How to Avoid Making Your Next Mediation a Waste of Time

By Peter A. Halprin and Giulio Zanolla

Raise your hand if you are in-house counsel and have ever participated in a mediation that seemed to be a complete waste of time. Unfortunately, it happens far too often.

It is particularly frustrating because the mediation process is intended to be an efficient tool to resolve even the most complex disputes, yet it may end up being a disappointing and futile exercise of exchanging small concessions without ever reaching the point of defining a realistic range of possible settlement options.

Most commonly the seeds of an unproductive mediation are sewn well before the mediation session. The work (or lack thereof) preceding the mediation session is a critical element in setting up the appropriate process for the particular needs of each case. Especially in factually and legally complex disputes, the preliminary phases of the resolution process bear significant weight in determining whether an in-person meeting can achieve a negotiated resolution of the case.

Many experienced advocates and ADR professionals understand that preparation is a key element in any successful mediation. While the concept is frequently promoted in advanced mediation trainings and seminars, it may remain amorphous and therefore elusive. There are, however, a number of specific actions that, if properly undertaken, will dramatically increase the chances of a successful mediation. Some of these relate to due diligence, some more specifically to case preparation, and others to process design.

Due diligence in mediation involves systematic process analysis encompassing the following elements: (1) the timeliness of settlement negotiations; (2) what information needs to be exchanged in advance of settlement discussions; (3) whether there are any apparent obstacles or possible conditions to participating in mediation; and (4) selecting the right mediator for the case.

Timeliness of the Mediation

The question of whether there is an opportunity to settle the case amicably at any given time should involve an ongoing, recurring analysis throughout the lifecycle of the case. By investigating an opportunity for mediation at every critical juncture from the inception of the dispute, it is possible to identify the earliest appropriate time to obtain an efficient resolution. If the answer to the above question is "not yet," the focus should shift on the reason why it is not yet the time for discussing settlement, which leads into the next two elements under "Due Diligence."

Peter A. Halprin

Giulio Zanolla

Information Exchange

Sometimes, getting the parties to a fruitful mediation requires a pre-mediation exchange of documents. To accomplish this, it is essential for the parties to clearly identify what information is needed in advance of the mediation and the purpose and benefit of such an exchange. For example, if a defendant needs a certain piece of documentation in their file to be able to convince upper management to settle, the plaintiff would benefit from providing the document (e.g., medical bills in a medical malpractice action) in a confidential setting. Agreeing upon and setting up a specific schedule for the exchange and the analysis of any such documents provided is essential to moving the process forward and avoiding allegations of gamesmanship and delay.

Potential Obstacles

Related to the prior point about information exchanges, there may be other obstacles or conditions that must be understood in getting the parties to a fruitful mediation. For example, in a multiparty dispute where certain parties are related entities or where multiple defendants and/or insurance companies are involved, there may be issues regarding decision-making amongst the different entities, including questions regarding how to allocate any possible settlement. Creative process solutions may be needed to address some of these preliminary issues.

The answers to these questions will allow parties and counsel to verify whether there are steps that can be taken to obtain the information needed and to overcome the obstacles that prevent settlement discussion from happening. In addition, it may become apparent that the mediation process can provide an extremely efficient forum to

exchange information and bring the parties up to speed for settlement discussions. This observation brings about an additional point about timeliness. The fact that a case is not "ripe" for settlement doesn't necessarily mean that it may not be ready for mediation. When the parties identify what information is needed to effectively negotiate a settlement and understand the potential obstacles to negotiations, they can structure the mediation process to accommodate access to needed information and address the issues preventing settlement discussions within the protected forum of mediation.

Mediator Selection

In many instances, the parties will want a mediator with previous experience dealing with the kinds of issues that have arisen in the case at hand. This is particularly true in highly specialized areas of law where the parties will not want a mediator to have to spend time getting up to speed on an issue or educating the mediator on technical issues. Beyond the right background, the parties will want a mediator both sides respect, whom both sides are willing to listen to regarding the risks associated with the case, and who can establish credibility and rapport with the parties and counsel.

Finally, in the selection of the mediator, the parties should keep in mind that a mediator's most important skill set lies in her or his ability to structure and manage the process effectively. Mediators who have gained significant experience in a vast array of dispute types may have developed a broader spectrum of tools to address the diverse types of issues arising out of complex settlement negotiations.

In addition to the four elements of due diligence described above, case preparation is also an important part of the necessary work leading up to a successful mediation session.

Case Preparation Involves

1) Engaging all stakeholders in preliminary discussion regarding process and scheduling;

2) Providing relevant information, mediation statements, analysis to the mediator and to the other side(s);

3) Analyzing the information and engaging in preliminary ex-parte and/or joint discussions, and

4) Formulating a plan for the mediation session.

Identifying All Stakeholders and Necessary Participants

Mediation is a party-centered process, the outcome of which depends on decision-makers' ability to commit to a negotiated resolution. The engagement of the key participants should include all preparatory phases, and lead to their participation in the mediation conference not only with the authority to settle, but also with an understanding of how the mediation will unfold and provide the parties with the opportunity to assess resolution options.

Exchange of Information and of Written Mediation Submissions and Documents

This should also be custom-tailored to the case. As a general consideration, it is important to set an appropriate schedule for exchanging mediation briefs and documents, in order to allow the mediator and all parties to review and process the information received. In complex cases, it may be appropriate for the mediator to invite the parties to submit additional analysis of specific issues or relevant case law, or to engage experts to opine on technical aspects of the case. Sufficient time should be allowed also for pre-mediation calls with the parties separately and/or jointly after the written submissions occurred.

One example of a realistic timeframe for setting up a mediation process could look like this:

- 8 weeks out—pre-mediation call with all parties regarding process/scheduling, case background;
- 4 weeks out—exchange of mediation statements, exchange of documents;
- 3 weeks out—separate pre-mediation calls with the parties regarding the statements/questions;
- 2 weeks out—discussion of initial positions;
- 1 week out—exchange of any further documents/information;
- 2 days before—call to discuss any last minute issues and to review process plan, and
- Mediation session.

The formulation of a mediation plan will necessarily depend on the many variables pertaining to the circumstances of each case, and the type of process that the parties, with the assistance of the mediator, design.

Analyzing the Information and Engaging in Preliminary Ex-Parte and/or Joint Discussions

In conjunction with the process described above, preparation for the mediation session requires the parties to carefully think through their positions. To do so, the parties must analyze the information and mediation statements they received. To properly prepare, parties should undertake this analysis in conjunction with the mediator and the other parties. For example, if the mediator believes that a certain issue is critical to the defendant but was not addressed in the plaintiff's mediation statement, it may be helpful for the plaintiff to provide a supplemental submission on the issue in advance of the mediation. Likewise, if one side's mediation statement suggests a lack of seriousness, the other party may want to discuss this with the mediator early on so the parties

do not waste the time and money of sitting through a day of mediation prematurely.

Formulating a Plan for the Mediation Session

While putting together a plan, consider:

1) How the joint session will be conducted (whether there will be formal presentations during the joint session, how to present the case, who will be speaking and how the presentation will be divided among the team members, whether there are questions that may be useful to ask directly to the other side and how to do it effectively);

2) The negotiation parameters (Aspirational goal, range of acceptable outcomes, BATNA, WATNA, possible non-monetary elements of the negotiation, reservation point, etc.);

3) Applicable objective criteria;

4) Concession strategy;

5) Leverage points;

6) Analysis of other side's team dynamic.

A mediation plan can be more or less detailed. In order to be effective, however, it needs to be realistic and built on solid analysis as opposed to best guesses. Keep in mind that during mediation parties may discover information that could legitimately modify their assessment of material aspects of the case. As a result, a plan should not be considered an absolute, rigid course, but rather a set of guiding parameters and references available to inform the parties' conduct during the process.

The process' structure and the design of its different phases will be consequential to the information that emerges throughout the initial stages of the discussion. An experienced mediator should have ample tools to present process suggestions to address the concerns of the parties and the type of issues involved as they arise in the preliminary conversations. Mediation has the unique characteristic of being completely flexible and adaptable. Parties and counsel should not be afraid of departing from what could be considered a typical, straightforward, caucus-based, mediator-shuttled bargaining dance. They should explore with the mediator and the other parties what type of process could be the most effective in the specific circumstances.

Conclusions

The foregoing preparation items are essential in facilitating a fruitful mediation. Only with counsel, parties, and the neutral working together to properly prepare for the mediation can counsel, parties, and the neutral engage in mediations that are not a waste of time. Mediation is a process and, as such, requires the right balance of structure and flexibility so as to enable the parties to reach a negotiated resolution.