cases is discovered, not foretold.

In multi-party, multi-issue cases, global settlements will consist of a series of component party settlements resolving the body of issues making up the whole dispute. Logistical questions arise with respect to the order or sequencing to be used to develop resolutions to the subsets of disputes making up the overall problem. Caucus session work should have a logical "negotiation pathway" which appropriately sequences reconciliation of individual component issues in a march toward a global reconciliation of all issues.

The best negotiation pathway will vary from case to case. There are several options available for consideration. Among the potential negotiation pathways discussed below are, "Top Down", Bottom Up", "Issue Group", Money Group" and "Key Issue.

"*Top Down" Negotiation Pathway.* As the name suggests, a "top down" negotiation pathway calls for the negotiation of a final settlement of the main claim and counterclaim first, which is then followed with settlement negotiations of the underlying cross claims, third party and fourth party claims. In this pathway, the primary defendant accepts settlement with primary plaintiff, then seeks to recoup some or all of the settlement funds from indemnity or contribution claims asserted

against the lower tier defendants. A "top down" pathway may look something like this:

Figure 3 "Top Down" Negotiation Pathway – settle claims asserted by parties in gold first

In our model case, the goal would be to negotiate a settlement of the main claim by the Owners (Slickdeal) against the Prime (Norong) and Designer (Mosright) first, then work downward to settle the cross and third party claims. (In our example we have also included a "topside" resolution of the dispute between the bonding company (Slippery Mutual) and the Owner as well).

There are some benefits to a top down negotiation approach. In some cases, the relationship between the Owner and the Prime or the Designer may warrant a prompt resolution of their dispute regardless of the outcome of the secondary claims. An expedient resolution of the topside main claim may, for example, serve to enhance or protect a valuable, ongoing business relationship between the principal players in that dispute. Further, the main claim may present significant variables in exposure that are time sensitive – drawing out the settlement of the

main claim until the lower tier claims are resolved may adversely impact the prospects of resolving the main claim.

There are, however, also definite downsides to a top down negotiation path. For one thing, in our Boggy View model case reaching a final settlement of the main claim puts the prime contractor and designer at risk of not raising dollars to adequately recoup financial commitments made in that resolution. Third party defendant subcontractors and vendors may not buy into unilateral concessions made by the prime contractor or designer to the owner in settling claims involving their work. By settling the main claim out first, the contrasting evaluation of litigation costs versus settlement value may change for the smaller third party contributors. What was once a formidable 20 day global trial of everyone's issues now becomes a more manageable and less onerous one day, single claim trial which adds strength of the third party contributor's settlement position. Unilaterally negotiating top claims down doesn't usually help securing contributions from the bottom claims.

On a more practical note, during a multi-day mediation session where significant focus is placed on settling the main claim first, the third party defendants have lots of down time in their respective caucus rooms awaiting outcome of those negotiations. (In fact, if a "top-down" pathway is selected, it might be best to divide the mediation session in two parts to be held on separate dates. Deal with the main claim settlement negotiations in the first session, then separately deal with the third party defendants when they will become the primary focus of session settlement negotiations).

"Bottom Up" Negotiation Pathway – In a "bottom up" negotiation path, settlement efforts would begin with claims against third party and fourth party defendants first. With those resources in hand, as well as information gathered in negotiating those claims, an upward approach is made to reach settlement of the main claim and counter claim later in the process.

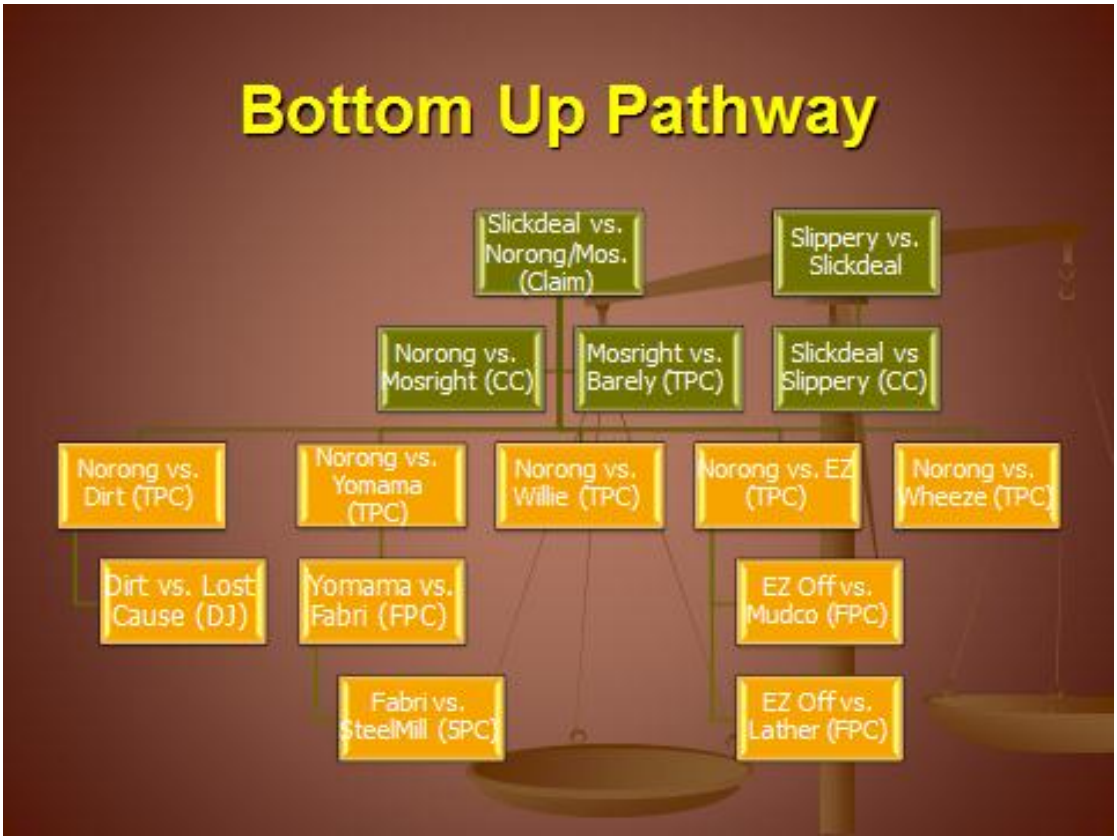


Figure 4 "Bottom Up" Negotiation Pathway - settle claims by parties shown in gold first.

In our model case, the prime contractor (Norong) would work downward to negotiate third party claims against its subcontractors (Dirtduab, Yomama Steel, Slick Wille Sealants, EZ Off EFIS etc.). At the same time, the third party defendant subcontractors might work down to settle claims with the fourth party and fifth party defendants as well. The point here would be to gather resources available then return to attempt settlement of the main claim.

A primary benefit to a bottom up negotiation path is that the prime contractor defendant can approach main claim negotiations with more certainty as to what resources are globally available to help defray settlement costs. By negotiating the lower level claims first, the prime defendant will know what's been offered as well as having gained a reasonable expectation of what more might be available.

One downside to a bottom up negotiation path is the fact that the main claim plaintiff (Owner) is kept waiting until the outcome of third party claim negotiations

are determined. Further, the final settlement amount of the Owner's main claim is not necessarily decided by outcome of third party claims. The primary defendants' obligations to plaintiff are not always driven by available indemnification or contribution from secondary defendants.

"Top Down - Bottom Up Blend" Negotiation Pathway In this process the parties would start with a top down negotiation simply to establish parameters of global settlement of the main claim. Where possible, the parties might even engage in one or two rounds of "top down" negotiations simply to more sharply define potential main claim settlement ranges. In any event, based upon information concerning the probable amount necessary to secure a top down settlement, the parties would then proceed with bottom up settlement negotiations. By offering final or interim settlement scenarios to define the resources available from below, the parties return to top down negotiations. Now armed with a better understanding of real and potential resources from the underlying claims, more informed negotiations can be held with the main claims.

If time and circumstances permit, the parties might return for a second round of all, or some, of the lower level claims. This might also be a good time for the prime defendant to consider "pay and chase" options (funding the third party defendant subcontractor's share of a global settlement, then continuing indemnification/contribution claims separately) or "pay and assign" options (paying out whatever it takes to settle the main claim with an assignment of its claims against the underlying third party defendant subcontractor the to the plaintiff Owner).

The obvious benefits of a blended "top down/bottom up" negotiation path is that it keeps everyone in game until path is clear for everyone to get out. It also preserves the opportunity for carving out third party defendants with partial settlements and assignment of claims if necessary.

The challenge presented by a blended procedure is time management during the caucusing phase. There will be long waits between caucuses with the different parties. A blended negotiation pathway also requires focused, attentive mediation services; the process features concurrent, interdependent negotiations with

different parties involving different issues. Using more than one mediator will be productive in these situations.

"Issue Group" Negotiation Pathway – In this process, settlement negotiations are channeled to deal with related groups of claims having common nucleus of facts. If issue refinement exercises for the global dispute reveals a relationship among the many claims that lends itself to sequencing efforts to reach settlement, this process may prove useful.

In our model case, we might thus see initiating settlement of the cladding issues first (shown in red as Norong, EZ Off EIFS, Mudco and Lather) as follows.

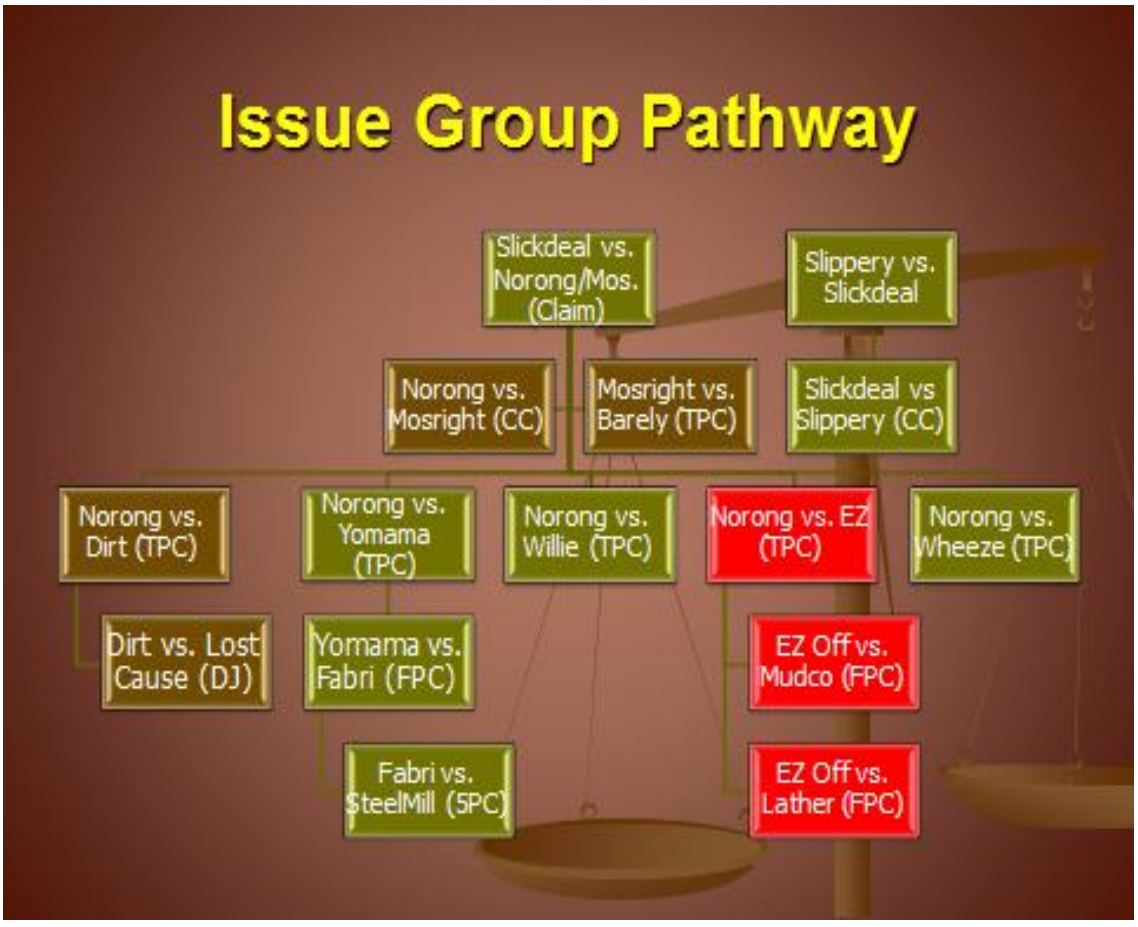


Figure 5 "Issue Group" Negotiation Pathway – settle select issue group claims (here, exterior cladding) shown in red first.

The benefits to following an issue group negotiation pathway is that it allows focus on a smaller group of parties – which can often be separately

scheduled and completed without involvement from others to dispute. This allows the mediator and the affected parties to deal with a more manageable body of data, results in less down time between caucuses, and less crowds and confusion during mediation sessions.

An issue group negotiation pathway works best (if not exclusively) when the claims are capable of independent consideration and resolution – irrespective of other aspects of the main claim. In our Boggy View model, for example, settlement of the site preparation claims is not dependent on, or related to, a settlement of the structural steel claims; each has different and independent damages and factual foundation. One note; settling parties exiting the dispute early after an issue group negotiation will generally want some protection against being brought back into suit by other non-settling defendants. In instances where there is no relationship between the claims settled and the claims remaining, the chances of being dragged back into the lawsuit are minimal. In instances where there may be a basis giving rise to a non-settling party to seek, for example, a contribution claim against a settling party, indemnification measures should be discussed to protect the settling parties.

"Key Issue" Negotiation Pathway – In cases where issue refinement measures have revealed one claim, or one aspect of a claim, might make other claims inconsequential or of lesser importance, a mediation session might be planned to deal with the "key" issues first.

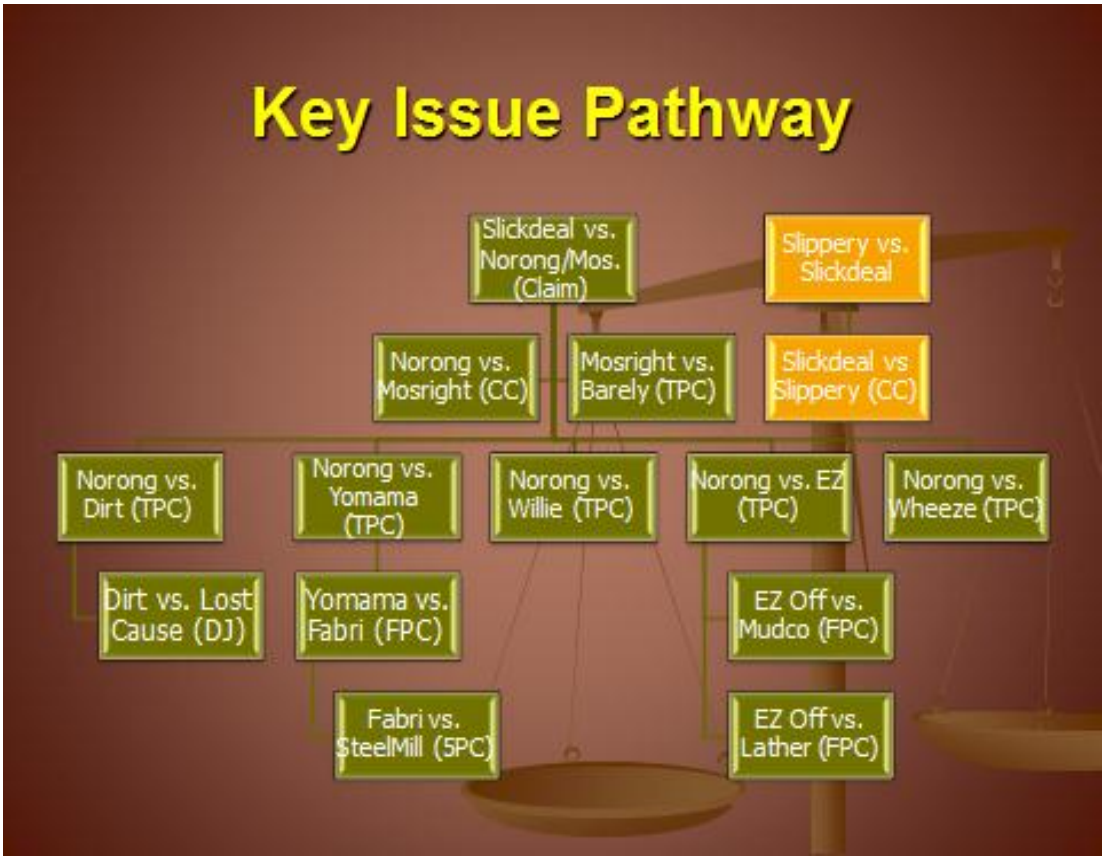


Figure 6 – "Key Issue" Negotiation Pathway – settle pivotal claims (here, bond claim shown in gold) first.

For example, in our model case the economic status of the prime contractor Norong (and its subcontractor third party defendants) may be such that the only source of relief for the Owner Slickdeal may be through the performance bond issued by Slippery Mutual. If there is no bond, there is little point in pursuing other financially destitute parties. Tackling settlement of the claim and counterclaim involving the validity and coverage of the bond may thus be a matter of priority.

Another "key issue" negotiation pathway might be presented in cases with significant damage questions. Oftentimes, the debate over liability lessens when the amount and logic of the damage claims reach common ground. Many times the nature and extent of damages available will serve to drive the entire lawsuit.

When the only resources available to cover asserted claims are insurance policies that come with significant coverage issues, focusing on those issues early may prove helpful. As with the bond situation in our model, if there is no insurance

coverage and no other available assets, there is no pragmatic value to pursuing claim – however compelling the liability arguments might be.

While the benefits of a key issue negotiation pathway will include a sharp reduction of litigation costs when resolution of less consequential issues becomes unnecessary, the process does present challenges. "Issue refinement" is a critical talent for mediators and counsel. Agreeing on the key issues can be difficult. Participants in the lawsuit tend to get focused on arguments they think they can win – without really analyzing the overall good a victory on that matter will produce.

Other negotiation pathways might include addressing the "Big Dollar Claims" first – attack the issues in the case having the highest economic impact. Alternatively, taking a "Little Dollar Claims" pathway to attack the small dollar claims first, can often build momentum toward reaching resolution of the remaining disputes.

Pre-planning the appropriate negotiation pathway for the caucus sessions of a multi-party, multi-issue dispute is a critical step. As will be discussed below, having everyone on board for the sequence and timing of events in this phase of the mediation session can be a major key to success.

Confirming and Documenting The Mediation Session Plan

Once the overall session plan is adopted – either by the Mediation Steering Committee or the group as a whole – a letter or email message should go out to all parties from the mediator recording and confirming the planning decisions reached. As discussed earlier, consideration might also be given to converting the agreed mediation session plan to another Stipulated Case Management Order. This will serve to bring in Court in to backstop the agreed mediation session commitments as well as provide a forum for resolving procedural disputes that may arise as the plan unfolds.

Setting Mediation Session Agenda for the Boggy View Condominium Association Construction Defect Case

With the "shape of the table" planning decisions made to handle the logistical requirements of the mediation session (conference room space, break out rooms, food and refreshments, etc.) the time has come to prepare a working agenda for our model Boggy View Condominium construction defect case. Based upon issue refinement and information gathering work completed to date, we have decided to schedule a three day session utilizing a "top down/bottom up" blend negotiation path following the opening presentations. A working agenda for the mediation, along with footnotes describing practice suggestions for each phase, may thus look something like the following.

Agenda - First Day

Opening Sessions - All Parties *(Exploring the Adjudication Option)*

- Owner/Plaintiff's Opening Presentation – Owner/Plaintiff's side of the, "positional debate" making up main claim against Primary Defendant Prime Contractor and Designer[6]
  - Liability overview
  - Damages overview
- Primary Defendants' Responsive Presentation - Defendant's side of the "positional debate" – touching upon defenses common to all defendants [7]
- Owner Rebuttal to General Defenses;
  - Owner issues global demand[8]

[6] The Owner/Plaintiff's opening presentation would typically assert a global claim as to the primary defendant with the expectation that the primary defendant will then sort out who should be paying what part of the total claim among the named third party defendants. While it is possible for the Owner/Plaintiff, through itemized damage presentations or even direct liability discussions, to implicate a specific third party defendant in its opening presentation, the consequences of that undertaking should be evaluated in advance. The plaintiff may be focused on one claim for one number against the primary defendant, but settlement negotiations will necessarily involve the primary defendant pursuing component claims against several third party defendants. Nothing in the plaintiff's opening presentations should unnecessarily compromise that task.

[7] With all parties (including the Owner/Plaintiff) present in the room, the Defendant's presentation at this stage should be limited to common defenses against the Owner's claims shared by all defendants at all levels, i.e., the owner's interference in construction, its failure to properly maintain the property, flaws in Plaintiff's damage calculations, and perhaps insurance coverage issues that would preclude recovery on certain claims. As will be seen later, in this model the primary defendants will have a private opening presentation session with the third party defendants alone to present the positional debate making up the third party claims and defenses.

Owner retires from group meeting – defense group remains assembled

- Defendants' Presentations on Their Claims against Third Party Defendants
  - Confidential discussions among defense group concerning third party indemnity and contribution claims; what are the contentions underlying the positional debate on this aspect of adjudication option? [9]
- Defendant/Third Party Defendant Group Session - Collective evaluation of Owner claims by all defendants.[10]

Primary Defendants and Third Party Defendants now retire from the joint defense group meeting and relocate to individual breakout rooms to begin the first of the "bottom up" caucus negotiations.

Preliminary Caucus Session – Primary Defendants and Third Party Defendants.

- Formulate plan for individual demands against third party defendants[11]

---

[8] In order to more effectively initiate the settlement negotiation process in multi-party mediations, it is important that the plaintiff appear at the mediation session with a clear demand. The demand may be a re-publication of an earlier unanswered demand, a new demand based upon pre-mediation negotiations, or even a fresh demand made in response to points raised during the opening session. The limited time available at a multi-party mediation session, however, should not be spent in formulating the plaintiff's original demand; a prompt transition from the opening presentations (describing the adjudic**a**tion option) to the caucus sessions (developing the reconciliation option) requires a clear starting point in the form of a prompt demand.

[9] The Defendants' opening presentations describing their claims against the third party defendants, and the responses to those claims, need not be conducted in the presence of the Plaintiff. Holding these discussions without the Plaintiff in attendance will generally promote more forthright informational exchanges among the defendants' camp.

[10] Again, in the security of a "defendants only" discussion group, it is often helpful to get a realistic consensus among the many defendants as to the overall exposure presented by case. In addition to candid exposure evaluations, what are the defense group's realistic estimates of fees, costs, time, and consequences of proceeding with adjudication? The idea is to re-focus the defense group from a relatively myopic visualization of their one part of the lawsuit, to a broader appreciation of the litigation as a whole. A month long trial is a month long trial, and the attendant costs of legal representation are the same – even if the matter at stake for a particular party involves a dollar claim that is a relatively small piece of the larger dispute.

[11] To the extent possible, it is best for the primary defendants to pre-plan what their opening demands will be on the third party claims and have those demands ready to advance immediately after the opening session. It is often the case, however, that events taking place during the opening sessions (among all parties, as well as sessions

- Initiate first round demands against third party defendants

Agenda - Second Day

Caucus Sessions – Round One - Defendants and Third party defendants (*Developing the Reconciliation Option*)

- Primary Defendants continue concurrent negotiations with third party defendant subcontractors and cross-claimants; all facilitated in private caucus sessions by mediator(s)[12]

- The negotiations in the concurrent third party claims might include "Cadillac" settlement proposals (contemplating a resolution of the third party claims regardless of whether there is a global settlement) or "Ford" settlement proposals (resolving the third party claims only if there is a global settlement, with the understanding there will be further demands on the third party defendant if a global settlement is not reached).

- In concurrent multi-party caucuses, keeping an accurate record of separate negotiation steps for each party is critical. To avoid miscommunications in this respect, use flip charts or dry erase boards in each caucus room (particularly in the primary defendants' room) to record the several demands, offers, counter offers from each of the third party defendants as they arise.

- When there is one proposed settlement number coming from more than one funding source in same caucus room (insured and insurer, different insurers for same insured, different co-third party defendants on same

---

involving only the defendant/third party plaintiff and third party defendants), will significantly impact what the third party demands will be and the direction the "bottom up" negotiations will take. Some flexibility may be required adjust the third party plans accordingly, but care should be taken to launch the bottom up caucus sessions with clear demands as quickly as possible.

[12] Armed with initial demands from the primary defendant for each of the third party claims, the mediator (or mediator team) initiates private caucus meetings with each third party defendant to present those demands and solicit a response. Timing is critical here. Typically, there will be several third party defendants engaged in concurrent negotiations with the primary defendant and only one, or perhaps two, mediator facilitating those discussions. The caucus time available should not be unduly focused on revisiting the positional debate making up the adjudication option.

issue, etc.) it is also essential that there is an accurate record and confirmation of the specific components of the single number going out in the negotiations.

Caucus Sessions – Primary Defendant's First Response to Plaintiff (*Developing the Reconciliation Option)*

- When the primary defendant concludes its first round of "bottom up" negotiations with the third party defendants, and has developed a better feeling for what resources are potentially available from those sources, it may be a good idea to go back and respond with an obtainable counter to the main claim.[13] At the same time, a report might be made to the primary plaintiff concerning where each of the the third party defendants are with respect to their piece of the main claim, along with other matters that will affect the reconciliation option (insurance coverage issues, underlying factual developments, etc). This also a good opportunity to generate some movement downward on primary plaintiff's global demand.

Caucus Sessions – Round Two - Defendants and third party defendants (*Developing the reconciliation option)*

- Based on primary plaintiff's movement, the main defendant now returns to the third party defendants with follow up demands on their particular pieces of the whole claim. The effort to be made here is to generate movement upward with additional contributions from third party defendants.
- In the process of re-visiting the third party defendants, it is important to keep everyone apprised of status of negotiations with primary plaintiff's main claim. The focus here should still be working toward a

[13] At this point, the primary defendant will have clear first round offers from the third party defendants in hand which, coupled with any contributions the primary defendant (or its carrier) wish to make, will generate a sum certain to advance to the Plaintiff. There is often some temptation here to add to that number an additional amount the primary defendant thinks may, or should be, collectable from the third party defendants. At this stage of the negotiations, however, great care should be taken in advancing or even suggesting sums that have not been committed.

global settlement, with each party well informed on where their particular piece of the resolution comes into play.

Agenda - Third Day

Caucus Sessions Round Three; Partial or Final Closure

- Partial Settlements - While a global settlement is the ideal, in the event there are third party defendant holdouts that may be compromising that goal, this may be the time to begin consideration of partial or, "carve out settlements" which resolve the claims that can be settled, and leave open the claims that cannot be settled. There are several variations of carve out scenarios:
    - "Pay and chase" settlements - in which the main defendant will fund full settlement then continue to pursue indemnity from non-settling third party defendants.
    - "Pay and assign" settlements - in which the main defendant pays the Plaintiff a cash amount coupled with an assignment of its indemnity claims against the non-settling third party defendants. This may also apply to situations in which an insured may choose to settle with an assignment of a potential bad faith claim against a reluctant insurance carrier.
    - In the final analysis, a global settlement resolving all claims as to all parties is clearly the preferred outcome. Often simply initiating a "carve out" discussion will stimulate full participation in a global settlement.

- Documenting the Deal. As discussed above, careful pre-mediation planning would include prior development and approval of settlement documents by all counsel. Ideally, therefore, at this stage the parties would simply utilize previously circulated and agreed form settlement agreements, releases, stipulations of dismissal etc. With appropriate advance planning, reaching a final documented resolution should be nothing more than simply filling in names and numbers.

In instances where advance preparation of the form of settlement documents has not occurred, however, it will become necessary to record and have the parties sign off on the deal at the conclusion of the session.[14] This can be a critically dangerous point in the mediation. After several days of intense negotiations culminating in what might be difficult concessions on all sides, nerves are stretched and tempers are often short. The settlement reached at this point might be likened to a "fragile flower" that can quickly be crushed with prolonged debate and wordsmithing over the precise language of a settlement agreement.

If the parties have the stamina and temperament to continue with a final contract negotiation, proceed accordingly. It is always better to have a "final" deal documented as quickly as possible. In multi-party, multi-issue mediations, however, counsel and the parties might be more comfortable with signing a simpler, bullet point agreement recording the general accords of the resolution.[15]

"Downstream Mediation Activities" What to do when the case doesn't entirely settle.

If the case, or any component of the case, cannot settle, an objective analysis should be made as to exactly why it cannot settle – what is the mutually recognized roadblock to reconciliation? Absent outlier subjective or emotional factors, the points blocking settlement will usually be either unresolved questions of law or unresolved questions of fact. Once those issues are precisely articulated, the question might be asked, "What additional information would be helpful in shedding light on the areas blocking settlement? What additional legal or factual input is needed?"

Having established the outstanding questions, the next task is to collectively agree upon a cost effective and timely process for gathering the answers.

[14] It goes without saying that, absent a written agreement signed by the parties, there is no enforceable settlement of the mediated dispute. Mediation confidentiality typically precludes any participant's verbal commitments from being introduced into evidence.

[15] The finer points of drafting a settlement agreement at the conclusion of a mediation session are beyond the scope of this article.

How can we quickly and efficiently go about developing more information on areas of dispute blocking settlement? In this process we work to devise and schedule "downstream mediation activities" aimed at cooperatively gathering the additional information necessary to give reconciliation a chance. It is important to note all downstream activities can be conducted under umbrella of mediation confidentiality, as part of the ongoing mediation process. In short, we adjourn the mediation session, independently or collectively complete the agreed downstream activities, and reconvene to work with the information developed.

*Downstream Mediation Activities – Examples - Legal Issue*s

There are a number of options for developing further legal data that might help reach a reconciliation:

- Counsel for the parties might simply conduct further legal research, prepare written briefs to be exchanged as additional mediation submissions.
- The parties can retain a mutually agreed legal expert (a retired judge, experienced specialty practitioner etc.) to conduct a private hearing on the legal issue – then announcing a "ruling" to parties which might be a preview of what the actual court might do. By prior agreement, the ruling can be binding or non-binding as to the issue.[16]
- The parties might utilize the mediator as messenger or embassy to the Court in order to facilitate a formal hearing and ruling on key legal issue.

[16] Another option available in the event the remaining legal issue would be determinative on the claim or a critical component of the claim, would be to place a "High/Low" settlement number on the outcome. If the plaintiff wins the issue before the private judge, the defense pays the "high"; if the defense wins, the plaintiff accepts the "low". The defense is thus protected with a cap and the plaintiff is protected with a minimum recovery. Either way, the case is over.

Downstream Mediation Activities –Examples – Factual Issues

A number of options also exist for developing additional factual information to help break negotiating logjams - again, unless otherwise agreed, all under the umbrella of mediation confidentiality;

- The parties can initiate cooperative joint investigations, inspections, or testing programs to confirm specific site conditions
- A jointly executed formal or informal document production and review session often reveals valuable information,
- A cooperative joint neutral expert evaluation to determine the best remediation measures and actual repair costs estimate,
- A joint financial audit or economic damage analysis.
- Private joint interviews with key witnesses or cooperative, limited scope depositions
- Joint focus group presentations to gather data on potential jury reactions.
-

The only limit on downstream mediation activities is the creativity and level of cooperation exhibited by counsel, the parties, and the mediator.

Conclusion

Clearly, advance planning is a critical key to successfully mediating multi-party, multi-issue disputes. Through pre-mediation organizational planning sessions in one-on-one meetings with the mediator, designated party group conferences, or through a Mediation Steering Committee, every effort should be made to get organizational "shape of the table" and formatting decisions resolved early. At the same time, the parties can confirm authority requirements, per-approve closure documentation, and establish rough guidelines for effective time management during the session itself. Wherever possible these organizational decisions should be memorialized in written agreements or stipulated case management orders. Structure the mediation time together carefully while maintaining sufficient flexibility, but above all, have a plan. Don't let these mediations simply happen.

South Carolina Bar

Mediating High Conflict Disputes

Michael Lomax
San Diego, CA

STEP 1 – SIGNING YOUR AGREEMENT TO MEDIATE

This step can take longer than other mediation formats as the mediator is bonding with the parties through the process of questions and explanations, as well as establishing the mediator has tight control of the process.

WHAT TO COVER

A. Information that you would normally cover in this step – ground rules, housekeeping

B. Aspects of mediation
- You're the Decision-Makers.
- I have experience, but not advice, with this subject. Think of me as a source of information.
- You have more flexibility if you agree than a judge does.

C. Sign Agreement to Mediate - Emphasize roles
- My role is to guide the process, answer questions, help.
- Your role is to make your agenda, gather information, make proposals and make decisions.
- Briefly explain making and responding to proposals.

D. Invite Questions
- They usually will have proposals, arguments, and challenges.
- Matter of factly provide information and help them resolve initial issues such as who pays using the proposals approach.
- Calmly defer their discussion of substantive issues for later steps in the process.

E. Repeat Explanation of the Process.

TIPS

1. Remind the parties the focus of the process is on the future (not the past).
2. Establish your authority for managing the process and the structure.
3. Explain the process – in as brief and simple terms as you can.
4. Stick to each step – Stop them from diverting you. Stay firm about delaying issues until Agreement to Mediate Step is complete.
5. Use proper process to deal with issues that come up that must be agreed upon (how the mediation will be paid for).
6. Give them hope that this structure usually works.
7. Gently avoid story telling – it usually reinforces emotions and positions.
8. Stay firm about delaying issues (like not wanting to get divorced; full facts about incomes; etc.) until Agreement to Mediate is signed.
9. Don't focus on how they feel – their feelings usually improve as the process moves forward and they can raise their concerns and be heard.
10. Disputes over minor issues may need to be resolved in this step, such as who pays, as they can derail process – but it's a dispute for them to resolve.

11. Encourage proposals for all issues they raise, even from the start. This helps establish their decision-making.
12. Tell them what options they have; what others have done. This keeps it on their shoulders. Mediator accepts it as important issue – but doesn't solve it.
13. On rare occasions, HCPs won't sign and mediator simply says can't work without it – suggest options: discuss with an attorney think about it and schedule another appointment; meet with them separately for a few minutes to discuss options.

SCRIPTS

Aspects of Mediation:

"Welcome to mediation. Before we get started I want to emphasize three key aspects of the mediation process. #1: You folks are the decision-makers. I won't make decisions for you, I won't pressure you to make decisions and you don't have to persuade me of anything. #2: I may have information on the subjects you are trying to decide today, and I am happy to share what knowledge I have about how other people have handled similar issues – but it is all information and not advice. #3: If you are dealing with a court case, it is helpful to know that the courts encourage mediation and will accept almost any out-of-court agreements you make, because you have more flexibility than a judge has so long as you both agree. Do you have any questions about these key aspects of mediation before we proceed?"

Brief Explanation of Proposals Approach:

"The focus of mediation is on the future, so that we will spend most of our time on each of you making proposals and refining your proposals until they can become agreements. I will help you with this process and explain more about this as we go. Also, when you hear a proposal, try to focus on responding simply with a 'Yes,' 'No,' or 'I'll think about.' Again, I will help you with this process. Think of me as responsible for the process and the two of you as responsible for making your decisions. Any questions about any of this?"

STEP 2 – MAKING YOUR AGENDA

This step puts responsibility directly on the parties to raise issues and agree on which issues they will discuss, including the order in which they will discuss them. By keeping this responsibility on the parties rather than on the mediator, it builds momentum for them making proposals and agreements. The mediator emphasizes it is the parties' dispute and decisions to be made, reinforcing the expectation they will be responsible for the outcome, not the mediator.

WHAT TO COVER

A. Thoughts & Questions - Ask for Thoughts and Questions in main categories of decision-making
   - Allow the parties to discuss any pending issues delayed until Agreement to Mediate was signed.
   - Give them simple categories of decisions they will need to make (parenting, support, property). This way you provide them with a structure for their discussion.
   - Ask for one person to start to go through Thoughts & Questions without interruption, then have the other do so.
     - Thoughts are the person's initial ideas or thoughts about what they would like to see happen with each issue.
     - Questions are a chance for the person to ask the mediator information questions about an issue.
   - Encourage them to take notes if they urgently want to speak, explain listening is hard at first.

B. Information - Give basic information about the topics they have raised.
   - The mediator can summarize what each party said and then give basic information on standards that relate to the issues they have raised (almost a mini seminar). For example, in divorce mediation, the mediator can explain the basics of parenting plans, property division, child support and other issues, so that the parties narrow their expectations and get to ask more questions.
   - By focusing on standards and options before the parties make their proposals, it saves them embarrassment and unrealistic expectations. It also helps the mediator avoid appearing to take sides.
   - Normalize hearing standards and gathering information as the way to prepare for making proposals. Remind them it will be up to them to make proposals and they can vary from standards.
   - The mediator will need to repeat this information during Step 3 as it can be confusing.

C. Make Agenda - Have them make their Agenda
   - Ask them what issues they would like to put on their Agenda for today's meeting and which one to begin with.
   - These could be the broad categories you have identified, or new issues.
   - Parties can raise any issue they want to discuss and they can say "No" to any issue they don't want to discuss.

TIPS

1. The mediator encourages each party to look at and speak to the mediator (in the presence of the other party), so the mediator can really concentrate on the party who is speaking. This also discourages sniping comments back and forth, as the parties are not looking at each other and simply reacting to each other. This further trains the parties to take turns and listen without interrupting throughout the process. It is also a time to predict and normalize disagreement – and that disagreements can be resolved.

2. With high-conflict people there will be a lot of interrupting during this step, even though they have been instructed not to interrupt. (Remember, unmanaged emotions are common for some HCPs) It is helpful at this point to show comfort with managing the process and calmly reinforce the benefit of each person speaking thoroughly, so that the mediator can really understand each one's point of view.

3. Don't let these issues become power struggles. Instead, say that you are simply sharing information you believe will help them understand their options and make proposals that can become agreements. Encourage them to seek the advice of separate lawyers or advisors to get more detailed information on what you are generally telling them.

SCRIPTS

Introduction:

"What I'd let to do is get your thoughts in 4 areas of decision-making we are going to discuss today and any questions you may have for me about them. This is often the hardest part of the process because you may hear points of view that you disagree with. That's fine and normal at this stage, as most people start out disagreeing and most people eventually reach agreements in mediation. So if you have a reaction or idea while the other person is talking, feel free to make a note of anything you wish, so that you can just listen without interrupting. After I hear from each of you, we will make our agenda of what you jointly agree you wish to discuss. You can raise any issue for discussion, and you can say "no" to any issue you do not wish to discuss. Who wants to go first?"

Information:

"You've raised an important subject and here's how it is commonly handled…"

Dealing with questions put over from Step 1:

"What I'd like to do is get your thoughts and questions in 5 areas of decision-making, so you know what's coming, but first let's address that threshold question you had Skip…"

Dealing with interruptions:

"This helps me think more effectively of ways that I might help the two of you resolve the problems you want to address today."

"It's normal to feel frustrated at this stage of the process, yet it usually helps each of you in thinking about the proposals that you're going to make and most people eventually reach agreement in this process."

STEP 3 - MAKING YOUR PROPOSALS

Once there has been a discussion of issues and standards, and the parties have set their agenda priorities, it is time for proposals. This may seem premature to many mediators who are used to spending a lot of time on discussing each party's feelings about the dispute or identifying their interests. New Ways for Mediation reverses somewhat these approaches as HCPs usually start out with a clear idea of what they want and don't want. They are usually too upset to manage discussions about feelings productively and too rigid to recognize value in the other party's interests. This method allows them to present their proposals but then the mediator assists them with understanding the underlying parts, including interests.

In the New Ways for Mediation method, the mediator is clearly managing the process with a very direct approach, while not taking any responsibility for the outcome. By taking this highly-structured approach, the mediator actually makes the process simpler and more user friendly for the parties, while also protecting them from each other's (and their own) negative impulses.

By training them in this 3-step method, you get them thinking about the future and picturing solutions to their problems. You avoid getting "hooked" into their helplessness and you can often redirect them into thinking about their future options versus rehashing their positions and complaints about the other.

WHAT TO COVER

A. Describe the Proposals Skill (Give the parties an overview of how to make and respond to proposals).

B. The mediator ensures the parties have information on standards, approaches or options for resolution before making proposals and continue doing this throughout.

C. Guide the parties through making proposals:

- MAKE A PROPOSAL: Encourage the parties a proposal (WHO, WHAT, WHEN, WHERE avoid WHY) on the topic they chose.

- ASK QUESTIONS: Encourage the other party to ask at least two questions about the proposal. This encourages These questions should not include WHY questions as they usually are criticisms. The proposing party must answer those questions as matter of factly as possible. The mediator should ask some questions as this demonstrates an objective search for solutions and discourages parties from quickly saying "No" to each other's proposals and slow down rapid-fire rejection and appearance of impasse that often occurs with HCPs.

- RESPOND: Help the other party to respond with "Yes, No or I'll think about it." If she says I'll think about it ask how much time they will need (such as 5 minutes a day, a week).

- If the responding party says "No". It is their turn to make a proposal back.

TIPS
Help the parties gather information about proposals. The mediator can suggest information they could gather, remind the parties of the default standards for a given issue, or provide more detailed information about the law or alternatives others have used. If the mediator suggests options, they should try to suggest 3 options.

DEALING WITH INTERESTS
The mediator can deconstruct proposals to identify for the parties the interests that are important to them. Highlighting interests can be helpful, however if the mediator spends too much time focussing on interests it can start an unnecessary fight because:

- HCPs have resistance to the idea of interests and analysing them. They don't think they have interests they just think they are right.

SCRIPTS
Intervening when a party wants to respond to a proposal immediately:
"Hang on, Dan. Don't respond yet to Emily's proposal until I really understand it. I want to make sure I'm absorbing all the parts of her proposal, which may help me help you two refine your proposals until you are ready to reach an agreement. Sometimes a proposal itself is not agreed to, but it helps us find another solution that will work for you both. So, Emily, tell me what it would look like if your proposal was put into action. What would your picture be? What you would do, what would Dan would do and anyone else involved."

"I have some questions also, which will help me to help you understand where you might find room for agreement."

Inviting a party to respond to a proposal:
"Do you have any questions for Emily about her proposal? Do you think you understand it pretty clearly? Ok, then what are your thoughts about it? Would this be a 'Yes, I can do it!' 'No, I won't do it.' or 'I'll think about it.' And if you want to think about it, when do you think you'll have an answer for her? And if your answer is a "No," then of course I'll be asking you next what your proposal would be."

If a party says their proposal has to be accepted and it's not "Just a Proposal"
"That's fine, you might be right. It might become your final agreement. But it really helps to have a full discussion of several proposals before reaching a final agreement, if you want it to last." People usually accept that, because the proposal hasn't been rejected and it has actually been cast in a positive light.

Avoiding putting pressure on a party:
"This is all information, it is not advice."
"I won't pressure you to make a proposal, and I won't pressure you to accept a proposal."

DEALING WITH IMPASSE:

Mediation is based on principles of self-determination, voluntary consent to specific terms and client empowerment. When parties in mediation ask the mediator to make a proposal or recommendation, it is important to show empathy and understanding for their request, while at the same time resisting the urge to simply tell them what to do.

If the parties appear to be at an impasse, it is important to help the parties exhaust their own efforts to come up with proposals and where they might get more information to make more proposals. Ask them where they might find more information with which to make proposals, or who they might consult with. You can suggest possible sources of information.

IF this is not successful, ask if they are at an impasse and if they agree, the following tips can be helpful:

- Consider calling for a private meeting with each party, remind them of the proposals that have been made, any relevant information and
- invite them to take a break to prepare two proposals for the remaining issues, which could be presented together ("A or B") or as a backup (If "A" is not accepted then "B") make a proposal that "bridges" between the two proposals. Inform on potential consequences for the choices or proposals they are making – costs and risks of litigation

IF these efforts are not effective, the mediator can offer three alternatives that others have done. This avoids the mediator taking over responsibility for resolving the dispute. They could be very specific or general, using your judgment. Three options encourages them to look at the pro's and cons of each and what might help them resolve their dispute.

The following are other general ways the mediator can avoid resolving the dispute, while giving the parties more guidance for their proposals. One or more of these approaches can be suggested, without specifying how it should be used in the case at hand. "Does this approach sound like it would be helpful to you? Why don't you picture what some of your proposals might be using this approach, then decide if it's helpful or not." This helps focus the parties more narrowly, without taking over their role in resolving the dispute.

1. **Phased-in plan.** Starting with what one proposes now and ending up with what the other proposes over time. This can help with finding compromises regarding payment plans, pay raises, child support, transferring job responsibilities, a timeline for a big project and so forth.

2. **Splitting the difference.** This simple approach has resolved millions of financial disputes over the years. It's very common knowledge that financial settlements end up approximately in the middle of the parties' first proposals. Of course, some people make extreme proposals based on this idea, which alienates the other person who then refuses to negotiate further. So keep original proposals within the "ballpark" of what is reasonable under the circumstances.

3. **Refining their proposals and then flipping a coin.** While this is not elegant, it is quick and simple. This is the "Last Best Offer" approach and sometimes a third party (but not the mediator) picks the one that seems the most reasonable. It is also similar to what may happen in court in those cases where the outcome is quite unpredictable.

4. **Getting a recommendation.** With some issues, there are experts who could be consulted who will make a recommendation, which the parties can bring back to mediation. Such a recommendation can be a reality check, which often puts the parties into the same "ballpark" from which they can negotiate more realistically. The mediator can then help them "tinker" with the recommendation to make it their own agreement.

How far will you go? One method occasionally used is to have both parties write down on a separate piece of paper (so the other party can't see) how far they are willing to go to resolve their dispute (dollar amount, parenting percentage, etc.). Then they fold these up and hand them to the mediator, who looks at them under the table out of sight of the parties. The mediator then announces that it looks *likely* they will reach an agreement (if these "bottom lines" overlap), and then asks for new proposals; or announces that it looks *unlikely* they will reach an agreement, but does either party want to make a last effort to bridge the gap? Sometimes, people are still able to make new proposals and reach agreements, even when their "bottom lines" didn't overlap. Of course, try to avoid using the term "bottom line" out loud, because it risks locking the parties into what they wrote down – when in fact most parties are still willing to go a little farther to settle their dispute.

If none of the above is effective:

- Tell them you are out of ideas, if you are, but you will keep working with them.
- Ask if they would like to stop for today & set a future meeting.

STEP 4 – FINALIZING YOUR AGREEMENTS

This step can often feel like the easy part, but it can take as long as the whole mediation process up to this point. It usually involves several edits of a written agreement involving lawyers and other advisers. High conflict people can resolve most of their disputes but they can often take twice or three times as long to reach final agreements. Even though HCPs can do logical problem solving with professionals, they often go home and become upset again as they interpret their agreement in negative relationship terms (feeling abandoned, disrespected, ignored, dominated). When they are around their reasonable advisers again their tentative agreements look reasonable again. This can go back and forth several times until the agreement is finished.

WHAT TO COVER

- Prepare draft written agreements for the parties to review and comment on.
- Avoid "hammering out" agreements – the parties will often undermine this effort.
- Be prepared to calmly repeat information, answer questions and deal with upset over your drafting.
- Take a neutral position about making edits and changes.
- Build breaks into this step to allow the parties to get advice from their lawyers and other advisers. Consider making contact with the adviser so they have a balanced perspective on the draft agreement.
- Remain connected with the parties throughout this step. This usually means maintaining face-to-face contact through this step.

TIPS

1. Remind yourself, "the mediator is responsible for the process and their standard of professional care, but is not responsible for the outcome."
2. If a party tries to pass responsibility for solving issues with the draft on to the mediator say, "It's up to you! To the two of you!"

ARTICLES AVAILABLE ON THE HIGH CONFLICT INSTITUTE WEBSITE

1. New Ways for Mediation, © 2012 Bill Eddy, LCSW, Esq.
2. Pre-Mediation Coaching: 4 Skills for Your Mediation Clients, © 2012 by Bill Eddy, LCSW, Esq.
3. High Conflict Mediation: 4 Tips for Mediators, © 2009 by Bill Eddy, LCSW, Esq.
4. Should Mediators Make Proposals, © 2014 Bill Eddy, LCSW, Esq.

Pre-Mediation Coaching: 4 Skills for Your Mediation Clients

Whether you are a lawyer, counselor, manager or other professional, you are likely to be involved in mediation regularly or occasionally. Legal professionals are required to have their clients participate in mediation before going to court in many kinds of disputes these days. Yet mediation isn't perfect and some disputes unfortunately remain unresolved, despite the mediator's and others' best efforts. Studies show that 60-80% of disputes are resolved in mediation, depending on the type of dispute, so it still has a great track record and is the preferred approach in most situations – but perhaps we can do even better.

In an effort to make mediation more effective – especially in high conflict cases – some mediators offer pre-mediation coaching services, or have other professionals provide this service. In this article, I suggest that pre-mediation coaching can be particularly effective if it includes teaching and practicing 4 specific skills, especially for clients dealing with a high-conflict dispute. This article is followed by a 2-page handout for clients, which you have my permission to use in individual coaching sessions.

When to Provide Coaching

Depending on the nature and history of the dispute, it can be very helpful to have a coaching session with each client several days before the mediation begins. This way, each participant can realistically think about the mediation process and can start thinking about making proposals and calming himself or herself down. Yet you don't want to do this too long before the mediation, or it may add to the person's anxiety.

It's also possible to do this at the beginning of the first mediation session, either separately or with both parties together. You can send out the attached client handout (4 Skills for Mediation) with pre-mediation materials, then refer to it and reinforce the 4 skills at the beginning of the mediation.

If you are dealing with a very high-conflict dispute, however, it is highly recommended that the parties have training in using these 4 skills several days before the mediation. You might even consider having more than one pre-mediation coaching session for each client.

Who Should Provide the Coaching?

The mediator? In ordinary disputes, the mediator can probably do this coaching – either before the mediation or at the beginning of the first session.

A lawyer? If you are a lawyer with a client who has been referred to mediation, you may be in the ideal position to coach your client on using these skills in mediation. You already have a relationship and you know the basic facts of your client's case. These skills will also help you in your own work with your client, especially in managing your client's stress and potentially resolving the entire case out of court.

A mental health professional? Depending on the nature of the dispute and the level of expected conflict – and how long it has been going – it may be wise to have a mental health professional or another experienced mediator provide the pre-mediation coaching. Such a professional may be able to use counseling skills in calming the client, helping the client see other points of view, and dealing with any related mental health issues.

By having someone other than the mediator provide the coaching, it reduces any effort by a possible "high conflict" person (one who chronically gets into conflicts, remains in conflicts for a long time and makes them worse) to hook the mediator into their upset emotions and extreme point of view. High conflict people (HCPs) usually put a lot of energy into persuading others – even neutral mediators – to

take their side and to become responsible for resolving their problems. They usually forget that the mediator is supposed to stay neutral.

Getting Acquainted

If the mediator or another professional is meeting each client for the first time, it is fine to get acquainted with some chit-chat and basic information about the case. However, you don't want to get too deep into the client's upset emotions about the case, as the focus of your session is to teach skills that the client will use. (A coach who is not the mediator should make sure to avoid becoming involved in the case in any other way, like telling the mediator anything about the content. The client needs to be responsible for that, although you can help the client practice.)

Teaching the 4 Key Skills

It's helpful to tie the skills to the issues that the client has mentioned. Explain each skill by saying how it can benefit the client. For example:

1. **Managed emotions**: Learning this skill can help you stay calm when so-and-so is talking in the mediation. It will help you appear reasonable and focused on solutions.
2. **Flexible thinking**: Can help resolve your dispute in a way that works for you.
3. **Moderate behavior**: Realizing how to communicate so you don't make the other person defensive can be really helpful, since most people don't think about that when upset.
4. **Check yourself:** This helps you remember to use the skills during the mediation process.

Practicing with the Client

If it seems appropriate, you can practice at least one example of one of these skills in a role-play exercise with the client. Suggest that the client take the role of the Other Party in the dispute for a minute or two, and you can play the Client. Ask the client (playing the Other Party) to say something the Other Party might say in the mediation that would be upsetting for the client. Then, you (playing the Client) respond using one of the skills. For example:

Other Party says:	You're not getting enough work done! You're always slow!
Client (you) says:	(Remembering not to take it personally): Then I have a proposal: Why don't you tell me what your priorities are, since you have several projects for me.

Then, switch roles and you be the Other Party and let the Client play himself or herself. Repeat the exercise. Clients often find this very helpful, because they didn't have the words and just got upset in the past. If you have time, you can do several such exercises or you can let the client talk about other issues.

Ask the Client to Summarize

At the end of the Coaching session, ask the client to summarize what he or she has learned. This helps the client remember better and shows how important you believe these skills are for his or her success.

Bill Eddy is a lawyer, therapist and mediator. He is the author of several books and the President of the High Conflict Institute, which provides speakers and trainers on managing high-conflict disputes in several areas, including legal, workplace, healthcare, education and families. For more information go to: www.HighConflictInstitute.com.

4 Skills for Mediation

A Client Handout

If you're preparing for a mediation to solve any type of problem, it helps to know about 4 key skills that can help you during the mediation process. Most mediations involve a mediator who has been trained to stay neutral and help the participants make their own decisions. The mediator is in charge of the process and the participants are in charge of making proposals and making decisions about the issues at hand. Sometimes people try to persuade the mediator to take sides, but the mediator is supposed to be very careful to stay neutral and to help the parties make their own decisions. The following 4 skills can help.

1. **Managed Emotions**

Talking about unresolved issues can be emotionally upsetting. However, it is possible to manage your own emotions by anticipating upsetting moments and preparing for them. Don't be surprised if you feel frustrated or angry upon hearing different points of view, hearing proposals you don't like, and having to think of alternatives. Remember that most conflicts are resolved through this process of talking and listening and creating solutions. Prepare yourself to deal with any possible difficult moments.

How can you help yourself stay calm? One of the best techniques is to ***memorize short encouraging statements*** that you can tell yourself as you are going through the process, such as:

PATIENCE:

- The agreement at the end is all that matters.
- Sometimes it takes a while, but an agreement is usually reached.
- With high-conflict emotions it usually takes longer, but agreements can still be reached.

DON'T TAKE IT PERSONALLY:

- Personal attacks are not about me – they're about the person who lacks self-control.
- I don't have to defend myself or prove myself – I'm already okay as a person.
- We can disagree about the past – reaching an agreement about the future is what matters.

2. **Flexible Thinking**

A big focus of mediation and other settlement methods is making proposals. It helps to prepare proposals for each issue you are trying to resolve or plan to raise in the mediation. That way you don't get stuck in "all-or-nothing thinking" and can avoid just getting upset when your first proposal isn't immediately accepted. Any concern about the past can be turned into a proposal about the future.

It can help to prepare two proposals on any issue that you or the other person is likely to raise, so that you don't get stuck if your first proposal is not accepted right away. You can make a list of issues and then write two proposals for how you would like to see each one get resolved.

Responding to proposals is another area in which practice can help. In general, just respond with "Yes" "No" or "I'll Think About It." This saves arguing over the proposal itself, since what really matters is finding an agreement. Of course, you can ask questions about a proposal for greater understanding and to picture how it would look if you both agreed. But avoid challenging questions, like: "Why did you say that?" Or: "Do you realize that's ridiculous?" If you disagree, just pause and calmly say "I won't agree to that," and focus on making a new proposal yourself.

3. **Moderate Behaviors**

Mediation is a structured process, to help people think of reasonable solutions to problems, even when they are upset. Therefore, there are several ground rules in most mediations. It helps to think about them in advance and remind yourself to follow them, including:

A. Don't interrupt while the other person is speaking. Instead, make notes to remind yourself of any ideas that pop up while he or she is talking. Then you can raise them when appropriate.

B. Treat everyone with respect. This means avoiding insulting comments, raising your voice or pointing fingers. These behaviors often trigger defensiveness in the other person. Instead, you want everyone to stay calm and rational, in order to focus on solving the problems you came to discuss. Speaking respectfully goes a long way toward reaching agreements that will work and last over time.

C. Use "I" statements. These are sentences that start with "I feel…" or "I prefer…" or "I have another idea…" Avoid "You" statements, such as "You always…" or "You never…" "You" statements tend to trigger defensiveness in the other person, which will make it harder to reach an agreement. Just use "I" statements to convey your own perspective, rather than assumptions or criticisms of the other person's perspective. Remember, all you need to do is to reach an agreement. You don't need to try to change the other person's way of thinking (which is unlikely anyway).

D. Ask to take a break, if necessary. Avoid just getting up and walking out. Ask for a break, so that everyone can stop for a few minutes. Mediation is more flexible than a court hearing or arbitration. Taking breaks can help you earn respect – rather than resentment if you rush out – and can help you calm down if you're upset. It's also fine to take a break to get advice from a lawyer, friend or other advisor before you make final agreements. Just ask for some time to do so – either a few minutes, or several days or weeks if necessary. Mediators generally do not pressure you to make final decisions at the same time as you first discuss an issue.

4. **Check Yourself**

From time to time, ask yourself if you are using these skills. It's easy to forget in the middle of discussing problems or upsetting issues. The mediator will try to help everyone in the mediation stay calm and focus on understanding problems and finding solutions. Just think about these four skills before the mediation and during the mediation, and you may do very well.

Bill Eddy is a lawyer, therapist and mediator. He is the author of several books and the President of the High Conflict Institute, which provides speakers and trainers on managing high-conflict disputes in several areas, including legal, workplace, healthcare, education and families. For more information go to: www.HighConflictInstitute.com.

SETTING LIMITS – Skills Sheet

SETTING LIMITS:

1. Focus the person on **CHOICES** or **OPTIONS**
2. Refer to **EXTERNAL Rules** or **Limits**
3. **EDUCATE** about **CONSEQUENCES**

SETTING LIMITS with E.A.R. Statement (Examples):

Choices:

"I understand this is upsetting and I want to work with you on this. You have a dilemma – you could do A or you could do B. It is up to you."

"I respect this is frustrating. You have two choices: You can go back into joint session with your lawyer and speak respectfully and not interrupt, or you can stay here and let your lawyer go back in and make the proposal for you. It's up to you."

External Limits:

"You may not realize it, but our policies do not allow us to do your request. I understand your frustration with that. We all have to follow this rule. I wish I could help you more. I have to go now."

"I respect you want to get started with mediation quickly. We have a policy that we always see each party separately in advance. We could schedule those appointments now if you like."

Consequences:

"I know this is frustrating. I want to help you resolve this. You might not realize it; if you take that step the other person might misunderstand your intentions. It could escalate the situation further."

GENERAL TIPS:

1. **S**etting **L**imits is not aggressive. The goal is to redirect the HCP while calming them and remaining calm yourself.
2. **S**etting **L**imits is assertive. The goal is to calmly and clearly communicate to **block** the Behavior that's Aggressively Defensive, while avoiding giving Negative Feedback, retaliating or avoiding dealing with an HCP.
3. **S**etting **L**imits is not only about the words being said but also, acting *differently* – by staying calm, confident and firm.
4. **S**etting **L**imits is best done in a matter-of-fact manner, with Empathy, Attention and Respect (E.A.R.). With practice, using this method will help you respond productively under pressure.

YES, NO, or I'LL THINK ABOUT IT
(Two Tips for Resolving Any Conflict)
By: Bill Eddy, LCSW, ESQ.

Whether in a divorce, a workplace dispute, or a conflict with a neighbor, it's easy to get caught up in defending our own behavior and point of view. In a conflict, people can "push our buttons," and it's easy to react before we know it. The focus can quickly become personal and about the past.

To avoid this problem, there's a simple, two-step method that seems to help, no matter what type of conflict you are in. If you think you are going to be in a difficult situation, remind yourself of these two steps before you start talking. And if you are in the middle of an argument, you can always shift to this approach.

1) First Person: MAKE A PROPOSAL
Whatever has happened before is less important than what to do now. Avoid trying to emphasize how bad the problem is or criticizing the other person's past actions. There's nothing he or she can do about the past now. This just triggers defensiveness. Plus, people never agree on what happened in the past anyway. Instead, picture a solution and propose it.

> For example, in a divorce dispute: "If you're going to be late to pick up the kids on Fridays, then I propose we just change the pickup time to a more realistic time. Instead of 5pm, let's make it 6:30pm."
>
> Or in a workplace dispute: "I propose that we talk to our manager about finding a better cubicle for you, since you have so many phone calls that need to be made and I often hear them."

2) Second Person: YES, NO, or I'LL THINK ABOUT IT
All you have to do to respond to such a proposal is say: "Yes." "No." or "I'll think about it." You always have the right to say: "Yes." "No." or "I'll think about it." Of course, there are consequences to each choice, but you always have these three choices at least. Here's some examples of each:

> **YES:** "Yes, I agree. Let's do that." And then stop! No need to save face, evaluate the other person's proposal, or give the other person some negative feedback. Just let it go. After all, if you have been personally criticized or attacked, it's not about you.

Personal attacks are not problem-solving. They are about the person making the hostile attack. You are better off to ignore everything else.

NO: "No, I don't want to change the pickup time. I'll try to make other arrangements to get there on time. Let's keep it as is." Just keep it simple. Avoid the urge to defend your decision or criticize the other person's idea. You said no. You're done. Let it drop.

I'LL THINK ABOUT IT: "I don't know about your proposal, but I'll think about it. I'll get back to you tomorrow about your idea. Right now I have to get back to work. Thanks for making a proposal." Once again, just stop the discussion there. Avoid the temptation to discuss it at length, or question the validity of the other person's point of view. It is what it is.

When you say "I'll think about it," you are respecting the other person. It calms people down to know you are taking them seriously enough to think about what they said. This doesn't mean you will agree. It just means you'll think about it.

MAKE A NEW PROPOSAL: After you think about it, you can always make a new proposal. Perhaps you'll think of a new approach that neither of you thought of before. Try it out. You can always propose anything. (But remember there are consequences to each proposal.) And you can always respond: "Yes." "No." or "I'll think about it." (And there are consequences to each of those choices, too.)

AVOID MAKING IT PERSONAL

In the heat of the conflict, it's easy to react and criticize the other person's proposals—or even to criticize the other person personally, such as saying that he or she is arrogant, ignorant, stupid, crazy or evil. It's easy and natural to want to say: "You're so stupid it makes me sick." Or: "What are you, crazy?" "Your proposal is the worst idea I have ever heard." But if you want to end the dispute and move on, just ask for a proposal and respond "Yes" "No" or "I'll think about it."

Bill Eddy is a mediator, lawyer, therapist and the President of the High Conflict Institute based in San Diego. High Conflict Institute provides consultation for high-conflict situations, coaching for BIFF Responses (written responses that are Brief, Informative, Friendly and Firm), and training for professionals in managing high conflict disputes in legal, workplace, healthcare and educational settings. www.HighConflictInstitute.com.

E.A.R. Statements – Skills Sheet

An E.A.R. (Empathy, Attention, Respect) Statement is a short statement that acknowledges a person's emotions, attempts to connect with them and helps calm them down, keeping them focused on problem-solving.

E.A.R. Statement (Examples):

- *I can **understand** your frustration – this is a very important decision in your life. Don't worry, I will pay full **attention** to your concerns about this issue and any proposals you want to make. I have a lot of **respect** for your commitment to solving this problem, and I look forward to solving it too.*
- *I **appreciate** this complaint process is very stressful and upsetting. You need a mediator who is paying close **attention** to your concerns and really **understands** how difficult this has been. I **will listen** to your concerns today and I will **do my best** to assist you.*
- *I respect your efforts on this.* [Respect]
- *You have put a lot of work into this.* [Respect]
- *I can see how important this is to you.* [Empathy]
- *I can understand how frustrating this is.* [Empathy]
- *I will listen as carefully as I can.* [Attention]
- *I will pay attention to your concerns.* [Attention]

GENERAL TIPS:

1. It may be counter-intuitive so it will take lots of practice to honestly show **E**mpathy, **A**ttention and **R**espect when someone is raging or **B**ehaving in other **A**ggressively **D**efensive ways.
2. An E.A.R. statement will sometimes take only a minute. It does not have to take much time to unlock The Cycle of High Conflict Thinking. You don' t have to listen forever.
3. Your statement of **E**mpathy, **A**ttention and **R**espect must be honestly felt or the HCP's Cycle of High Conflict Thinking will continue.
4. Avoid volunteering to "fix it" for the person (in an effort to calm them down).
5. Keep an arms-length relationship.
6. Avoid believing or agreeing with the content.
7. Avoid apologizing as this only confirms to the HCP you are to blame. A "social sorry" is fine – "I am sorry this is so difficult."
8. To help you stay calm in the face of the other person's upset, remind yourself "it's not about me!" Don't take it personally. It's about the person's own upset and lack of sufficient skills to manage his or her own emotions.

HIGH CONFLICT INSTITUTE

Mediating High Conflict Disputes

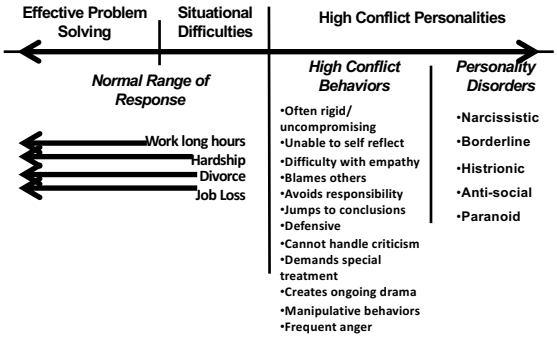
South Carolina Bar Association
January 19, 2017

Michael Lomax, Esq.
Attorney, Mediator, International Trainer

Disclaimer

- This seminar does not train you to diagnose personalities.
- It may be harmful to tell someone that you believe that they have personality problems or a high conflict personality.
- Just recognize potential patterns and adapt your approach accordingly.
- Just develop your Private Working Theory

The Continuum



COMMON ISSUES of HCPs

- Rigid and Uncompromising
- Difficulty Accepting and Healing Loss
- Emotions Dominate Thinking ***(Can Hide This)***
- Inability to Reflect on Own Behavior
- Difficulty Empathizing With Others
- Preoccupied with Blaming Others
- Avoids Responsibility (For Problem or Solution)
- Depends on Others to Solve Problems
- They may have Personality Disorders

2 Brain Types of Conflict Resolution

- **PROBLEM-SOLVING BRAIN** (Generally **Left Brain**)
- Slower; takes time to analyze problems
- Flexible thinking (many solutions to every problem)
- Managed emotions
- Moderate behaviours (so can maintain relationship)

DEFENSIVE BRAIN (Rt Brain)

- Fast; shuts down higher thinking & problem-solving to focus on quick action
- All-or-nothing thinking (eliminate or escape the enemy)
- Intense emotions drive fight or flight behaviour
- Extreme behaviours (to defend self from life or death dangers or *perceived* life or death dangers)

"The Issue's Not the Issue"

- In high-conflict cases, the issue is not the issue. The high-conflict thinking is the issue, with distorted perceptions and expectations.
- For many people with high-conflict personalities, they are stuck in their negative emotions (R.B.) and can't easily access their problem-solving skills (L.B.)
- To handle them, you need to learn to communicate with the Right Brain

Talking to the "Right" Brain

- Tone of voice and body language is amazingly important: Calm, confident, firm
- Avoid personal attacks: these escalate the defensiveness of HCPs and bad behavior
- Avoid threats: these escalate the HCP
- Avoid logical arguments in times of stress
- Avoid giving (focusing on) Negative Feedback:
  (focusing on past behavior, whole person, neg tone)

Mediator's Role
(A Very Ethical Role)

1. CONNECT with respect (Empathy, Attention and Respect) throughout the process
2. STRUCTURE a client-centered process from the start. Teach them to: *Focus on the future by making proposals and making agreements*
3. EDUCATE them about their choices and possible consequences of each choice

1. CONNECTING:
Empathy, Attention & Respect

You'll be frustrated by the HCP's emotional reactivity and thinking distortions. It's easy to get "emotionally hooked," and to withhold any positive responses. It's easy to feel a powerful urge to attack or criticize.
Instead, consciously use your E.A.R.:

- EMPATHY
- ATTENTION
- RESPECT

Empathy

- Acknowledge the person is upset:
  "I can see this is upsetting."
  "Wow! You're really upset."
- Let person know you care:
  "I care about you and want to help."
  "I want you to succeed here."
- Connect with their feelings:
  "I can understand how frustrating this is."

E.A.R. Statement

- Example: "I can ***understand*** your frustration – this is a very important decision in your life. Don't worry, I will pay full ***attention*** to your concerns about this issue and any proposals you want to make. I have a lot of ***respect*** for your commitment to solving this problem, and I look forward to solving it too.

Fears and EARs for HCPs

Their Fear For any of these:	**Your EAR Response** **Use any of these:**
• Being abandoned	• **I want to help you**
• Being seen as inferior	• **I respect your efforts** • **I'll pay attention**
• Being ignored	• **I'll listen** • **Its just rules we all have to follow**
• Being dominated	• **I understand this can be frustrating**
• Being taken advantage of	• **I'll work with you on this** • **I know this can be confusing**

Cautions about E.A.R.

- Avoid believing or agreeing with content.
- Avoid volunteering to "fix it" for them (in an effort to calm down their emotions).
- Be honest about empathy and respect (find something you truly believe)
- Keep an arms-length relationship.
- You don't have to listen forever.
- You don't have to use words or these words.

Big Paradigm Shift of Managing High Conflict People

- Your focus needs to be on ***your relationship*** with the person, rather than their outcome. So as they move forward, then backward, you can calmly move them forward again. Don't become stressed by their "resistance.
- **The Paradox**: When you focus on the relationship rather than their outcome, you are more likely to get good outcomes.

Dancing with the Resistance (The "2-Step")

1. CONNECT with E.A.R. w their concerns (no matter how absurd)
2. Then EDUCATE them: "You may not be aware of this, but ..."

Educate using Indirect Confrontations

- HCPs need limits because they can't stop themselves
- With HCPs, focus on **external reasons** for new behavior (rather than focusing on negative feedback about past behavior):
- "Our policies require us to …"
- "The law requires me to …"
- "It might appear better to _____ if you…"
- "I understand, but someone else might misunderstand your intentions with that action…"
- "Let's take the high road…"
- "Choose your battles…"

Educate About Consequences

- HCPs do not connect realistic CONSEQUENCES to their own ACTIONS, especially fear-based actions.
- They feel like they are in a fight for survival, which blinds them to realities.
- Their life experiences may have taught them different consequences than most.
- They can be educated by a caring person.

Proposal-Focused Mediation

STRUCTURE the Process

- Remember that HCPs are defensive reactors, more than planners. Their focus is on the past.
- Establish the structure from the start.
- Explain how the process is going to work.
- Establish your authority in managing the process, including sticking with each step.
- Stop them from interrupting each other (much more important than in ordinary negotiations).
- Stop them from diverting the step you're in.
- Give them hope – this structure usually works.

Reducing Client Resistance

HCP clients feel helpless & want YOU to be responsible for THEIR behavior or to play a parental role – but then they think you did it wrong and attack YOU

Keep responsibility for decision-making on the clients

Avoid getting emotionally hooked; don't feel responsible for fixing clients or solving their problems

You're not responsible for their outcomes

– just manage the process

– just do your job - your "standard of care"

Client-centered Decision-Making

(Especially in High-Conflict Cases)

1. Have clients participate in as many decisions as possible – even ones you are allowed to make.
2. Say **"It's up to you!"** when they challenge you on something, then explain their options.
3. Suggest next steps to take, then ask: **"Is that ok with you?"**
4. Give them lots of little decisions to make, such as who goes first, what's on the agenda, etc.
5. When they try to hand you problems, give them back by saying **"You folks have a dilemma – how do you want to handle it?"** Here's some options.
6. Avoid saying "can you agree to that?" to the other's proposal. Gives appearance of taking sides.

New Ways for Mediation®

The Structure

Step 1: Signing Your Agreement to Mediate (structuring the process)

Step 2: Making Your Agenda (and gathering info)

Step 3: Making Your Proposals (and Analyzing Them)

Step 4: Finalizing Your Agreement

Step 1: Signing Your Agreement to Mediate

A. Information that you would normally cover in this step – ground rules, housekeeping
B. Describe Process
C. Sign Agreement to Mediate - Emphasize roles
D. Invite Questions
E. Repeat Explanation of the Process.

See summary: *New Ways for Mediation*

Step 1: TIPS

- Remind - the focus of the process is on the future (not the past).
- Establish authority for managing the process and the structure.
- Stick to each step – Stop them from diverting you.
- Give them hope that this structure usually works.
- Gently avoid story telling – it usually reinforces emotions and positions.
- Stay firm about delaying issues until Agreement to Mediate is signed.

Step 1:
TIPS

- Don't focus on how they feel
- Encourage proposals for all issues they raise.
- Tell them what options they have; what others have done. This keeps it on their shoulders.
- On rare occasions, HCPs won't sign and mediator simply says can't work without it.

Step 2:
Making Your Agenda

A. Thoughts & Questions

-Discuss pending issues

- Give them simple categories first

- Ask each for initial ideas or thoughts and any questions

B. Information

- Mediator/Lawyers give basic legal information

- Explain accepted/default standards or options

C. Make Agenda

- Parties agree on issues to put on Agenda.

Step 2:
TIPS

- The mediator encourages each party to look at and speak to the mediator
- Calmly deal with interruptions.
- Don't the sharing of thoughts and information become power struggles.
- Encourage breaks to seek the advice from lawyers/advisors.

Step 2: Making Your Agenda

Example

Tell me what you each propose to put on today's agenda. Each gets an uninterrupted turn while you write their list.

Now, what do you two agree should be the first and second items we address?

This should be totally up to them. You want them to practice making joint decisions.

Step 3: Making Your Proposals

- Describe the Proposals Skill (Give the parties an overview of how to make and respond to proposals).
- Ensure the parties have information on standards, approaches or options for resolution before making proposals and continue doing this throughout.
- Guide the parties through making proposals.

3-Steps for Making Proposals

1. **Propose:** WHO will do WHAT, WHEN and WHERE.
2. **Ask questions**: The other person then asks questions about the proposal, such as: "What's your picture of what this would look like, if I agreed to do it?" "What to you see me doing in more detail?" "When would we start doing that, in your proposal?"
3. **Respond**: Other person then responds with: "Yes." "No." Or: "I'll think about it."

And if you say "No," then you make a new proposal.

Avoid "Why" Questions

Why questions easily turn into a criticism of the other person's proposal.

Why questions start up defensiveness. If someone's defensiveness is triggered, then it makes it hard for them to think of solutions to problems.

"*Why* did you say that?" usually really means "I think that's a stupid idea and I want to force you to admit it." Instead, if you think the other person's proposal is a bad idea, then the best thing to do is to just make another proposal – until you can both agree on something.

Help them Analyze the Proposal

- Don't allow quick negative reactions to proposals: "That's a ridiculous idea!" "I'll never agree with that?"
- Instead, as negotiator take time to ask the proposer to say more about proposal, so you can deconstruct their proposals if they can't reach agreement.
- Tell the responder to wait a couple minutes while you really understand the other's proposal. "*I want to understand the details so I can help you find solutions*."
- Then, let other respond: **Yes, No or I'll think about it.**
  "I'll think about it" is often a way of saving face.
  They often matter-of-factly say they agree later.

Help them Analyze "What's Important" in Their Proposals

- If no agreement, ask for new proposals. If still no agreement, tell them what you saw was important in each (their interests).
- You can write these on a white board.
- This is reverse interest-based negotiations:
  Reframe any positions as "proposals."
  Negotiator helps analyze proposals with questions.
  Negotiator identifies "what's important" and check if parties agree; add whatever they wish.
  "What's important" is really their interests.

Educate them about options

If no agreement:

- Discuss sources of information they might investigate.
  - Reading resources
  - People to consult with
  - Plan to meet again after their research
- Give them at least 3 options that others have done, which might give them new ideas for proposals.
  - 1 option is too directive
  - 2 options risks one likes one and other likes other

Educate them about General Negotiation Approaches

Still if no agreement, suggest these General Approaches:

Phased-in agreement (start with one party's approach and end up at other party's approach)

Split the Difference (this is common easy solution – meet halfway, approximately)

Get a recommendation from an expert in the field

View their confidential bottom lines – then say if they overlap or not. Then ask if any new proposals.

See article: *Should Mediators Make Proposals?*

Teach Them It's THEIR Dilemma

- Keep the burden of resolving the issues (even questions about the facts of the case) on the clients, no matter how badly they want you to resolve it for them.
- When they raise problems, tell them "**You have a dilemma. How do YOU want to resolve it?"**
- Then, if they can't think of options, suggest several:
  - "You could do discovery"
  - "You could informally ask to see more info"
  - "You could proceed with what info you have now"

Step 4:
Finalizing Your Agreement

A. When they appear to have an agreement, write it down. Ask for all details necessary.

B. If they have been "thinking about it" on an issue, ask them now if it's a Yes or NO or need more time to think.

C. If they appear to have an agreement, encourage them to think about it and know they aren't locked in until they sign.

Writing enforceable agreements

- Take a neutral position and educate them.
- Expect them to reject their own agreements or to edit them endlessly. It's up to them.
- Tell them what they can and can't do under the law, in as neutral way as possible.
- Never "own" their agreement or tell them what they "should" do or "shouldn't do" in your own opinion.
- Have them help you build in consequences for breach of agreement, in matter of fact way.

CONSEQUENCES
(the way they really learn)

- Consequences are better than criticisms
- Agreements and court orders need detailed consequences built in
- Sanctions are an excellent consequence
- A credible threat of consequences may be as good as actual consequences
- Help them save face and have hope

Closing Points about HCPs

- HCPs behavior is mostly unconscious
- HCPs want relief from their constant distress
- HCPs push professional boundaries out of desperation, not out of intent to be difficult
- Direct confrontation brings resistance and escalation of blame, not insight for HCPs
- Most HCPs have problem-solving skills, which you can access if you calm their emotions
- Many HCPs can be helped