Session Title: Zoom: A Permanent Fixture in ADR Proceedings or Just a Passing Trend?

(Paper Title: In-Person, Virtual or Hybrid Mediations: Best Mediation Practices for Complex Cases)

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In-Person, Virtual or Hybrid Mediations: Best Mediation Practices for Complex Cases

This article covers all aspects of effective mediation practices for complex cases for the practicing attorney. I define complex cases in a number of ways including the complexity of the legal questions at issue, the stakes involved, or just the sheer number of parties in the case. However, no matter the case, many of these same tactics can be deployed when mediating any type of case.

The Logistics of an Effective Mediation

There are a number of reasons to mediate complex cases. These include the time investment inherent in litigation, the financial and emotional costs attendant to preparing for and trying a case, and the uncertainty of the outcome. In addition, the parties may seek settlement as a means to find closure and end-game certainty or they may wish to preserve personal and business relationships that are precious. No matter the motivating factors, there are certain keys to assuring that the process is given considered thought in order to maximize success.

In my experience handling mediations on behalf of a client and especially in my experience serving as a mediator, there are a number of common errors that lawyers make in preparing for mediation. These include the following:

- Insufficient objective and critical evaluation of the case.
- Failure to make a persuasive, competent case in the joint session.
- Failure to fully support or vet the damages claimed and the supportive proof for each element.
- Failure to establish the transactional cost of a judgment including attorneys fees and all expenses.
- Failure to realistically assess the risk of an adverse judgment.
- Failure to keep greed and ego out of the decision-making process and for those driving the decisions.
- Failure to remain objective so as to avoid polarizing the other side.

So what logistics matter? The most significant ones are the timing of the mediation and the choice of the mediator.

Timing of Mediation

I have long believed that there are several critical intersections in the life of a case where mediation has the best chance of success. What seems to drive this success best is when the parties have sufficient knowledge of the case in order to meaningfully evaluate the facts, the law, the damages and most importantly, the risk. In a simple, relatively low damage case, this point may come early in the process after the initial pleadings are filed and some written discovery has been exchanged. Consideration of the costs involved from the standpoint of the time investment required and the emotional and financial toll on the parties seem to make simpler cases ripe for an early resolution. More complex cases may mean that another intersection occurs following these same events along with the depositions of the parties. Other more complicated cases may require the hiring of experts and the issuance of their reports prior to expert depositions in order for settlement options to crystallize and make resolution timely. The one thing that is certain is most civil cases settle prior to trial but the continuum of settlement intersections requires that careful thought be made at the beginning of the case in order to develop the case and seize the right moment for maximum mediation success.

Another important factor that influences the timing of the mediation is the cost of litigation and the consequent exhaustion of resources whether those be time, monetary costs or emotional upheaval. The trick is making sure you know enough about the case to meaningfully evaluate it and the risk of trial but not so much so that all those resources have already been exhausted. I like to see cases mediate once some discovery is done but the case is far from fully discovered. After all, mediation itself can be a discovery tool albeit one with limitations in terms of what you learn and how you can use it.

Another factor in timing a mediation just right is fixing it early enough in the process that it does not interfere with the countdown to trial should the case not settle. Suffice it to say that one should leave plenty of time for any unexpected twists and turns that may be revealed at mediation for the first time so those can be dealt with a sufficient time ahead of trial.

Selection of the Mediator

I am of the belief that in most cases, as long as you have selected an effective and objective mediator, it matters not who that person is. In my former life as an attorney representing a party at mediation, I usually tried to defer to opposing counsel if at all possible to let him or her choose the mediator. Clearly though, one wants a mediator who will not be unduly influenced by any one party.

As a mediator, I think experience is critical because only with that experience, can a mediator help both sides identify and evaluate the risks of proceeding to trial. Said another way, a mediator needs to have had real life trial experiences in numerous cases, before numerous judges, and with numerous attorneys. I also think practical knowledge of the issues and the type of case is important. Finally, I think a mediator's people skills are critical because you want a mediator who will listen carefully and who can generate confidence and trust in all parties so that the questions the mediator asks get the ear they deserve on all sides of the negotiating table. A mediator's deference to the messages he or she is entrusted to deliver, whether those be about the facts or the demands, offers, and counteroffers, is also important. An effective mediator will also be one who knows how to control the dynamics, the emotions and the politics so as to capitalize on reason and unemotional decision making. Critically, an effective mediator must be able to adapt his or her style to every single decision maker in every room so as to keep everyone engaged in finding a solution.

As is obvious from this list, the mediator selection process is a complex but critical step in the mediation process. While the mediator does not make the decision of whether to settle the case, that person and their communication and messaging style are essential tools that can help the process along or can thwart it.

The 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 reasonably 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 is also often a billable task which is ignored.

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

Many of you are required by your clients to provide detailed pre-mediation reports analyzing all aspects of the case, the law, the witnesses and the evidence. These are mandated 60 to 90 or more days ahead of mediation and they require detailed, critical and strategic thought. They force us to be deliberative about the risks and strategies early on, but they are yet one part of the preparation timeline about 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 coverages and layers? What amounts exist for each? What events trigger each layer? Have notices been provided to all carriers? Are there any reservation of rights issues which must be addressed?

I also recommend that counsel give thought to creating an internal mediation countdown with benchmarks that must be met. There should be communication either globally with all counsel in the case and/or groups of counsel by type of party and/or with each attorney in the case on an individual basis so thought should be given about how to structure those communications and when those discussions must occur. In those conversations, I suggest urging each party to "show his or her 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 in the discussions can be adequately synthesized and 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 also 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 couple of years ago. 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 wi-fi 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 tradeoff for the convenience and flexibility of such mediations. Other considerations and realities mitigate in favor of using the technology to do virtual mediations. 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 the costly effects on businesses and individuals alike. Of course, the inability to get to trial in many jurisdictions due to 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. Finally, as the world continues to navigate new coronavirus outbreaks and variants, virtual mediations allow cases to move forward safely.

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 wi-fi connections and that everyone involved understands the platform and its options. In this way, the potential for these 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.

The Role of the Parties, Counsel and the Mediator

I will next focus on the party representatives who should ideally be an integral part of the mediation, counsel's role and how to utilize the mediator's services to maximize efforts leading up to the mediation.
At the outset, there are two questions: Who needs to attend the mediation? Who should attend the mediation? These are quite different questions. The ability of counsel to not only assure that those who need to attend the mediation are present at the mediation, but more importantly, that those who should attend the mediation are present, is critical to the mediation's success. These include the real decision makers at all levels.

As an illustration of this premise, we all have our day-to-day litigation representative to whom we report and who authorizes basic steps we should take in the case, but this person may not be the best person to attend the mediation, especially in a complex case. For example, you may need someone at the mediation who can sell the settlement terms of the case to upper management. So how do you diplomatically cut through your client's or insurer's management layers to accomplish this goal while preserving the relationship with your routine client contact representative? One way to approach this is to politely suggest to your adjuster that having upper-level management at the table may be necessary to convey to the other parties that your client is serious about the mediation in other words, this case is important enough that it has higher management's attention. On the other hand, you might convey to senior management that while day-to-day litigation activity can be delegated to adjusters, settlement decisions demand upper-level management's attention only with such attention can creative solutions be conceived. Suggest that to do anything less is tantamount to engaging in a team sport with your star player on the bench.

Be sure to educate your client in writing ahead of the mediation. Consider and discuss how demands and offers may evolve before and during the mediation. Make sure you and your client are in unison on how to handle those developments. Make sure you evaluate and communicate to the client the odds at trial in an unvarnished way. Make sure your messages are consistent throughout all reports to the client. Manage expectations with the client so there are no surprises and most especially, no surprises that have not been the subject of written reports and evaluations. Educate the client on summary judgment procedure, the rules of evidence and procedure, the possible limitation of testimony or other evidence, anticipated motions to exclude experts, the time necessary to prepare and try the case and of course, your fees and the attendant expenses that will be incurred. Consider a presentation to all client levels and/or all layers of insurance so there are multiple representatives hearing the message.

I also highly recommend that you talk with opposing counsel about who will attend the mediation from his/her side. Who is this person? What is their role or title? What authority do they have? Try to understand the nuances of opposing counsel's relationship with that person. If possible and if not already apparent, obtain a commitment from opposing counsel that he/she will have a real decision maker at the table that has the same level of authority as your representative has a person who has a realistic evaluation and expectation one who can step out of the adversarial roles and the four corners of the case to find unexpected resolutions. I suggest having this dialogue with opposing counsel weeks or months prior to mediation so if either of you need to change who should attend the mediation, there is plenty of time built into the schedule to pivot on attendees.

One more thought on mediation attendees if you find that opposing counsel is not cooperative on the subject of his/her attendees at mediation, consider lobbying other counsel in the case or the mediator to drive home the importance of the attendees so as to encourage attendance by all key decision makers.

I think it is also beneficial to consider the dynamics between the parties and whether a joint opening session will be helpful to understand the points of view around the table and the issues involved or whether an opening session will be polarizing and set the mediation back before it gains momentum. In certain cases, you might wish to have a conversation with both opposing counsel and/or the mediator about this concept and how to assure the mediation does not get off on the wrong note.

As you can see, there is a lot to consider and much of this overlaps.

Educating Your Client

Client education should not begin and end with the pre-mediation report. Depending upon the medium for the mediation (i.e., traditional in-person, virtual or hybrid), one must explain in detail exactly how mediation will evolve so the client understands and adjusts expectations for the day of mediation. In a complex case, some clients will have some understanding of the procedure, but your job is to be sure they are educated in all aspects of the procedure and all the nuances they should expect. That should include assuring the client knows who will attend the mediation for each party, whether a joint opening session will occur, and if not, why that will happen as well as any other politics or dynamics to expect. After all, as a prepared mediation counsel, you have been gathering these details for some months.

These same details are equally important in a virtual mediation but may also include test-driving the platform (Zoom or otherwise) with clients and to assure their wi-fi signal is strong, secure and private.

The idea of going through these details is to remove anxiety and maximize intellectual analysis and reason so the mediation has the best chance of success. Explain that effective communication in mediation means no emotion, no drama, no greed and no personal attacks of any kind. Only a reasoned approach to finding a resolution that works well so educating your client (and others) is the name of the game. Hopefully, other counsel will assist by likewise cautioning his/her/their clients on these goals.

Prepare your client that with the mediator, you must deal candidly about weaknesses while showing a willingness to try the case if necessary. Your job may be a bit of a balancing act!

Educating Opposing or Co-Counsel

When I was still in private practice, I always appreciated a pre-mediation demand or offer especially if it included some degree of evidence and substantiation and so in complex cases, I asked for this. I urged all parties to reveal their hand in advance of mediation so we do not spend half a day getting everyone on the same page. If everyone engages in this process fully ahead of mediation, it gives us all time to re-formulate our goals and strategies and assure we have the relevant authority at the table. Sometimes this is as simple as urging everyone to agree to fully supplement discovery or exchange details on anticipated experts. Sometimes it requires a more soul-searching exercise which you may or may not be able to control.

The more parties in the case, the more likely that parties will not take the mediation and their risk factors seriously so how can you effectively push that thought process along? First, early on, arrange conference calls with other counsel, either as a group or groups or individually to discuss the case, the mediation and their respective goals. If your case involves defendants in various job categories such as in a construction defect case, you might suggest a conference call with the subcontractors and perhaps a pre-mediation conference among and/or between them and the general contractor. Perhaps your construction defect case involves design professionals. Those too might wish to meet prior to the mediation so they understand the issues specific to them and how they can position themselves effectively. Another possible grouping is that of the owner, design professionals and the general contractor. Be creative and think broadly so you are resourceful in ways to manage the mediation. As you do this though, keep in mind that there are percentages of possible and probable exposure so you must also be willing to have a frank discussion on contribution and indemnity percentages and risks.

One final note on your education efforts before the mediation. Most of my experience has been that a high demand, especially without evidence to back up that demand, almost always begets a dismally disappointing counteroffer. For a mediation to have the best chance of success, it is imperative that all parties make demands and counteroffers which are reasoned and backed by evidence. If you are able to interface effectively on this subject with opposing counsel before the

mediation, you will likely avoid the lost time on the day of mediation and can commence the mediation day productively from the outset.

Educating the Mediator

I always appreciate the parties that make my job at analyzing the facts and law easier so that I am the most effective mediator I can be. To that end, I welcome draft motions for summary judgment or any other potentially game-changing remedies. I am also always open to a call from an attorney for a party so we can talk candidly, openly and confidentially about the mediation ahead these sorts of tools allow me to be at my best at the mediation and that is of value to the parties and their counsel. Finally, I am open to suggestions as to how, with the parties' imprimatur, I might better educate myself. I suggest in a complex case that a "cast of characters" or list of the parties and each of their roles in the case, helps me as the mediator to get into the "play" and understand it from the point of view of the players. A list and copy of key evidence and a timeline can both be very helpful to a mediator who almost always comes to the case new. In short, you want to help your mediator learn the case, the dynamics, the motivations and the expectations from multiple points of view.

The Mediation Day

The day has dawned and you have done your homework as best you can. You have thought carefully through the timing of mediation for your case. You have been thoughtful about the best mediator (perhaps by being deferential to your opponent). You have made and followed your timeline. You have considered the best venue or platform for mediation and tested that with your client. You have the right parties at the table and engaged. You have educated your client, opposing counsel, co-counsel and the mediator. You have done your job at least to this point. How do you use all of those efforts to maximize success at the mediation table? What else must you do or consider doing to advance the ball?

At a minimum, you must be sensitive to the dynamics among the parties on the day of mediation. These may very well be different from prior dynamics. You must help the mediator understand these dynamics. If you have done your homework ahead of time, you may well have set the stage for the mediator's understanding of the politics, but you may have more work ahead of you depending upon what has transpired since your last discussions with the mediator.

Candidly brief the mediator on the strengths and weaknesses of all parties' positions. This sounds strange but the better you can size up yours and your opponents' strengths and weaknesses and vulnerabilities at trial, the more helpful you are to the mediator and the more credibility you have. There is strength in that credibility.

Deal frankly with speculative issues and manage cultural issues with care but understanding. Share with the mediator your client's considerations, whether they be business or personal. This is important as the long term effects of litigation and its resolution for a client's personal or business plans demand knowledge and careful vigilance.

Make sure your mediator understands any underlying concerns or goals that an insurance carrier might have as they often have the power to authorize resolution and they are not always making decisions in harmony with their insured and your client. They are motivated by precedent, confidentiality and other factors that may be of little or no consequence to your client.

Be sure to brief the mediator on plans for summary judgment and declaratory judgment and the basis for those. If possible, have these instruments drafted so you can demonstrate a willingness to move forward with those strategies, if necessary. Make sure the mediator has the weapons he/she needs in order to confront the process with full knowledge.

Finally, just a few last rules:

1) Be creative about ways of resolving the dispute. Is there a non-monetary solution that bears consideration? Are there untapped warranties? Has retainage been released and if not, does that provide a possible resolution? Are there limited releases that will reduce or enhance your client's "skin in the game" as much as possible? Are there viable non-compete or non-disparagement agreements? Are there continuing business relationships that warrant protection? Each of these might provide leverage to give the process momentum.

2) Seek non-monetary solutions in the joint opening session hopefully you have already begun this process as you and other counsel worked through the communications ahead of the mediation. Craft solutions that may not be available in traditional litigation. Ask if there are those that can provide some relief.

3) Consider drafting a settlement agreement before the mediation or at least have one that resolves your client's issues. You can always modify it but having such an instrument in your back pocket makes clear your client is serious about resolution at mediation.

I hope this article has provided you with food for thought and a mediation methodology for your complex (and other) cases.