


Who's Mediation Is It Anyhow?

By Joseph Epstein, Esq. with Andy Silverman, Esq.

Introduction

You have a client and your client has a civil litigation case. It may be a family firm dispute, a breach of contract action, a probate matter, a construction defect case, a wrongful death claim or a personal injury case. Should they all be mediated the same way? Does the consumer have a say? Does a "one size" mediation fit all mediations as a "one size" fits all overcoat fits all people?

What do your clients want from a mediation? Do they want a fair process, a chance to state their case, an opportunity for closure? Or, do they want someone to swoop in and learn the case on the fly, pull out the Jury Verdict Reporter and then tell them the likely result and why? We believe that attorneys and their clients deserve individualized mediation design from creative, proactive mediators who work with you and your clients before and during the mediation. Mediators need to understand that for most parties, mediation has become their day in court. Process, fairness and conflict resolution do go hand and hand.

With this article, we want to make clear that mediation is for the parties and that they should be given the opportunity for pre-litigation and early dispute resolution whenever possible; that mediators should give the parties an opportunity to tell their story; and that mediators should "listen with their eyes" as they help the parties resolve their conflict issues.

What is Proactive Mediation?

We use proactive mediation to have parties, their advocates, mediators and opponents ready for mediation and closure.[1] Proactive mediation brings energy and creativity to the mediation process, even before the parties get to the mediation table.[2] The positive dynamics of proactive mediation begin with the setting.[3] In short, proactive mediation is starting the process of mediation with the first contact between the mediator and counsel.

A. Case Setting

1. *By whom*? It is our belief that attorneys should set case with the mediator or a well trained assistant so they can raise mediation design issues well in advance of the mediation.
2. *What information should you give the mediator*? It is best if an attorney can send the mediator a short summary of the case highlighting legal and factual issues as well as emotional and underlying issues.
3. *When should you set the case*? We urge parties to set cases as early as possible. In these days of considerable transactional cost pressures, we have a bias that favors pre-litigation and early dispute litigation. If parties favor this preference, we can facilitate informal or formal discovery plans. Many cases can be successfully negotiated pre-litigation or in early dispute resolution if the parties are willing to engage in some informal and/or limited discovery.

B. Individualized Mediation Design

Individualized mediation design is the development of a mediation that fits with the type of case, the case complexity, the interests of the parties and the emotional components that the mediator can identify.[4] The hallmark of mediation design should recognize this complex blend of mediation factors. The mediation process should be tailored to fit the parties and their specific conflict.[5]

1. *Type of case*. Cases involving on-going relationships often require a different design and mediation process than cases involving zero sum negotiations. Cases having precedential value will proceed differently than one-time cases. The management of highly emotional cases is different from "it's only money" cases. Wise mediators with more than one tool in their Mediator's Toolbox appreciate these differences and more and work with the parties to engage in a process that works for each specific case.
2. *Complexity of case*. The number of parties; the degree of disputed facts; the variety of legal issues and the spectrum of potential results; and the depth of underlying issues, motivations and non-legal goals all need to be factored into the design of the mediation.
3. *Legal and factual issues*. Our experience is that motions for summary judgment, motions in limine and trial briefs that counsel filed in advance of mediation are helpful background information for mediators so long as the parties do not become too tied to their partisan perceptions. Sometimes, a pre-mediation meeting between counsel and the mediator is useful when there is a host of such pleadings to consider.
4. *Underlying interests, goals and objectives*. Dealing with these factors is one of the critical advantages of mediation over litigation, but all too often attorneys neglect to highlight these issues for the mediator prior to mediation, and neglect to have their clients address them candidly with the mediator at mediation. The mediation format can facilitate or frustrate the ability to address these concerns.
5. *Process fairness*. It is fundamental that advocates, their clients and the mediator be on the same page as to what the parties need in order for them to feel that the mediation process has been fair. A key element in determining whether the mediation process was fair is whether the parties had an opportunity to tell their story and feel that they have been "heard." Indeed, hearing parties tell their own story may have a greater positive impact (both on mediators and, when appropriate, opposing counsel and parties) than when it is filtered through another's voice.
6. *Examples of special formats*. In a construction defect case, parties, counsel and the mediator may well find a pre-mediation site visit ultimately time saving and constructive. Site visits may be a consideration in other cases too. Sometimes parties may bring the site, the accident scene or the product to mediation in DVD, PowerPoint and/or an animated format. In probate cases and other high energy, high emotion cases, pre-mediation caucuses rather than multiple mediations may be the preferred route. Other mediations may require co-mediation, which can mean, for example, a gender or ethnic balance and/or a substantive knowledge and process experience balance. In ERISA reasonable necessity multi-claim cases, the parties may favor a nonbinding arbitration/mediation approach. Other cases may warrant a mediation-arbitration or an arbitration-mediation approach. In still other instances, counsel may specifically invite experts and/or other witnesses to the mediation or ask them to

participate by telephone. For example, counsel may ask a CEO to attend in order to match a CEO from the other side. While some mediators favor having mediations early and often, we favor having one proactive, individually designed, early mediation.

C. Preparation

1. *Of counsel*. Counsel prepares best by first listening carefully and patiently to his or her client in order to understand the client's motivations, underlying interests and goals. Utilizing similar skill when dealing with opposing counsel and when deposing the opposing party can develop some insight as to the opponent's motivations, underlying interests and goals. This is the foundation upon which the facts, the law and the leverage involved in the case evolve.
2. *Of client*. The preparation and the education of the client start with the first attorney-client meeting. The attorney must lay out the client's role and responsibility. Establish the lines of communication so dialogue about expectations evolves with the evolution of the client's case. Prior to mediation counsel should review role playing and discussions about the legal negotiation process - worst case outcome, best case outcome, target number and settlement number.
3. *Of opponent*. It helps if attorneys provide opposing counsel with the information necessary to conduct a fair evaluation, reflect preparation and better identify purpose. It is our view that counsel should share a version of their mediation statement with opposing counsel before the mediation. This gives each side an opportunity to reflect on their partisan perception when calm and careful reflection is possible. This is often a different version of the mediation statement than the one provided to the mediator.
4. *Of mediator*. The preparation of the mediator should start with the setting. Follow this with an early summary of the case, then a review of the complaint, answer and other key pleadings and briefs. The mediation statement should be candid and reflect non-legal as well as legal issues and weaknesses as well as strengths. Mediation statements should ideally be provided 7-10 days in advance of the mediation (longer in more complex cases) so the mediator has time to convey pre-mediation questions to counsel and to consider process issues in advance of the mediation.

At the Table: Whose Mediation Is It Anyhow?

At least one book involving an analysis of soul traits states that "humility" is the most important soul trait that a person must acquire and exercise.[6] For mediators, advocates and parties alike, this may be a difficult pursuit. It does get a bit easier when one considers that having "humility" is not synonymous with being humble. Rather "humility" means knowing what space to occupy.[7] Sometimes that requires leadership. Other times it requires stepping back, and still other times, it requires coaching by the mediator. Mediators should work with advocates in determining a reasonable and satisfying process that allows the parties to have an opportunity to have their story told and "heard," to allow for an exchange of information, and recognition of underlying issues. We suggest that in preparing for mediation, counsel process a realistic risk assessment with their clients and then share it with the mediator. For example, in a business conflict, counsel might pose the following questions for discussion with his or her client.

1. How much time will you and your employees have to devote to this dispute over a two to four year period?
2. Do you and your employees have more productive and satisfying things to do with your time and/or theirs?

3. How much will this litigation cost in attorney fees, expert witnesses, travel, and other expenses?
4. What collateral damages may occur from fully pursuing this litigation (*e.g.*, negative publicity)?
5. What is the likelihood of a total victory, a total loss or a partial victory/partial loss? What would each look like?
6. What is the likelihood of a pyrrhic victory?
7. How can mediation rather than litigation effectively address underlying issues, motivations and goals?

It is best to have this attorney dialogue well before mediation. If a reality check is necessary because of partisan perception, judgmental overconfidence, and/or stereotyping, then focus groups can add another perspective before mediation. Thus, at mediation, a party can be more balanced, open and flexible. We are mindful that mediation is for the parties. As often as possible, the design of mediation should to meet the needs of the people who are present as well as those who stay home. Mediators should respect advocates and elicit their insights. Mediators who know "humility" know the correct role to play - guide, coach, sage, leader - and when to play each role.

Conclusion

It is our belief that the design of mediation should fit the individual, type and complexity of each case. The thinking about the mediation design and process should begin with the case setting. Engage the mediator in the case when the case is set, and use the mediator before the mediation itself begins. At mediation, mediators should recognize the soul trait of humility and occupy the correct space. Sometimes that is a leader, other times a coach, and other times a wise observer. The skilled mediator recognizes and acknowledges all the issues - legal, factual and emotional. He or she brings a respect for the fairness of the process and a talent for assisting the parties to come to closure. Reaching the end of mediation with an ending is an end but not the only end. Process fairness begins with mediation design and ends with the mediation itself. Process fairness often requires mutual story-telling, mutual respect and facilitated dialogue with a mediator who understands the true meaning of "humility."

Joe Epstein, President of Conflict Resolution Services, Inc. (CRS), a Distinguished Fellow and former Vice President of the International Academy of Mediators and a member of the National Academy of Distinguished Neutrals (Executive Committee for Colorado), has mediated over 3500 cases. He regularly mediates bad faith, business, catastrophic injury, employment, medical malpractice, nursing home, probate, products liability, professional liability, railroad and trucking cases throughout the Rocky Mountain and Southwest regions. Mr. Epstein (303-355-2314, joe@crs-adr.com) is based in Colorado and Arizona.

Andrew Silverman is a CRS panelist who focuses his mediation practice on commercial disputes, construction and real estate, family law, family-owned business disputes, homeowners and homeowners association disputes and probate. Mr. Silverman (303-355-2314, andy@crs-adr.com) is based in Colorado.

Endnotes

[1] Joe Epstein and Steve Berkowitz, *Proactive Mediation*, TRIAL TALK®, Oct.-Nov. 1999, at 13.

[2] *Id*.

[3] *Id.*

[4] Joe Epstein and Karen Hobbs, *Individualized Mediation Design*, FOR THE DEFENSE, Oct. 2007, at 64-65.

[5] *Id*.

[6] Alan Morinis, Everyday Holiness at 45-54 (2008).

[7] *Id*.