



2019 Annual Conference

March 13 -15 2019

Orlando, FL

## Effective Use of Mediation for Claims Resolution

### I. The mediation process: Structure, flexibility, preparation and process design

Mediation is increasingly a common and widely-accepted process to resolve a large volume of claims and disputes. However, the potential of the mediation process as a malleable and efficient tool to resolve conflict is often underutilized. The structure for mediation is often viewed as a single event with a typical structure based primarily on private caucuses and shuttle diplomacy. However, effective mediation is a process consisting in distinct phases and characterized by a high level of flexibility.

Rather than a fixed, single type of process, flexibility in assessing the nature of the case (number of parties, complexity, amount of unresolved issues, coverage issues and conflict, etc.) can govern the preferable structure of the process for each matter. Understanding the needs of each case and developing the right process for the parties involved is critical to successfully resolve the case amicably.

Flexibility is key throughout the process and affects both the mindsets, positions, valuations, and sometimes the process. New information arises, positions will inherently require additional discussion, emotions may heighten, and the process is fluid. Flexibility itself can be a tool that can be leveraged during mediation. As the mediation process is inherently flexible, it allows the parties to work with the mediator to tailor the process based on the specific needs of the case and parties involved.

Mediation starts with the first call. Planning and preparing for the mediation involve a range of pre-mediation activities including joint and separate calls with the mediator, exchange of information, submission of mediation statements, preliminary negotiations and strategic process-design choices. All such phases and activities represent essential elements of the mediation process and should be used to develop and implement an effective strategy.

Counsel and the claims professional should both be actively involved in the design of the process.

By preparing adequately in advance of the mediation and working with the mediator to develop an effective process for each case, the parties can explore all available options for settlement in creative ways, develop mechanisms to overcome impasse, and achieve satisfactory resolutions efficiently in the vast majority of cases.

Process design elements to consider also include what information to exchange, use of joint session consideration, full day v. multiple shorter session discussion, use of experts at the mediation, and review of potential hybrid processes that may be best for a particular case. Each of these elements have been used successfully to resolve various types of cases, in varying degrees, and in combinations that match the case and issue types.

## II. Strategic choices on mediation

The resolution strategy for any claim should take into account the statistical reality that only a marginal portion of all claims ever reach trial, and a large number of them are settled in mediation. The common paradigm of considering mediation only after most or all discovery is concluded or at the eve of trial does not represent an efficient use of a powerful tool such as mediation and may result in a suboptimal resolution. Thinking strategically to open the path towards a negotiated resolution should include considerations about early mediation and process design options to allow the parties to develop a constructive discussion despite the adversarial posture in the litigation.

Timing of the mediation is key and there is very often value in early mediation. Even though it may not be the right time for final settlement, it doesn't mean that it cannot be the right time for mediation. Initiating a dialogue about mediation could promote an understanding of the parties' needs in order to make informed decisions on how to resolve a particular case and avoid a widening of the negotiation gap that makes the matter more difficult to resolve. An initial valuation may have missed unknown elements or the weight for critical elements may change based on information learned at mediation (how the other party presents, fluid witness, etc.). Learning information and drivers early in a case is an effective way to tailor next steps for an appropriate resolution as opposed to an ongoing, unfocused approach.

Counsel, parties and insurance professionals have an opportunity to be involved in a collaborative effort to create the best conditions possible for the other side to agree to acceptable settlement parameters. A knowledgeable mediator should be able to proactively assist the parties in creating the right process for the needs of the parties and in setting the right tone for a productive discussion. In choosing a mediator the participants should think of how a particular type of approach, style, experience, or skillset may be relevant in a particular case, and they should consider researching and reviewing and interviewing different mediators before making a choice to ensure fit for the issues and personalities involved.

It is essential that parties and counsel understand that what works well in the litigation process does not necessarily produce great results in mediation. Parties who focus their efforts in trying to persuade the mediator with their arguments are missing the main goal of the process, which is to bring the other side to agree to an acceptable settlement. Mediation offer a unique opportunity to persuade the other side. However, aggressive tactics, posturing, threats and ultimatum seldom work well in a negotiation setting. Therefore, approaching the process from a collaborative perspective and setting up a constructive dialogue from the beginning of the conversation, although frequently dismissed as signals of weakness, are critical paths to a

successful mediation and demonstrate a high level of sophistication in the process. Positions that indicate a non-collaborative approach can create a wider impasse thus a counter-productive approach. Constructive dialogue creates a deeper understanding of impasse drivers thus enhances an ability to address same and strategize a resolution.

The one common denominator present in every dispute is that conflict always occurs between people. Whether the parties in a claim are individuals, organizations, or both, the resolution of it depends on how people see reality, process emotions and assess options. The mediation process has the unique characteristic of allowing the parties to look at the past events that originated the conflict while focusing on the future consequences of their choices regarding the outcome. Negotiating the resolution of a claim through mediation allows to take into account all elements involved in the case including the facts, the law, the perspectives of the people and organizations involved and the broad sets of interests that may drive the motivation of the decision makers.

### III. Strategies in mediation

It is hard to overestimate the importance of the psychological elements involved in any dispute and their effect in the resolution process. Given that in mediation the parties are in control of the outcome, it is fundamentally important to enable the people involved have psychological barriers mitigated early in the process in order to focus on the merits and to feel comfortable in making tough decisions regarding settlement. The mediator can (and should) assist the parties in embracing all those elements in order to provide an opportunity for careful, rational based determination of desirable outcomes.

As mediation is an inherently flexible process, negotiating within the mediation involve a broad array of possible options to enable the parties to actively engage in the discussion, assess the strengths and weaknesses of the case in a protected, confidential environment and develop a strategy for resolution that does not need to conform to a traditional negotiation pattern (or “dance”) which can be counter-productive.

Execution of team participation strategy should be clear but flexible: who says what. Who delivers a message can result in different responses, depending on the nature of the message. Also, the balancing of legal and personal issues can be a sensitive strategy, depending on the nature of the case. It’s critical to understand what is more important in a particular matter- the legal issues, personal issues, or emotional issues and who or what is the case driver. Securing insight from the mediator to remain flexible in the process. Responding to extreme position in a manner that does not further widen the gap but productively brings the case back on track and the one step or multi-step processes for same can vary.

Exercising the identified common ground and primary leverage, particularly effective when backed by empirical evidence that is not subject to nullification by a trier of fact (laws, clear forensics, etc.), is key. Negotiations are predicated both on the pre-mediation planning and also what occurs during the process. Situations differ as to when it is best to make the first move,

whether tit-for-tat is effective, use of concessions, focus on resolution language (e.g. “because”), and brackets. Thus, the pre-mediation strategy, combined with flexibility and an understanding of the drivers and pressure points are all key components to success.

Techniques that allow to manage emotions, make parties feel comfortable in the process and carefully analyze all the elements relevant to fully assess the spectrum resolution options available are broad. Effective elements include: the power of party participation in the mediation process, the (delicate) role of an apology and when it may be appropriate, the use of caucuses and joint sessions, effective communication styles and message delivery, and strategizing before and during mediation the highest and best use of the various techniques.

Creative ways of resolving impasse include an array of techniques including: small group discussions, bracket negotiations, hybrid processes, mediator proposals and more. The process from planning the mediation, through the process of this powerful tool, is a strategic and fruitful effort but involves creating the right mindset and choosing the right move to try and create movement and further settlement from an impasse situation. The mediator can help parties explore settlement territories without exposing their positions farther than they are comfortable at a given time in the process by using techniques such as brackets, ranges and conditional offers. Pre mediation strategy should include a plan, including actions steps if the mediator is not proactive in utilizing these techniques or creative in resolving an impasse.

Overall, the outcome of the settlement discussions depends primarily on the ability of the parties to negotiate effectively each component of the settlement. Unlike in direct negotiations, in mediation parties can use the mediator, as a neutral voice, to increase their ability to achieve acceptable settlement efficiently. Using the mediator, parties can deliver settlement offers/demands accompanied by messages and explanations that, if skillfully formulated, can effectively influence the perspective of the other side regarding negotiation moves and settlement values.