COMPLEX MEDIATION

Key Issues and Considerations

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Mediation can be an efficient format in which to resolve a complicated dispute, but it also presents a learning opportunity for astute counsel to assess the strengths and weaknesses of their case. Should mediation efforts fail, the information exchanged may be invaluable or destructive to subsequent proceedings. It is critical for counsel to understand the interplay between complex mediation and litigation, and the strategic considerations for parties engaged in both.

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Mediation is a process of dispute resolution in which a neutral third party facilitates negotiations among adversaries and seeks, but does not impose, a settlement of the dispute. Complex mediation refers to mediation of more complicated cases, usually involving multiple parties and issues and higher financial stakes (see *Box, What is Complex Mediation?*).

In complex cases, bringing the parties to the mediation table may require considerable effort and expense, particularly if the participants are geographically diverse, extremely busy or entrenched in their litigation stances. Moreover, if the process is unsuccessful, much of what transpires in the mediation session may influence the parties' positions upon return to litigation or arbitration. As a result, counsel must delicately balance the opportunities and risks associated with complex mediation, and give careful consideration to certain key issues and strategic decisions, including:

- How the mediation came about, whether by court order, contract or voluntary agreement after the dispute arises.
- The optimal timing for the mediation.
- Overriding confidentiality concerns.
- Selecting the right mediator for the specific case.
- Steps the parties and counsel should take in advance of the mediation session.
- The main components of an in-person mediation session.

Search Mediation Toolkit for a collection of resources to assist counsel with the mediation process.

INVOLUNTARY VERSUS VOLUNTARY MEDIATION

Engaging in complex mediation may be required by a court order, compelled by a prior contract or voluntarily agreed to by the parties after a dispute arises. The circumstances of how the parties arrive at the mediation table naturally will influence the dynamics of the negotiations.

REQUIRED BY A COURT

Where a court imposes mediation as a first step toward resolving the dispute, the parties may have no true interest in settlement, making mandatory mediation a somewhat perfunctory exercise. On the other hand, a court-ordered process enables a party who is interested in early settlement discussions to have a forum in which to do so without having to ask for it. This can alleviate the perceived show of weakness or lack of confidence that may accompany a request to mediate or discuss settlement generally.

Federal Appellate Courts

Notably, nearly all US circuit courts of appeals have active mediation programs that require parties in certain civil appeals initially to attempt mediation (see *Craig A. Marvinney, Mediation in the US Circuit Courts of Appeals: A Survey (2013)*, available at *walterhav.com*). These programs typically use statements or questionnaires provided by the parties at docketing to determine whether a case is eligible or appropriate for mandatory mediation. If the case is selected for mediation, the parties must participate in the process. Even if a case is not initially selected, the judge presiding over the case can often require mediation by referral, or a party may request it.

Although certain cases, such as *habeas corpus* petitions and *pro se* cases, may be excluded from the mediation requirement, complex commercial cases are good candidates for these mandatory mediation programs. For litigants involved in these disputes, court-ordered mediation at the federal appellate level can be a surprising and potentially significant opportunity.

Federal District Courts

Mandatory mediation is not as widespread in federal district courts as it is in the circuit courts. Although the majority of federal district courts have some type of alternative dispute resolution program, participation in these programs is often voluntary. However, some courts, such as the US District Courts for the Northern District of New York and the Middle District of North Carolina, have implemented mechanisms similar to the circuit courts, requiring certain cases to go through mediation (see, for example, *N.D.N.Y. Gen. Order No. 47, Pilot Mandatory Mediation Program (Nov. 4, 2013)*; *M.D.N.C. Loc. Civ. R. 83.9a-g*). Other courts, such as the US District Court for the Western District of Washington, require counsel to meet at least once if the court refers the parties to mediation (see *W.D. Wash. Loc. Civ. R. 39.1(c)(2)*).

State Courts

State courts vary widely in terms of mediation requirements, and rules can differ from county to county within a state as well. Some states require that cases in certain areas of law initially go through mediation. Examples of this include medical malpractice actions in Wisconsin and Florida, and divorce actions in Utah (see *Wis. Stat. §§ 655.43, 655.445*; *Fla. Stat. § 766.108(1)*; *Utah Stat. § 30-3-39*). Other state courts, such as the Commercial Division of the Supreme Court of New York (New York County), allow the assigned justice to direct parties to mediation "where the Justice deems it useful to do so or upon consent of the parties" (see *N.Y. Sup. Ct., N.Y. County, Commercial Div., Rules & Procedures of the Alternative Dispute Resolution Program (ADR Rules & Procedures), R. 3(a)(1)*). That court has also recently initiated a pilot project that automatically refers every fifth case to mediation, subject to certain exceptions (*N.Y. Sup. Ct., N.Y. County, Commercial Div., ADR Rules & Procedures, R. 15*).

COMPELLED BY CONTRACT OR AGREED POST-DISPUTE

Parties may contractually agree to mediate, just as they would any other form of alternative dispute resolution. By providing for mediation in a contract, the parties can attempt to control in advance certain procedures and timing. In these cases, the fact that the parties agreed in their contract that mediation was a viable option may help make the process more efficient and effective.

On the other hand, although mediation compelled by contract is still voluntary in nature (given that it arises from a prior agreement), the party representatives operating under that contract may not have been involved in setting its terms. As a result, this type of proceeding may feel more mandatory than voluntary.

Search General Contract Clauses, Alternative Dispute Resolution (Multi-tiered) for a model clause requiring parties to resolve their dispute through negotiation and then mediation before submitting it to litigation or arbitration, with explanatory notes and drafting tips.

In contrast, where parties voluntarily agree to mediation after a dispute arises, all participants likely have at least some interest in settlement and may address issues in a more cooperative and constructive manner. The parties may seek mediation for a variety of reasons, such as:

- Avoiding or reducing upcoming litigation expenses, including the costs of:
  - extensive e-discovery;
  - retaining expert witnesses; and
  - taking and defending multiple depositions.
- Preventing negative publicity associated with the dispute.
- Preserving the relationship between the parties, which may be particularly important if there is an ongoing business relationship.
- Desiring flexibility and creativity in the outcome, which may be particularly important if there are several parties with competing demands.

TIMING OF THE MEDIATION

Mediation can occur at the outset of a dispute, as a way to avoid litigation entirely, or at any agreed point thereafter. Court-ordered mediation at the trial level generally occurs soon after the case has been filed. For mandatory mediation at the appellate level, the dispute will have been ongoing for some time in the lower courts with a decision rendered below. Therefore, the timing of appellate mediation potentially puts the parties in very different bargaining positions from when the case was first filed.

If mediation is voluntary, the parties can agree to mediate at any point. The chosen timing may be driven by a myriad of factors, including:

- The increasing cost of the litigation.
- Discovery of unfavorable facts.
- An interlocutory decision.
- An uncertain litigation outcome.
- A desire to avoid public exposure of certain facts.
- The parties' need for closure.

In complex cases, it is often helpful for the parties to engage in some amount of discovery before mediation. Discovery allows counsel to review information that might shed light on the strengths and weaknesses of the case, which will place the parties in a better position to assess settlement value. On the other hand, too much discovery, and its related expense, can defeat the purpose of attempting a compromised result because the parties may be far more invested (financially and emotionally) in their respective positions and therefore less open to compromise.

A litigation or arbitration calendar lends itself to certain natural breaking points that could be fruitful for mediation, for example:

- After the close of initial document discovery but before more extensive e-discovery.
- After the close of all document discovery but before depositions are taken.
- After the close of fact discovery but before expert discovery.
- After the close of all discovery but before summary judgment motions are prepared.
- After summary judgment motions are filed but before a decision is rendered.
- Immediately before trial or an arbitration hearing.
- During or after a trial or hearing but before a judgment is rendered.

It can be advantageous to raise the mediation option at the outset of the dispute and propose that mediation take place at a later agreed-on time that makes sense from both a cost and case-scheduling perspective. This helps to prevent a party from reading into the motivations of the other for suggesting mediation, which can occur where a party raises mediation after discovery of certain facts or a negative interlocutory decision.

WHAT IS COMPLEX MEDIATION?

Complex mediation refers to mediation of a case where there is more at issue, such as:

- The number of parties.
- The monetary amount at stake.
- The factual complexity.
- The number and difficulty of the legal questions to be resolved.
- The level of media interest or public scrutiny.

The complex mediation process generally follows the same path as any other mediation (see *Box, Key Stages of Mediation*), but may require multiple sessions to mediate to conclusion. Additionally, in multi-party disputes, each group may have different positions or be aligned on certain issues but not others, adding obstacles in the negotiation process. Some concerns, such as avoiding privilege waivers, are also amplified given the more complicated nature of the dispute.

Types of matters that are often best-suited for complex mediation include, among other areas, antitrust, collective bargaining, insurance and reinsurance, mass tort, patent, products liability and securities fraud cases.

CONFIDENTIALITY CONCERNS

Mediation is typically a confidential proceeding, based on:

- Pre-written rules and guidelines (see, for example, *JAMS Int'l Mediation Rules, R. 11 (2011)*; *American Arbitration Ass'n (AAA), Commercial Mediation Procedures, M-10 (2013)*; *Model Standards of Conduct for Mediators, Standard V (2005)* (adopted or approved by the AAA, the American Bar Association and the Association for Conflict Resolution)).

- The parties' own contractual mediation provisions, which typically include confidentiality clauses.
- State statutes or court rules that expressly hold that mediation communications are privileged, confidential or otherwise inadmissible in a subsequent proceeding (see, for example, *Fed. R. Evid. 408(a)*; *Unif. Mediation Act § 4*; *Cal. Evid. Code § 1119*; *Fla. Stat. § 44.405*; *9th Cir. R. 33-1(c)*).

Under the Uniform Mediation Act (UMA), a "mediation communication" is defined as "a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator" (*Unif. Mediation Act § 2(2)*). Subject to certain exceptions, a mediation privilege extends to these communications (*Unif. Mediation Act §§ 4-6*).

However, this privilege may give parties false comfort, as some information disclosed during mediation may not in fact be protected later. Indeed, the UMA states that evidence "otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation" (*Unif. Mediation Act § 4(c)*; see also, for example, *Cal. Evid. Code § 1120(a)*; *Fla. Stat. § 44.405(5)*). Additionally, despite the protection against admissibility of "compromise offers and negotiations" under Federal Rule of Evidence 408(a), these communications may be held admissible where offered for another purpose (see *Fed. R. Evid. 408(b)*).

Search Mediation: US Privilege and Work Product Issues for more on mediation privileges and protections, including best practices to avoid waiving them.

Also, generally there is no "fruit of the poisonous tree" defense against using evidence discussed or shared in a mediation should the mediation fail (*Unif. Mediation Act § 4, cmt. 5*). For example, if a party's written position statement includes argument about the existence of certain documents or witnesses that support its case, the other parties will know to take discovery on those topics and likely will not be precluded from doing so on the basis of a mediation privilege. Further, if a party shares an otherwise non-confidential, preexisting document with other parties during the mediation, that document does not typically become confidential merely by virtue of its disclosure in the mediation setting or attachment to a position statement.

Moreover, even information that is protected as confidential may influence matters outside of the mediation should settlement not be reached, and counsel must remain cognizant of the scope of what is being shared. For example, parties may learn which issues are of greater sensitivity to their adversaries, and they are apt to remember the various positions taken during the course of their mediation-related discussions. Even if confidentiality rules prevent parties from later claiming that these statements constitute admissions of liability, counsel should carefully analyze, before the mediation session, the potential consequences of this dialogue. Confidentiality protections cannot wholly unring a bell, and they do not prevent one side from obtaining a tactical advantage based on statements made in mediation.

CHOOSING A MEDIATOR

Complex mediation is a hands-on, intense process of dispute resolution, where parties, counsel and the mediator often spend hours locked in conference rooms attempting to hash out the details of a proposed settlement. As a result, its success can at times hinge on who is facilitating the session. The mediator's knowledge, experience, gravitas, likeability and neutrality, or the lack of any of those qualities, will be critical factors influencing whether the process results in settlement.

To choose the best candidate for the mediator role, the parties and counsel should:

- Consult the relevant rules and agree on selection procedures.
- Consider each candidate's unique personal characteristics.
- Avoid selecting the current arbitrator of the dispute, if applicable.
- Assess whether to retain a mediator with subject matter expertise, process expertise or both.
- Identify the candidates' different mediation styles and how they may be used.

Confidentiality protections cannot wholly unring a bell, and they do not prevent one side from obtaining a tactical advantage based on statements made in mediation.

RULES GOVERNING THE MEDIATION PROCESS

The mediation process can be prescribed by a variety of rules, including court guidelines, state statutes, and contractual or other voluntary agreements. A complex mediation may require many more case-specific steps to resolve the parties' dispute compared to a simple, single-issue, two-party mediation. Although pre-written rules do not typically address those case-specific steps, they usually allow room and flexibility for the mediator to respond to the particular needs of the case.

COURT PROCEDURES

The procedures for court-mandated mediation programs can differ depending on the jurisdiction, so it is important for counsel to check the local court rules for guidance. Many of the circuit courts use court employees as mediators, but some use trained independent parties for this role. Some courts automatically select the mediator, whereas others first allow the parties to attempt agreement. Court guidelines and rules, particularly at the federal appellate level, also often dictate the location and format of the first mediation session, along with the format of any follow-up sessions. Nevertheless, there are several jurisdictions that emphasize the case-by-case nature of mediation and prescribe few, if any, rules to govern the process.

STATE LAWS

State statutes may also govern certain mediation procedures, and may particularly impact the scope of privilege or confidentiality that applies to mediation. Indeed, the Uniform Mediation Act, now adopted by 12 states, notes that as of its enactment, "legal rules affecting mediation can be found in more than 2500 statutes" (*Unif. Mediation Act Prefatory Note § 3*; see also *Nat'l Conference of Comm'rs on Unif. State Laws, Legislative Fact Sheet — Mediation Act*, available at *uniformlaws.org*).

CONTRACTUAL AND VOLUNTARY AGREEMENTS

Contracts that require mediation may provide many or no details regarding what rules and processes to follow. Some may incorporate the guidelines of a neutral third-party organization, such as, among others:

- JAMS.
- The American Arbitration Association (AAA).
- The International Institute for Conflict Prevention & Resolution (CPR).

Even in those circumstances, however, counsel should explore whether all parties still seek to follow the contractually-specified rules or might benefit from a change. Depending on the contract's terms and whether all parties agree, it may be possible to revise the prescribed procedures or agree to follow a different organization's model rules.

Even if not imposed by contract, the parties should consider selecting a set of pre-written rules drafted by a reputable third-party organization to vest the mediation session with the formality necessary to gain the critical trust of the participants. If any party senses unfairness in the process or a lack of mediator neutrality, the mediation is more likely to fail.

Alternatively, if the parties are all sophisticated entities who have mediated disputes before, they are less likely to be suspicious of the process and more apt to suggest common approaches familiar to all participants. In those instances, using a third-party's set of rules or guidelines may not be necessary.

Importantly, when evaluating potential candidates throughout the selection process, parties and counsel should vet the reputation of any potential mediator, preferably through colleagues who have personal experience with the candidate.

SELECTION RULES

The rules governing the mediation will likely provide guidance on how to select the mediator (see *Box, Rules Governing the Mediation Process*). If the rules are silent on this issue, or the parties are able to agree otherwise, there are various options and no one "right" way to proceed. In some cases, one party may simply suggest a possible candidate to the other side, with the other side having the option to accept or reject the suggestion, or respond with another possible name.

However, in complex mediations that involve multiple parties with diverging interests and potential conflicts, it may be advisable for the parties to agree on certain facially neutral criteria that the candidate must possess, for example:

- Particular certifications.
- Education or work experience.
- Geographic location.
- Language skills.

Each party would then propose a slate of three names that they believe meet those criteria. Alternatively, if the parties have chosen to use a third-party organization to administer the mediation, that organization may maintain rosters of certified mediators with accompanying biographical information from which the parties can select candidates. Even in that situation, however, counsel should still explore whether the parties might agree on certain facially neutral criteria. This can help narrow the roster to a more reasonable size from which to select candidates

and ensure that the chosen candidate possesses those traits the parties view as most important.

Once the parties have identified an agreed number of mediator candidates, counsel should then jointly contact each of the proposed candidates with an agreed statement or questionnaire to vet them for interest, availability and conflicts. Joint contact by counsel is advisable so that a candidate does not know which party suggested him. Alternatively, if the parties are using a third-party organization, that entity would likely reach out to the candidates and conduct the vetting process on the parties' behalf.

The parties could agree in advance that, barring any conflicts, any candidate name in common be immediately selected as the mediator, or that they consider that candidate first before engaging in any strikes. If no immediate agreement is reached, the parties would then engage in simultaneous or alternating strikes of candidates until only two names remained. The final candidate could then be selected at random. One common way to make this selection is through a "long distance coin flip," for example, by having the parties guess whether the digit immediately to the right of the decimal point in the closing Dow Jones Industrial Average for a specific date, as reported in the online version of *The Wall Street Journal*, was odd or even.

PERSONAL CHARACTERISTICS TO CONSIDER

No one quality defines the perfect mediator but the parties and counsel should consider several key criteria, including a candidate's:

- **Degree of neutrality and lack of bias.** While the candidates will each be asked to certify a lack of conflicts, counsel should also vet this point. Conducting independent research on candidates, including work and education experience, as well as colleagues' anecdotal experience with them, is key to ascertaining any potential bias and evaluating the candidates overall.
- **Gravitas.** A mediator does not rule from the bench as a judge or arbitrator would (unless specifically requested by the parties), but a mediator must still be able to control the room. This means counsel must consider whether a particular candidate will be able to inspire the trust and confidence of the parties and counsel, as well as rein in unnecessary posturing. Along the same lines, counsel should ensure that the opinion of the mediator will carry weight with the parties and counsel, especially if that opinion were critical of a particular position.
- **Creativity.** Negotiation is a free-form process. The mediator must be flexible and inventive to adapt to case-specific needs and develop creative solutions, particularly in a complex mediation.

AVOIDING A DUAL ARBITRATOR-MEDIATOR

Where parties engage in mediation while in the midst of a pending arbitration, they may be tempted to use the sitting arbitrator, who is already up-to-speed on the issues, as the mediator. However, it is almost never advisable to retain someone in a dual arbitrator-mediator capacity. If the mediation does not result in a settlement, the mediator will return to his role as arbitrator typically after having engaged in numerous *ex parte* communications with the parties and counsel. This is problematic for many reasons, including that:

- **Counsel will not know what was said in their absence to the mediator by the opposing participants.** Counsel will not necessarily know which arguments may have been made in a private session with the mediator (and therefore may be unable to defend against certain points in a subsequent arbitration), or worse, whether false or misleading information was presented to the mediator and remains unrebutted.
- **Counsel may regret communicating certain information to a mediator who is later elevated to decision-maker.** During settlement negotiations, the parties and counsel may find it beneficial to compromise their positions and discuss those potential compromises in confidence with the mediator. However, if settlement fails, they may regret having shared their own analysis of potential weaknesses in their case (or having admitted their "real" bottom line) with the individual ultimately deciding their dispute.

SUBJECT MATTER EXPERTS VERSUS PROCESS EXPERTS

The parties and counsel should consider whether it is better to retain a mediator who is a subject matter expert or a process expert, based on the specific needs of their case. Frequently, the best candidate in a complex mediation is both.

Having a mediator with expertise in the subject matter of the dispute is particularly important where the dispute is highly technical (such as intellectual property or actuarial matters) or requires industry-specific knowledge to understand (such as the customs and practices of reinsurance intermediaries). Although the mediator is not a decision-maker, if the parties feel that he does not understand the true nature of the dispute or appreciate the significance of certain issues, they will not trust the mediator's recommendations.

On the other hand, subject matter expertise may lead to the potential for mediator bias, depending on the source of that expertise. For example, it could be relevant to an environmental dispute that a mediator candidate gained his technical understanding and knowledge of the issues while working for a government agency, coal company or non-profit clean air group. Each of these experiences has different implications depending on the nature of the conflict.

Nevertheless, a mediator with subject matter expertise is particularly useful in complex mediations to help streamline the process. In any dispute, the parties will have to educate the mediator to some degree, but if there is a common baseline of knowledge that would simplify that process, they can reach the heart of the conflict much more quickly.

In contrast, process expertise refers to the mediator's experience being a mediator, as opposed to a professional in the field or subject matter at issue. Some of the key qualities to consider in a mediator, particularly gravitas and creativity, are often associated with process experts. As with subject matter expertise, process expertise is highly useful in complex mediation. With divergent groups and coalitions representing multiple competing interests, participants will require a mediator with deep experience to establish a case-specific structure for the session.

In some complex mediations, it may prove difficult to find the ideal candidate who has both the requisite subject matter and process expertise. Another mechanism for injecting both subject matter and process expertise into the proceeding is for the parties to select a mediator with process expertise and then jointly retain a neutral expert to advise the mediator on the subject matter at issue.

STYLES OF MEDIATION

It is useful for counsel to be aware of the various styles of mediation. Mediators with considerable process expertise will typically be familiar with several different styles and may employ some elements from each, including the following:

- **Facilitative.** A mediator using the facilitative style will be completely neutral and will not provide the parties with any substantive advice or recommendations. Rather, the mediator will guide the structure and process of the mediation, but will allow the parties to develop their own solution to the dispute.
- **Evaluative.** A mediator employing the evaluative style will make recommendations and use his expertise to explain what may happen if mediation fails and the case is litigated. The mediator may make assessments about the merits of the parties' respective positions.
- **Transformative.** A mediator favoring the transformative style will be similar to one using the facilitative style. However, the mediator will also be trying to achieve the broader goal of restructuring the relationship between the parties through facilitating the parties' recognition of one another's views and needs.

PRE-SESSION TASKS

Once the parties have formally retained a mediator, they typically arrange a conference call among counsel, and possibly party representatives as well, and the mediator. The purpose of the group call is to decide various procedural issues affecting the mediation session, each of which involves important strategic considerations, including:

- Who should attend the session to capitalize fully on the opportunity for a successful resolution.
- Where to hold the session, which should be a mutually convenient location for the parties.
- What background information and materials to provide to the mediator in advance of the session.
- Whether any specific multi-party issues must be addressed, such as selecting group spokespersons.

DECIDE WHO SHOULD ATTEND

Typically, mediators will demand that party representatives with decision-making authority attend the mediation session. Although the presence of counsel may be optional, it is highly recommended that counsel for all parties also attend a complex mediation. (An exception to these practices may occur in court-mandated mediation, where the presence of counsel may be required and the presence of party representatives may simply be encouraged.) In disputes involving large groups of parties, the mediator can limit the number of people at the table at any given time to encourage constructive dialogue or have subgroups focused on different aspects of the case.

What constitutes decision-making authority can vary to some degree, but it is usually a person whose recommendation to settle the dispute will generally be accepted by his company, or is at least a phone call away from acceptance (for example, where approval from the board of directors is required). Unfortunately, this means that a busy, high-ranking company representative likely must travel to a mediation and devote several hours to sitting in a conference room hashing out details that arguably could be handled by a more junior player, at least in draft form.

However, the presence of senior decision-makers is important for many reasons that override this inconvenience. For example, having experienced representatives physically present can:

- **Signify a commitment to the process.** Mediations are more successful when all participants believe that everyone at the table is taking the process seriously. That is more likely to happen if senior representatives are present.
- **Promote efficiency.** Mediations are more efficient when the participants in the room have the requisite authority to offer creative compromises that may not have been considered or agreed to by their respective companies in advance.
- **Create a sense of urgency.** Mediations thrive on an underlying compulsion to seize the opportunity and settle the matter swiftly. This is partly driven by external factors, such as involving high-level company representatives who must give up their time to participate.
- **Help set realistic expectations.** Mediations often reveal weaknesses in a party's case that the party may not have previously understood, despite counsel's efforts to identify them. It is more useful for a representative with decision-making authority to experience that realization than for a junior team member to convey that message back to the company long distance.

PICK A LOCATION

An in-person session at a neutral venue is the best option for the location of the mediation. Having all parties travel about the same distance to the site is also preferable. Counsel should avoid non-neutral settings, such as the conference rooms of one party's law firm or the hometown of one party, where the other parties have to travel long distances to attend. The effort involved in getting to the mediation session helps raise a sense of urgency to resolve the dispute. Convenience should not be the overriding concern.

Similarly, group conference calls, video-conferencing, Skyping and the like may all present cheaper and seemingly more appealing options for a mediation session, but they should be avoided absent extraordinary circumstances. (An exception may arise in court-mandated mediation, particularly at the appellate level, where initial mediation sessions are frequently telephonic.) Non-verbal cues can be essential in understanding whether other parties perceive strengths or weaknesses in the various positions and arguments, and while some non-verbal cues are captured on a video-conference, many are not. It is critical for counsel to assess those cues, particularly in a complex mediation which may involve different cultures or languages (where so much can literally be lost in translation). That assessment will guide counsel during the mediation

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negotiations and, if mediation fails, in any subsequent litigation or arbitration proceedings.

Additionally, it is easier to remain hardened and unwavering in a view if an "us versus them" mentality is allowed to persist. Unfortunately, this mindset can pervade a mediation taking place across multiple conference rooms separated by thousands of miles.

PROVIDE BACKGROUND INFORMATION TO THE MEDIATOR

Because the mediator will have had no personal involvement in the actual dispute, the parties and counsel must educate the mediator on the specifics of the case and the areas of disagreement before the in-person session. During the initial conference call with the mediator, the participants should agree on how that process will take place.

Typically, counsel will want to provide the mediator with a written statement of each party's position, and mediators often request this type of submission. A written statement can then be followed up with an *ex parte* call to elaborate on any points needing clarification. As long as each participant has the same level of access to the mediator before the in-person session, these *ex parte* communications are usually highly beneficial in moving things forward.

Provided the mediator does not have a preference, counsel must strategically decide whether to exchange written position statements among opposing parties at this stage or provide those statements confidentially to the mediator alone. Although case-specific circumstances could dictate otherwise, it is usually helpful for a party to exchange written statements with its adversaries, so that everyone begins on the same page and understands each other's positions.

Exchanging written statements ensures that participants enter the mediation knowing the shape of their dispute and whether there are areas of agreement or disagreement that had not been anticipated. There will be numerous other opportunities to share information and concerns with the mediator privately, both during pre-session conference calls and mid-session caucuses.

Depending on what circumstances led to the mediation, counsel might be surprised by the contents of the other parties' written statements. It is more productive for this to happen before the in-person session, when there is an opportunity to assess the merits of these new positions. Moreover, counsel can respond to any unexpected points in a follow-up *ex parte* call with the mediator.

Regardless of whether the written statements are exchanged among adversaries, the content and persuasiveness of those statements are of great importance. Mediators handling complex disputes will often read these submissions closely and devote considerable time to preparing for the in-person session by:

- Analyzing the merits of the issues.
- Determining where common ground might exist.
- Assessing potential roadblocks.
- Devising creative solutions to problems.

At the same time, confidentiality issues are critical at this stage (see above *Confidentiality Concerns*). If discovery is ongoing, counsel should carefully assess what information and materials to disclose in the mediation. If discovery is already complete, then the discussion of evidence is unlikely a concern, but tactical considerations remain. The written position statement may provide a detailed roadmap to a party's case, disclosing both the strengths and weaknesses of its arguments. Counsel must keep in mind that if mediation were to fail, the adverse parties will retain this roadmap.

CONSIDER ADDITIONAL MULTI-PARTY ISSUES

Complex, multi-party mediation may involve additional homework for the parties before they prepare or exchange written position statements and participate in an in-person session. Where multiple parties are on the same side of a dispute (for example, in the context of a large joint defense group), selecting a primary spokesperson for the group will simplify the in-person session, although this typically does not alleviate the requirement that representatives of all parties attend. It is also important for the coalition to discuss its bottom line in advance, to determine whether the parties are united under all circumstances, or whether certain events or specific issues could divide the group.

THE IN-PERSON SESSION

The steps involved in the in-person mediation session can be ordained by the mediator, agreed to by the parties, prescribed by

a set of rules, or some combination of all of these options. Under any of these scenarios, however, certain traditional elements routinely arise.

First, there is usually a joint session where the parties, counsel and the mediator meet together in one room. The mediator will likely provide guidance on how the session will proceed, and may opt to summarize what he views as the key issues in dispute. Alternatively, or additionally, the mediator may ask the participants to give opening oral presentations.

After this joint session, the parties typically separate into different conference rooms, and the mediator holds private sessions with each of them. At this stage, there is great fluidity as to how the session will proceed. There may be subsequent group sessions or the mediator may choose to shuttle back-and-forth among the separated parties to facilitate the negotiations. In a complex mediation, it is likely that the parties will not settle all issues in a single session. They may schedule additional sessions to discuss open issues or choose to resolve only certain claims, while continuing others in litigation or arbitration.

OPENING STATEMENTS

The utility of opening statements in a joint session is case-specific. Counsel should consider the potential pros and cons when deciding whether to advocate for this opportunity or seek to suppress it.

Advantages

Opening statements offer counsel an opportunity to introduce the parties and issues, and set out their strongest arguments. In a complex mediation, they can:

- **Provide a needed reality check on the relative strengths and weaknesses of a party's position.** Hearing an oral summary of each side's best arguments is a useful tool in gauging how willingly, or unwillingly, a party should compromise its claims.
- **Allow a party to update its position after reviewing the other parties' written materials.** After exchanging written position statements before the in-person session, parties may change their views. It is possible that certain issues will resolve themselves, or that new issues will come to light. Presenting opening statements allows parties to put forward these new or adjusted stances.
- **Enhance the credibility of a party's position with the mediator.** Although the mediator is not the decision-maker, his opinion can strongly influence the outcome of the dispute. Depending on what mediation style he employs, the mediator's personal views on the merits of the case may impact how hard he pushes the parties to settle and in what direction. Strong in-person, as well as written, advocacy may influence the mediator's outlook on the various issues in the case.

If the parties do proceed with opening statements, however, these presentations should be kept brief and focused.

Disadvantages

Despite the many advantages, opening statements also present certain risks. For example, they can:

KEY STAGES OF MEDIATION

GETTING TO MEDIATION

Mediation may arise by:

- Court order.
- A mediation clause in a contract.
- Agreement between the parties post-dispute.

SELECTING A MEDIATOR

The mediator may be chosen by:

- Court rules.
- Nomination of a third-party organization.
- Agreement between the parties.

PRE-SESSION PLANNING

To prepare for the mediation session, the parties typically confer with the mediator or third-party organization administering the mediation to:

- Identify who will attend.
- Agree on a location.
- Provide background information to the mediator.
- Exchange written position statements or provide them solely to the mediator (taking into account confidentiality concerns).

Additionally, before attending the mediation session, parties usually confer with their respective counsel to develop a negotiation strategy and consider their bottom line for settlement.

IN-PERSON SESSION

The main components of the in-person session typically include:

- The mediator's introduction.
- The parties' opening statements.
- Private caucuses.

MEDIATION OUTCOME

After joint sessions and caucuses, the mediation process will come to a close. This can result in:

- Settlement of all issues.
- Resolution of only certain issues.
- Impasse, possibly leading back to litigation or arbitration.

Search Stages of a Mediation for a Checklist outlining key steps in the mediation process.

- **Incite opposing parties and cause each side to become more firmly entrenched in its position.** Chest-thumping and table-pounding theatrics sometimes accompany oral statements and can present an obstacle to reaching settlement. Rather than opening minds to other viewpoints (or holding a mirror to the strength of one's own case), these oral statements can inflame opposing parties and actually do more harm than good.
- **Potentially hurt a party's credibility with the mediator.** It can prove challenging for a party to present and maintain a solid stance regarding the strengths of its case while simultaneously showing a good faith interest in proceeding with a possible compromise.
- **Disclose too much.** The same tactical considerations about the content of the written statements apply to opening statements as well. Over-sharing (even without a court reporter memorializing it) is a risk.

If the parties are faced with multiple separate disputed issues, settling only some of those issues may still reduce risk and enable a subsequent litigation or arbitration to proceed more efficiently.

PRIVATE CAUCUSES

The mediator typically uses a series of private caucuses with the parties to facilitate offers and counter-offers. In a multi-party dispute, where parties may overlap in their positions on some issues but diverge on others, different forms of break-out sessions might be necessary. These sessions are a fluid process where the mediator is gathering and processing information to determine:

- How important various issues are to the parties and where the points of entrenchment are.
- Whether some issues are tied to the results of others or stand independently.
- Whether some issues can simply be resolved quickly and then removed from the table.

Throughout this process, the parties and counsel must assess the style of the mediator (if not known already from prior experience) and whether the mediator has arrived at any conclusions about the merits of the parties' respective positions. Some mediators are careful never to reveal their opinions, whereas others intentionally employ an evaluative mediation style. Counsel will want to determine whether the mediator is pushing the parties in a particular direction, and whether that direction is desirable.

Counsel will also want to make clear in private discussions with the mediator what information is confidential and how much can be shared with the opposing parties. For example, counsel may wish to tell the mediator that the party's bottom line for settlement is a certain dollar amount, recognizing that revealing a true bottom line position to the opposing parties may be harmful in the negotiation process. In a multi-party mediation, it is also possible that some parties will be privy to certain information and others will not. The mediator must be trusted to keep those confidences straight (see above *Confidentiality Concerns*).

RESOLUTION OF SELECT ISSUES

If the parties agree to settle the dispute at the end of the mediation, they often negotiate a term sheet that outlines the principal points of their agreement. Term sheets enable the parties to solidify the scope of their agreement in writing without committing to formal language that will be included in the ultimate settlement agreement (which may take more time and subsequent negotiations among counsel to finalize). Term sheets typically are not signed by any party.

Importantly, a successful mediation does not need to resolve every dispute between the parties. If the parties are faced with multiple separate disputed issues, settling only some of those issues may still reduce risk and enable a subsequent litigation or arbitration to proceed more efficiently. Additionally, in a complex mediation, obtaining a definitive resolution of some issues may assist the parties in reaching a compromise solution on the remaining issues in dispute.

To that end, the scope of the mediator's authority (unless subject to court rule or contract) is typically within the parties' complete control. It can be useful to vest the mediator with authority to decide certain issues for the parties, after full briefing and argument. Alternatively, the parties can request that the mediator provide a non-binding opinion on specific limited issues.

The author would like to gratefully acknowledge the assistance of Stephanie Wang of Steptoe & Johnson LLP in the preparation of this article.