

## Effective Mediation Techniques for Complex Cases – Part Two

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Part Two of my series on Effective Mediation Techniques for Complex Cases focuses on the timeline and mechanics of such mediations and includes an analysis of in-person vs. Zoom or other virtual platforms for mediations.

### **Timeline for Effective Mediations in Complex Cases**

I begin with the assumption that the parties in any complex case wish to avoid trial and resolve their disputes wherever possible. It is my experience that most parties are not in the business of litigation and find it undesirable and costly.

I also observe that there are no mediation preparation rules nor is there any template for a timeline but I suggest that perhaps both of these can be beneficial. Clearly, litigation is deadline driven in most cases from the outset with docket control and scheduling orders, deadlines set forth in the procedural rules and calendar requirements set out to deploy certain remedies. Consequently, does it not make sense that the best practices in mediation require the same thought, earnestness, discipline and diligence as those we are accustomed to utilizing in the underlying litigation? In addition, I must point out that establishing a timeline for mediation preparation is not only meaningful and necessary to the process but it also is a billable task which is too often ignored.

As part of the early internal processes, careful thought must be given to impediments to a successful mediation. Perhaps those are internal impediments or perhaps they lie with perceived obstacles either opposing counsel or his/her client may have.

Many of us are required by our clients to provide detailed pre-mediation reports analyzing all aspects of the case, the law, the witnesses and the evidence. These are mandated 60 or 90 or more days ahead of mediation and they require detailed, strategic thinking. They force us to be deliberative about the risks and strategies early on but they are yet one part of the preparation timeline of which I write.

In addition, one must identify the insurance coverages and layers of insurance available to both one's client as well as the opposing parties in the case. What are those? What amounts exist for each? What events trigger each layer? Have notices been provided to all carriers? Are there reservation of rights issues which must be addressed?

I also recommend that counsel give thought to creating an internal mediation countdown with benchmarks which must be met. There should be communication either globally with all counsel in the case and/or with groups of counsel by type of party and/or with each attorney in the case on an individual basis so thought should be given to how to structure those communications and when those discussions must occur. In those conversations, I suggest urging all parties to "show their hand" prior to mediation for several reasons, not the least of which is assuring the parties understand each other's expectations for the mediation but also so the parties can factor into the equation what strategy will be a part of the mediation and what authority will be needed leading up to and on the day of the mediation. I would suggest that if the client requires a pre-mediation report, those discussions be conducted among counsel for the parties at least 30 to 60

days ahead of the due date for the pre-mediation report so that what is revealed can be adequately addressed in the internal strategy and so the client's most appropriate decision makers are part of the dialogue long in advance of the mediation. This premise means that there must be an aggressive period of education many weeks if not months prior to mediation and this time period factors into the timeline.

While skeptics may say the parties will be reluctant to talk candidly about their risks, they should not be reluctant to have a candid discussion of what it is they expect at mediation and what their goals are for the mediation. In this way, counsel has the ability to shape not only the day of mediation but also its relative success.

### **Mechanics of Mediation in Complex Cases**

Let's begin this topic with a look at the pros and cons of traditional in person mediations vs. virtual mediations.

The recent pandemic has forced our profession to pivot in ways that were unimaginable a few months back. Prior to that, traditional mediation dictated that the parties attend in person or at a minimum, in the case of adjusters, those attend the mediation in person. If the mediator was insistent that the parties attend the mediation in person, there was often travel involved for one or more parties and that frequently became the incentive to send a "placeholder" instead of a key decision maker. As a consequence, traditional mediations often resulted in having the wrong party representatives at the table in person and with that came a questionable incentive to resolve the case. These are the perceived negatives of in-person mediation.

But in-person mediations, unlike their virtual counterparts, did not usually require the use of special equipment (which may or may not be available to every party), that counsel and clients be seasoned at using the special equipment required, or that the parties have a strong wifi that is secure and free from interruption. These were simply not required in traditional mediations.

For all its ills, the pandemic brought us some new ways to do things and those in turn brought benefit. A virtual mediation does not require travel for the most part so it is more efficient and maximizes the assurance that the key decision makers are in attendance and engaged for little or no cost. The mediator, the parties and counsel can all still see and hear one another even if not in person and that is a small trade off for the convenience and flexibility of such mediations. Other considerations and realities mitigate in favor of using the technology to do virtual mediation. For example, these platforms allow the parties and counsel to move the case forward while maintaining responsible party distancing. In addition, in the financial downturn caused by the pandemic and the attendant furloughs and budgetary constraints, these mediations minimize costly effects on businesses and individuals alike. Of course, the inability to get to trial because of the uncertainties of when in-person trials will be safe, coupled with the limitations of virtual trials mean that the ability of parties to make personal and/or business planning most difficult.

As for the cons of virtual mediation, I suggest that most of these can be overcome with some logistical planning by counsel and the mediator ahead of mediation. The parties and their attorneys can determine whether there is a need for equipment that is unavailable and solve that ahead of time by testing phone and other possible equipment. The mediator can and should offer to conduct demonstrations to assure the parties and counsel have strong wifi connections and that everyone involved understands the platform and its options. In this way, the potential for these potentially difficult issues can be addressed in plenty of time prior to the virtual mediation.

As a mediator who is comfortable conducting mediations virtually, I have found that, increasingly, counsel and clients have embraced the technology and love the convenience and flexibility these sorts of mediations allow. Hopefully, you found this segment and **Part One** of assistance.

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