

Guidelines for Efficient, Effective and Good Faith Mediation

By Joe Epstein, Esq. and Barry Epstein, Esq.

Parties invest time, money and emotion into mediation. Most parties are looking for closure or at least a giant step toward closure. The experience of having handled over two thousand mediations and arbitrations has led us to conclude that the key to more efficient and effective mediations is preparation. It is not enough for parties to set the case for mediation, and then forget about the mediation until they prepare a "confidential settlement statement" just days before the scheduled mediation. Instead, we suggest that well in advance of the mediation, parties consider:

1. What information they require from the opposing parties before the mediation in order to be adequately informed;
2. What information they need to provide the opposing parties before the mediation in order for their opponent to be adequately informed;
3. Who needs to be at the mediation table not just for decision-making but also for apology, acknowledgement, restorative justice or transformative justice;
4. What pre-mediation caucuses should be considered with the mediator to set the stage for a successful mediation process;
5. Whether counsel and the mediator need to confer in advance of the mediation,
6. Whether consent issues may preclude meaningful mediation; and
7. Whose presence, while not required at the mediation, would increase the likelihood of an effective mediation (this may include an expert, an employer, a spouse, a co-worker, etc.) and a solution that has a social and/or

psychological rehabilitative element to it.

Too often parties miss the opportunity for restorative and transformative justice. Opportunities for healing are often unnecessarily lost in a shamble too frequently focused on monetary relief.

Our role as mediators is not simply to resolve conflicts. It includes a role as a modern healer or guide to assist the parties in reaching a peaceful accord. Since the mediator is neither an advocate for any one side nor an arbitrator, the parties must "own" the process. Otherwise, mediation often becomes inherently passive-aggressive, with each side simply advocating a position in the hope that the mediator will rescue the parties from impasse.

The likelihood of achieving an efficient, effective and good faith mediation can be increased significantly by thoroughness and collaboration by the parties **before** the formal mediation session. In order to achieve these goals, we have prepared the following guidelines:

1. Each party shall advise the mediator of the need for counsel to confer with each other and with the mediator in advance of the mediation in order to design the mediation or provide preliminary information to assist the mediator.
2. Each party shall advise whether they require a pre-mediation caucus with the mediator in order to enhance the likelihood of a successful mediation.
3. When, in a professional liability case, the professional has not consented to settlement, defense counsel shall advise opposing counsel and the mediator in advance of the mediation.
4. If the defendants are relying upon

independent medical evaluations, they will provide the plaintiffs with these reports in advance of the mediation.

5. The parties shall promptly make their best efforts to provide opponents with the information required for a fair evaluation of all aspects of the case.

6. The parties shall have the necessary decision-makers at the mediation.

7. The parties should meet with their decision-making "team" in advance of the mediation in order to avoid surprises.

8. The defense counsel and the defendants shall make their best efforts to put any excess carriers on notice sufficiently in advance of the mediation in order to allow for their meaningful evaluation of the case and their meaningful participation in the mediation.

9. The defense counsel shall advise opposing counsel and the mediator in advance of the mediation of the possibility that an offer may not be forthcoming at the mediation.

10. To the extent possible, the plaintiffs shall have complete and accurate lien information available before mediation and when possible and appropriate they will also have lien holders available in person or by phone during the mediation.

11. If the plaintiff's medical condition has changed, (e.g. surgery is planned for just before or just after the mediation), then the plaintiff's counsel shall advise the opposing counsel and the mediator in order to determine whether the mediation should be continued.

12. The parties should provide the

continued on page 38

participants to influence with photographs, diagrams, flowcharts, medical illustration and other similar physical or demonstrative evidence in advance of the mediation.

13. All the participants shall treat each other with dignity and respect.

14. To the extent possible, the parties shall consider the transformative

opportunities, the powers of restorative justice, the value of closure and the potential for healing.

Your comments about these guidelines would be welcomed. Please forward your comments to joe@crs-adr.com or write to Conflict Resolution Services, Inc., 1750 Humboldt Street, Ste. 201, Denver, CO 80218.

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