The Critical Importance of Individualized Mediation Design[1]

By Joe Epstein, Esq. and Karin Hobbs, Esq.

Introduction

Imagine walking into an automobile showroom and asking the salesman, "Would you pick out a car for me?" Then, without asking you about your driving habits, your family, your business or your particular needs and concerns, the salesman picks out the same bland white four-door sedan he has shown to his last 100 customers. Yet, his last 4 customers included a robust Colorado rancher, a successful venture capitalist with a second home in Utah, an environmentalist/river rafting guide, and a single parent with five children. Do they all want and/or need the same vehicle? Of course not! Notwithstanding this obvious mismatching of needs and desires, many lawyers and mediators choose the same model of mediation for each case.

In the rush of business, many lawyers agree to mediate, find an acceptable date for all attorneys, and locate a mediator who is open that day. Several days prior to mediation, they send the mediator a mediation statement, and arrive at the mediation table expecting to "have the mediator do magic." To compound the problem, many mediators never pick up the phone, email or arrange an in person meeting to ask questions. What type of case is this? Is this a pre-litigation or early dispute resolution case? What discovery has been done and/or needs to be done so everyone is ready for mediation? What do you need prior to mediation? Can I assist? What are the needs, interests, and motivations of the parties? Who are the decision makers? Who is coming or should come to mediation? And, last but not least, what can we all do in advance to give this mediation the best chance of success?

Illustrations

Employment

In a recent pre-litigation employment termination case, the parties called the mediator and flew her in to mediate in the employee's home state. If the mediator had done nothing, both parties would likely have accepted the bland white sedan of mediation with the mediator flying in, attending the mediation and trying to help the parties resolve the dispute. However, the mediator was proactive. She contacted both attorneys and asked questions. She facilitated the exchange of necessary documents and arranged separate meetings with plaintiff and his attorney and defendant and defendant's attorney prior to mediation. She learned that the case involved a lengthy contract, a large wage claim, convoluted claims regarding enforcement of the employment contract, including a bonus provision and a non-compete clause, and close personal relationships between the employer and employee. The mediator met with plaintiff and his attorney the day prior to the mediation and the defendant and his attorney later that evening. The next morning, after a joint session, the mediator had several different caucuses to facilitate the needed discussions. Due to the pre-mediation discussions, the parties largely agreed on the bonus issue and moved on to the disputed wage claim. Following resolution of the case, the parties noted that designing the mediation process for their needs created the proper environment for efficient and effective settlement discussions.

ERISA

In a recent Employee Retirement Income and Security Act (ERISA) case involving 325 parties and millions of dollars, the mediator learned that the case was set for a mediation conference. The mediator picked up the phone and discussed an efficient mediation design with the parties. He suggested including a co-mediator, and the parties agreed. The attorneys, parties and the mediators first met to determine a process for taking a sampling of the claims and narrowing the issues. Then they agreed to have a nonbinding arbitration in order to indicate the likely adjudication of the ERISA issues. The parties mediated the

defined issues with both mediators working with the parties together and in caucuses in order to reach a resolution on the multiple claims.

Trucking Accident

In a trucking accident case involving numerous vehicles and several trucks, one mediator was contacted to mediate the entire case over several days. The attorneys and parties discussed the case with the mediator. Together they agreed that several pre-mediation meetings with key groupings of parties to discuss percentage of liability and damages would expedite the mediation process. The mediator suggested a co-mediator to streamline the process. The parties agreed, and the mediators had separate discussions with all plaintiffs, all defendants and individual keys parties to discuss brain injuries, burns, and severe orthopedic injuries, allegedly caused by the accident. The mediators encouraged plaintiffs and defendants to share demands and records, expert reports, expenses, lien and subrogation information one month before mediation. Again, the attorneys and the parties were elated with the proactive approach of the mediator in custom designing the mediation process to minimize wasted down time paying attorneys while the mediator talked to others, the frustration of taking people from their busy lives when some of the work can be done in advance and using the insurance adjustors' time efficiently and effectively.

Insurance Bad Faith

Similarly, three parties in an insurance "bad faith" case conducted an initial mediation after completing limited depositions and briefing on complex legal issues. In mediation, the parties learned the mediator's impression of a key legal issue, another party needed to depose a witness about this issue, all parties needed timelines to understand the sequence and importance of the key facts, and plaintiff needed to reveal more of her expert's truncated mediation dialogue. In preparation for reconvening mediation, the parties agreed to 1) provide the additional facts as part of confidential and privileged mediation discussions; 2) furnish the expert's report as a preliminary report, provided the expert could not be questioned about it later in litigation; 3) re-evaluate their respective settlement positions in view of the new information; and 4) reconvene in mediation to negotiate in light of the new information. The mediation process in this instance facilitated confidential disclosure of information early in the litigation process and allowed the parties to re-evaluate their risk factors and resolve the case without trial.

Construction

In several recent construction disputes, the attorneys called to set the mediation. The mediator contacted counsel, and the parties agreed the case needed to be separated into subparts. The mediator met with the general contractor and the owner and their attorneys. The two subcontractors and their attorneys met with the mediator. The attorneys shared the relevant and essential information and gathered needed documents. The "dead time" for the parties was minimized and all parties were satisfied with the efficient process and the result.

Design

Design is a requisite hallmark of TEARS & FEARS™ mediation. TEARS & FEARS™ mediation recognizes the blend of emotional and rational factors that are involved in all varieties of mediation. Emotions typically run between opposing parties in conflict, frequently between attorneys and often within negotiating teams. Rational analysis is required both between teams and within teams. TEARS & FEARS™ mediation addresses the creative energy mediation requires. The parties' core concerns must be recognized along with emotional, psychological, and rational factors. Design is the prerequisite planning and preparation of TEARS & FEARS™ mediation. Tailoring each case depending on the needs of the case, the parties, and the attorneys is essential for streamlined mediation. Just as the robust Colorado rancher needs a two ton diesel pickup truck to haul hay and tractors, and the venture capitalist wants a plush car to transport important investors to his mountain home in Park City, Utah, different cases require different creative approaches. The environmentalist needs a hybrid to feel better about driving to southern Utah frequently for river rafting trips, and the single parent of five requires the reliable and economical wagon. A bland white sedan may "work," but it does not provide the best vehicle for any of the individuals. Similarly, simply finding a date, hiring a mediator and showing up is a less effective approach to mediation. Attorneys are increasingly recognizing the need to design mediation. However, they need to engage mediators with the creativity, expertise, and initiative to assist them in designing an effective and efficient mediation process.

1. How does an attorney assist in designing mediation?

At the onset of potential litigation, the parties might ask themselves such questions as, "Is this case proper for pre-litigation or early dispute resolution?" If so, the follow-up questions might include:

- How can I arrange for pre-litigation or early dispute resolution?
- What exchange of information will be necessary?
- Should the parties consider the utilization of respected neutral experts on specific aspects of the case?
- Should the parties engage a mediator skilled in organizing pre-litigation and early dispute resolution cases?
- When should the case be mediated later in the litigation process?
- Who should the attorney consider inviting to the mediation?

Whether mediation is early, in the regular course of mediation, or late in

the litigation, the parties should seriously consider who needs to be at the mediation table. For example, in professional firm dissolutions and family firm disputes, parties, their counsel, and the mediator will be present. In some instances, it may be helpful to have family members available, or experts in tax, financial planning, and business present. When spouses, parents, siblings, or others influence the settlement negotiations, the parties should consider including this "audience" to experience the process, understand the interests, concerns and risks on both sides, and become part of the solution. Handled appropriately with the proper attention to confidentiality, this careful planning can avoid the second-guessing that can otherwise occur when the client contacts that significant person late in the process and has difficulty explaining the risks to the "audience."

In cases involving nursing homes, hospitals, or other health care providers, risk managers or other executives may need to be present, show commitment to settlement, acknowledge the injury, offer an apology (if appropriate), evaluate the case, and address possible changes in policies and procedures. Similarly, in trucking cases, risk managers assist in acknowledging the claim, offering a genuine apology and assessing the case.

Attorneys also may use visual aids such as a video presentation. Frequently, settlement brochures or videos assist in resolving claims involving damages and losses. Large demands require advance exchange of this information to enable the "audience" on both sides to fully review the case in advance of the mediation.

2. How do I deal with fear at the mediation?

Fear is the number one pervasive factor in litigation. While all participants in mediation are subject to fear, some have a greater risk tolerance than others. Parties need to analyze fear in each case and decide how to effectively address it. The fear element may affect who is encouraged to come to the mediation table, how the table is set with applicable motions, and when parties mediate. Experienced and extensively trained mediators can provide ideas, suggestions, and real life examples to assist the parties in making this critical decision.

3. Should we have a joint session?

Each case should be examined individually to determine whether a joint session is useful and, if so, when the joint session(s) should be held. Mediation should be designed to 1) encourage listening, 2) promote respect and 3) create an agreed upon process. These important criteria should be incorporated into the mediation design.

4. Are the interests, needs and motivations of all parties important for attorneys and/or the mediator to consider?

Understanding the parties underlying interest, goals and motivations are often at the heart of the mediation process. Interests may include the desire to be heard and acknowledged, to protect others, and to be treated fairly. Needs may more specifically address losses and damages and the core concerns of safety and security. Motivation is the fuel for the engine that drives litigation. In a wrongful death case, anger or revenge may be the fuel. An employment case may be fueled by a sense of rejection or unfairness. Interests, needs, and motivation overlap and are intertwined. Counsel and mediator should analyze these motivations in designing an effective mediation process.

Structural Design Options

1. Pre-mediation options.

Complex commercial cases, professional firm dissolutions, family firm conflicts, employment cases, wrongful death cases, and catastrophic injury cases are often suited for staggered starts or pre-mediation caucuses. To illustrate, often the plaintiff in a personal injury case, who is still in the midst of grief and still bearing the consequences of the underlying occurrence may require additional time with the mediator to process grief and to understand the legal issues. In such instances, plaintiff may need extra time with the mediator to feel at ease and to develop some comfort with the mediation process, the mediator, and the legal system. A multi-party trucking/automobile case may require 1) individual pre-mediation meetings, 2) a plaintiff's meeting, 3) a defense meeting and 4) co-mediation. Once again mediators can assist with designing the mediation process and ancillary issues such as a discovery plan, which may include having the mediator function as a special master.

Other unique designs may include walking a desert mountain biking trail that factored into a case resulting in quadriplegia. A front end loader may be brought to the mediator or the mediator to it for a demonstration of the disparate theories of what caused a wrongful death. A defective home construction dispute in a distant location may require meeting with experts in the home and/or mediating in the home while the unhappy prospective buyer identifies the areas of concern. The unique design of the ERISA case combining non-binding arbitration with co-mediation is another example of using a unique structural design to fit a particular case. We believe parties are insured a more efficient and effective process if they confer with mediators versed in creative mediation design early in the conflict resolution process.

2. Co-Mediation

Co-mediation is an important structural design tool that should be considered when there may be a need for gender diversity, cultural diversity, diversity of substantive knowledge and experience and multiple parties. Co-mediation has been effectively used in civil rights cases, wrongful death and catastrophic injury cases, medical negligence cases, employment cases, business cases and

multiple party cases. In such instances, cultural, ethnic, gender, experience and substantive knowledge and organizational issues are more effectively addressed with co-mediators, and the parties have a greater probability of a successful resolution of the dispute with complimentary and skilled co-mediators.

Common goals of all types of co-mediation are to:

- Provide an extra set of eyes and ears to help resolve the dispute
- Organize the mediation process before the start of the actual mediation
- Expedite the mediation process
- Minimize "dead time" for attorneys and clients
- Maximize momentum
- Encourage prompt agreement of the parties
- Facilitate effective follow-up after completion of the mediation

Co-mediation requires careful preparation, planning, and communication between the mediators, as well as between the mediators and the parties. Also, co-mediation allows mediators with different talents and expertise to help the parties actually determine the direction the mediation process will take to resolve their dispute. Efficiency is enhanced because the mediators can divide the work before, during, and, if necessary, after the mediation.

Many parties assume that co-mediation will be more costly than working with a single mediator. However, co-mediation usually results in shorter, more efficient mediations and, consequently, less cost to the parties. Also, co-mediation often results in a faster mediation process, so that resolution is more likely to occur and follow-up is more effective.

One of the biggest complaints mediators face in multi-party mediations involves the "dead time" parties experience while waiting for the mediator to join their caucus. This "dead time" can result in the parties becoming impatient, ill-humored, rigid, or even back sliding. Also, a sole mediator might feel pressured to rush the process while in a caucus because of the perceived time pressure and an awareness of the frustration levels in each caucus. In such instances, co-mediation will accelerate the pace of the mediation and reduce problems associated with dead time. A two-party team has a greater opportunity to build trust, to listen and to learn from the parties while providing feedback. A co-mediator's ability to observe and brainstorm provides the opportunity for enhanced reality checking, more strategic planning, and greater creativity during the course of the mediation.

3. Settlement Pods

In some instances, breaking the parties into different groupings or working on each issue is more efficient. For example, if there is a multi-vehicle traffic accident involving numerous tractor trailers and passenger vehicles resulting in deaths and catastrophic injuries, determining whether natural groupings of parties should meet to have their portions negotiated may be a more efficient process. In construction cases, the general contractor may need to have discussions with subcontractors while the owner and the general contractor may need to talk to the architect. In other instances, breaking the case down into specific construction defect issues may be more effective.

Designing mediation makes the mediation manageable and more likely to facilitate a resolution. Machine manufacturers seek simplicity in designing new products for ease and efficiency of use. Similarly, individualized mediation with staggered starts, caucusing on specific issues, or mediating by pods is more flexible and efficient.

Conclusion

TEARS & FEARS™ mediation emphasizes that the same careful planning attorneys use in preparing for trial also assists attorneys in planning and implementing an effective mediation process. TEARS & FEARS™ mediation encourages creativity in designing the mediation early in the litigation process to attend to the wide range of emotional and legal issues present in the case. Parties in conflict bring a dynamic energy to the mediation, and carefully examining the motivations for that energy can assist the parties in creating and designing an individualized and effective mediation process. This dynamic energy can be used to accomplish the parties' goal of early and creative dispute resolution.

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End Notes

1 Portions of this article were adapted from *Co-Mediation*, Joe Epstein & Susan Epstein, THE COLORADO LAWYER, (June 2006), Vol 35, 1406, p. 21; Joe Epstein & Susan Epstein, *Pre-litigation and Early Dispute Resolution*, TRIAL TALK, (April/May 2007), Vol. 56, No. 3, p.23; Joe Epstein & Steve Berkowitz, *Proactive Mediation*, TRIAL TALK (October/November 1999), Vol. 48, No 5, p. 12.