

**PLANNING, ORGANIZING, FORMATTING
AND EXECUTING THE MEDIATION
OF A COMPLEX, MULTI-PARTY, MULTI-ISSUE,
LAWSUIT**

Lawrence M. Watson Jr.

Introduction

This article will examine procedures mediators and trial counsel might use in organizing and formatting the mediation of complex, multi-issue, multi-party lawsuits. More often than not, planning and structuring the mediation of these sorts of disputes will be case specific; the unique nature of the participants and their particular issues will ultimately dictate how their mediation proceedings should be structured. There are, however, some general concepts that might prove useful in approaching these cases. The suggestions made here simply reflect “some” ways, certainly not, “the only” ways, to organize these mediations.

Additionally, while the title here suggests we are considering “complex” lawsuits, the subject matter complexity of the dispute is not always a significant factor in making the mediation of the case difficult to manage. Often the subject matter of multi-party, multi-issue disputes will be technical or specialized. That fact in and of itself, however, does not present unusual problems in structuring and formatting a mediation session for the case. Subject matter complexity is usually a matter of nomenclature; understanding the buzz words, and the language of the field. Subject matter complexity can be neutralized by good pre-mediation submissions from the parties or independent advance review by the mediator. Good mediators need to be quick studies who get past the complexity of the subject in dispute and deal with the gist of the core issues in the case.

The major problem for conducting a productive mediation session for larger civil lawsuits is the “multi-party” and, “multi-issue” aspects of dispute.

Multi-party disputes involving several parties with independent interests and concerns present challenges to mediate which include:

- Engaging and logistically handling each party - often with an entourage of lawyers, experts, insurance adjusters and advisors.
- Allotting appropriate time to be spent with each participant.
- Defining procedural pathways focused on individual needs while still keeping the group in line and everyone moving toward the same goal.

Multi-issue disputes involving a plurality of arguments present challenges to mediate which include:

- Recognizing the interrelationship of a multiplicity of disputes, how they connect or stand alone.
- Defining, prioritizing and initiating an appropriate flow of negotiations or, “negotiation pathways”, to properly sequence issue resolutions.
- Understanding essence of the various positional debates; the interests and concerns in conflict, and the possible concessions available to lead to resolution.

While subject matter complexity can be a factor, the number of people involved, and the number of issues presented will generally drive how we plan and organize the mediation of complex multi-party, multi-issue disputes.

To put the following organizational steps in perspective, we will use a model case - the, “Boggy View Condominium Construction Defect Litigation” - to serve as example. A construction defect lawsuit serves as excellent model for discussing how to organize and structure the mediation of a multi-party, multi-issue case because this sort of case will involve one or more main claimants seeking relief from several principal defendants who, in turn, not only assert defenses and counterclaims against the claimants, but also actively pursue third party claims for indemnity or contribution from third parties as

well. To add to the mix, these cases also routinely feature liability insurance companies which add additional parties with their own issues involving coverage and indemnification obligations.

With that said, we begin at the beginning . . . when the case first reaches the mediator's office.

Getting an Early Start - Initiating Preliminary Contact with Counsel to Gather Case Information and Assume Control of Planning the Mediation Program

Having the mediator make prompt personal contact with the lawyers to gather basic information and get involved in the planning process is a critical first step in successfully structuring the mediation of multi-party, multi-issue disputes. A mediator's case intake procedures should provide an alert when a multi-party dispute first appears; flags should be raised to get the mediator directly involved as quickly as possible. Suggested appointments for telephone conferences between counsel and the mediator should be made even as the initial inquiries are being answered. In cases with 10 parties or less, an effort should be made by the mediator to personally speak with the lawyers for each party. In larger cases, it might be advisable to select and speak directly with select counsel involved with claimant group, the defendant group and the third party defendant group.

There are two objectives for making this prompt initial contact; gathering the basic information about the case which will be necessary to structure a meaningful mediation program, and taking control of the organizational effort.

Taking control of the organization is a relatively easy task. In the process of getting an overview of the claims, defenses, counterclaims and third party claims the mediator might ask, "Why not let me and my office help organize and structure this mediation?" Most of the time, the lawyers involved in these cases are delighted to let the mediator take the lead in planning, organizing and scheduling the mediation session. Trial counsel can be competitive, argumentative and mutually distrustful of each other. This often results in poor communications and a refusal to accommodate. When they are able to speak with each other, trial

lawyers frequently focus on their own clients, their own needs and their own definitions of the controlling issues. They rarely evidence an overwhelming concern for the needs of all parties to the dispute. The absence of a cooperative cohesive attitude in planning results in a stalled process. It may not be the best idea to leave it to trial counsel plan and format the mediation program.

As to the base information necessary properly structure the mediation session, there are a number of topics to uncover.

Chart the Transactional Relationships.

Before getting into the details of the dispute, it's helpful to understand how business transaction underlying the lawsuit was supposed to look. Who are the players? What are their contractual relationships? What were their intended duties, responsibilities in the transaction? What was intended risk allocation? What insurance protections in were place?

In our model Boggy View Condominium Case we might thus see a Relationship Chart as described in Figure 1.



Figure 1 Boggy View Construction Project Transaction Relationship Chart.

Chart the Claims and Defenses Making up the Lawsuit.

Once the intended transactional relationship is understood, we begin an analysis of the dispute as it has been established in the lawsuit. What disputes are we attempting to reconcile? In summary form, chart the main claims, the defenses and counter-claims raised, as well as any cross claims, third and fourth party claims asserted. Develop a general understanding of the factual basis for liability claims – what went wrong? What is the nature of the damages claimed? What factual defenses and avoidances have been raised? Importantly, the mediator should also identify and

chart any collateral issues involved in the dispute which will also need to be addressed in dealing with the primary claims. For example, have insurance coverage issues been raised? If so, are coverage denials the subject of related declaratory judgment actions? Are there related third party lien foreclosures? In our model case we may thus see a “Litigation Claim Chart” as depicted in Figure 2.

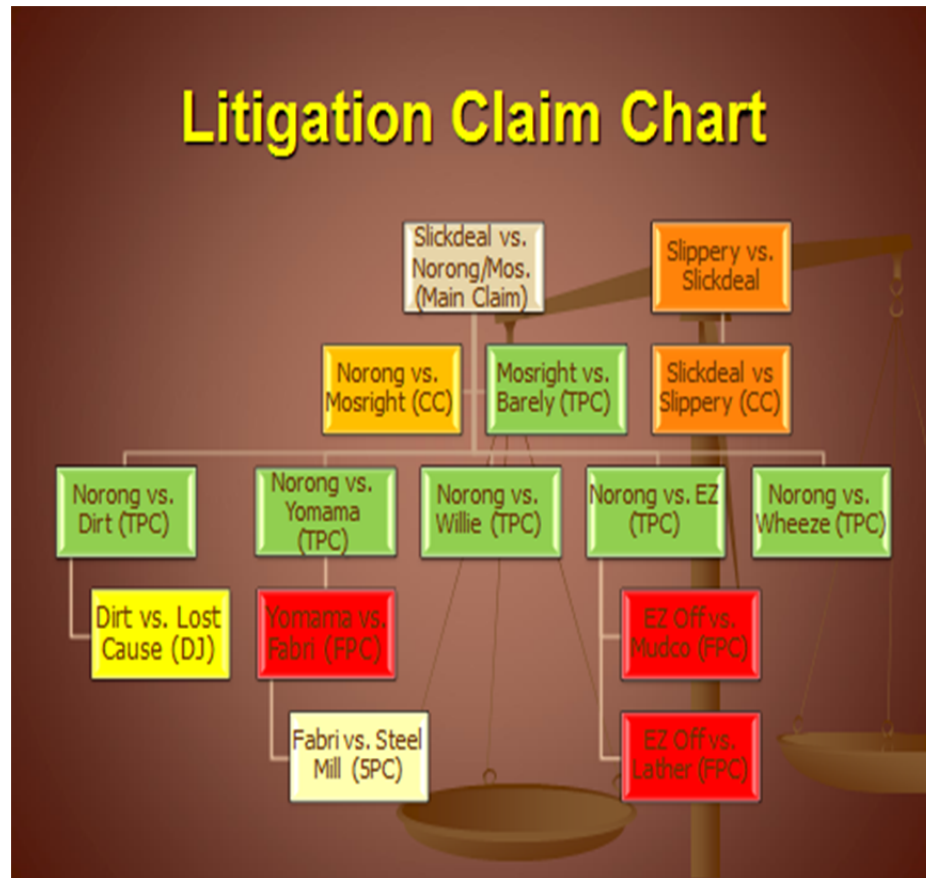


Figure 2 Boggy View Litigation Claim Chart (“CC” – Counterclaim; “TPC” – Third Party Claim; “DJ” – Declaratory Judgement Action; “FPC” – Fourth Party Claim)

A word about charts . . .

In multi-party cases, simply keeping track of the players can be a daunting experience. The preparation and use of graphic hierarchy charts identifying the parties, their lawyers, their contact information and their overall positions in the dispute can give the

mediator an invaluable “high altitude view” of the case. Kept as a ready resource in the file, these charts not only instantly identify the players and their relationships in the controversy but, as will be discussed later, can suggest “negotiation pathways” for reaching an overall resolution of the claims.

Mediation Services Engagement Letter

In multiparty suits, it is never too early to secure a clear understanding of the terms and conditions of engagement for the mediation services to be rendered. Once the mediator generally understands the nature of the dispute and who is involved, terms of the engagement for mediation services should be formalized. A critical starting point in this regard is to confirm exactly who is in lawsuit and who will be participating in the mediation program. It is not always sufficient to rely on a service list sent over by someone’s office. More often than not, the case will have been pending for some time before it reaches the mediator; parties will have been dismissed, dropped, and added. Confirm that you have a current list identifying the parties to the lawsuit and verify, by direct contact if possible, who will be participating in the mediation.

Once an accurate list of participating parties and their counsel is obtained, make sure each participant receives written terms of the mediation engagement.

All experienced mediators have a standard engagement letter containing terms and conditions of their agreement to provide mediation services. In multi-party, multi-issue engagements, however, there are at least two unique but essential provisions which may not be found in routine mediation engagement documents.

First, make it clear exactly who will be paying the mediation fees and costs and how they will be divided among the parties. The allocation of mediation fees and costs often becomes an issue in multi-party disputes; an issue which can be readily avoided by simple advanced attention.

Start with the premise that the mediation bill will be divided equally among, and paid by, each “mediation participant” with the engagement letter defining exactly who is a, “mediation participant”. One good working definition is, “any entity with an independent position advanced in the dispute”. If the mediator becomes engaged in facilitating negotiation of a position unique to one party, that party is a “participant” who will be getting a share of the bill. Another less formal working rule – if they have their own lawyer, they get their own mediation fee bill.

In determining who will be paying a share of mediation fees in multi-party lawsuits, there are danger areas which always warrant advanced inquiry and resolution. For example:

- An insurance carrier with separate counsel who is asserting insurance coverage issues – typically not a named party to the lawsuit, but often a critical component of the settlement negotiations. Are we mediating a coverage issue between the carrier and the insured as part of this dispute?
- Multiple entities with common ownership, i.e., a sales company, marketing company, development company, management company, etc.; all under one owner. While each entity may be a named party, the common owner is effectively taking one role in the settlement negotiations. Are the named parties really advancing independent positions?
- “Distant” third/fourth party defendants, i.e., relatively small players in overall dispute with marginal roles in the settlement negotiations. Are they “active participants” in the mediation process?
- Parties settling out early.
- Parties, or subsets of parties, settling out late following “downstream” mediation services from the mediator.

Secondly, it should be made clear in the engagement letter that a broad scope of mediation services involving a broad group of participants will be involved in the mediation program. Before the session begins there will be substantial pre-mediation organizational activities that can involve a limited number of parties or sub-sets of parties. Generally, the fees incurred in these

efforts will benefit all parties and should be shared equally by all parties. During the mediation session, there will be always be mediator face time devoted to a greater number of participants. Consequently, there will be significant mediation session time spent that no one participant will witness first hand. That session work, however, benefits everyone and, again, the fees incurred in these efforts should be shared equally among all parties. Finally, there will most likely be post mediation follow up activities which may directly involve only a few of the parties in the dispute. Depending upon the scope of those follow-up mediation services, the fees and costs incurred might also be shared by everyone.

To elaborate further on the post mediation session services, mediation of multi-party, multi-issue cases frequently involve follow-up sessions involving a limited number of parties to the lawsuit. It thus becomes necessary to make it clear how mediation costs and fees for follow-up sessions will be allocated and paid; evenly across board among all parties, or only among the participants directly involved. As a general rule, if a global resolution of all claims is dependent upon the success of resolving subsets of claims in the follow-up sessions, it might be said that all parties are benefiting from that follow up work, and all parties should thus participate in paying the mediation fees and costs incurred for that work. If, on the other hand, some claims have been finally resolved in the initial mediation session, and only lingering claims are being addressed in the follow up sessions, then clearly the parties to the follow up sessions should be solely responsible for those mediation fees and costs.

Pre-Mediation Organizational Meetings – The Mediation Steering Committee.

After solidifying the terms of the mediator's engagement, planning the mediation session should begin. In mediating multi-party, multi-issue lawsuits, advance planning is essential.

In some situations, it might be sufficient for the mediator to unilaterally announce when the mediation session will take place, what the agenda will be, define the process for meeting that agenda, and direct the parties to respond accordingly. In a majority of cases, however, counsel for the parties will want to have a say

with respect to how the mediation session will be conducted. This will call for pre-mediation organizational meetings between the mediator and counsel and an immediate challenge for the mediator to get everyone on the same page with respect to how the mediation session will unfold.

There are a variety of options for holding these meetings. The mediator may choose to arrange separate meetings with different subsets of the parties; plaintiffs as group, defendants as group, third party defendants as a group etc. In cases where the numbers would allow it, pre-mediation planning sessions might be held with counsel for all parties at once, although the logistics for convening meetings with a larger group of lawyers can be formidable.

In larger cases - 15 or more parties – the mediator might consider forming a “Mediation Steering Committee” consisting of 4-5 lawyers representing key parties to the dispute. This avoids or minimizes problems in assembling and scheduling multiple counsel for the pre-mediation planning sessions.

In the Boggy Creek lawsuit, for example, the Mediation Steering Committee membership might thus include one lawyer from the claimants (owner, prime contractor), one or two from the defendants or third party defendants (major subcontractors) and one lawyer representing the cross defendants (designer, suppliers). Alternatively, the Mediation Steering Committee might include lawyers representing the parties who are biggest players in outcome of the dispute (biggest potential dollar loss or gain), or who are the biggest players in the transaction.

The best process for creating the Steering Committee is for the mediator to privately solicit the selected lawyers to participate with direct invitations. Once the core membership is committed, an announcement of the formation of Mediation Steering Committee should be made to all parties in the lawsuit along with an open invitation for anyone else to join in if they wish. Once the Committee schedules its meetings and develops a topical list of the planning decisions to be made, an open invitation might again be extended to all other lawyers for their participation and involvement. While the Steering Committee’s meetings and activities are thus open to input from all, its operation will not be

driven by finding a time and place acceptable to every lawyer in the entire group.

To help facilitate acceptance of the decisions made by the Steering Committee, the mediator should use a “newsletter” approach to all parties in the dispute announcing decisions made, the agenda of any future meetings to be held and, again, inviting input. By having the Mediation Steering Committee function in a transparent process with full communications to all, the process decisions made for conducting the mediation session are generally accepted by the entire host of affected lawyers.

As noted, a “Mediation Steering Committee” can be formed and developed simply through the efforts of the mediator working with some of the lawyers representing key players in the multi-party lawsuit. In some very large cases, however, it might be advisable to have the Court appoint and empower a Mediation Steering Committee. This can be accomplished by enlisting counsel to secure, by stipulation or motion, a Case Management Order creating the Committee and judicially directing the Committee and the mediator to make mediation “process decisions” with an available appeal to the court if anyone dissatisfied with the decisions made.

Many dispute resolution professionals will question how much control a mediator should have over the mediation process. Some contend the overriding concern for protecting the parties’ self-determination in mediation should extend to procedural decisions about the process itself. An orderly and inclusive mediation of multi-party, multi-issue cases, however, requires central process control – a benefit that becomes difficult to achieve without singular decision making power. At some point, and at some level, someone needs to be in charge. If the mediator (or the Steering Committee) in charge maintains a level playing field in process decisions, exercising this level of control is usually not a problem.

Pre-Mediation Organizational Meetings – Setting the Goal

Face to face planning meetings usually work far better than telephone conference meetings. Attendance can be limited to

counsel, but having key party representatives (including insurance adjusters if possible) in attendance is invaluable. Securing party “buy in” to the mediation process in advance is as, if not more, important than having all counsel accepting the process decisions. Not only does party buy in save time, money and potential process disruption, once party representatives understand first-hand how the mediation process is supposed to work and have a personal, direct investment in the planning of the session, issues with adequate preparation and appropriate authority at the mediation session tend to never materialize.

The mediator should prepare an organizational meeting agenda that includes a check list of topics to be resolved. The agenda should be distributed in advance with an invitation for input on any other topics the participants want to have covered. Depending on the size of the case and the number of persons attending the meeting, expect a minimal half day duration. A neutral, accessible site is preferred.

At the outset, it will prove helpful to collectively establish a clearly achievable goal for both the mediation itself and the pre-mediation planning exercise. The goal to be achieved in mediating these cases is not necessarily to, “make a settlement happen”; the definition of success for these mediations should not be established as entering into a final settlement agreement. If a settlement results from the mediation program, fine. There are, however, many other readily achievable benefits that can come from an effective mediation program that might better serve as a planning focus point.

In simplest of terms, the parties have two options for resolution of their dispute. The dispute can be adjudicated, or the dispute can be reconciled. If the dispute is to be adjudicated, each party will convene before a third party neutral and engage in a positional debate as part of a fault finding exercise to determine who is right and who is wrong based on applicable standards. The outcome of the adjudication is a judgment, award, verdict, or ruling that resolves the dispute. If the dispute is to be reconciled on the other hand, each party will make mutual accommodations to meet or address defined individual interests and concerns. The outcome in that instance is an agreement, an accord, or an

understanding that resolves the dispute. The point here is simply that the parties have choice to make; they can adjudicate their dispute, or they can reconcile their dispute.

At the close of the mediation session, the decision makers who must choose the resolution option - want and need to make an intelligent, fact driven, decision. To fulfill their duty to themselves or their constituency, they want to choose the resolution option wisely. Good decisions are based on good data. Accordingly, we need generate as much factual data as we can get on both the adjudication and reconciliation options.

The mediation planning goal, therefore, would be to format and structure a mediation session that will provide the parties the best factual data possible on the two dispute resolution options; to put parties into a position to make an intelligent, factually driven resolution choice.

The specific information needed to understand the adjudication option focuses on the “positional debate” to be staged. What are the principal, determinative issues in that positional debate? What is the “center of the case”? What are the contentions to be asserted by each side and an overview of the data to be presented in support of those contentions? What is the range of possible outcomes? How long will it take? How much will it cost? What is the impact on future relationships? What are the collateral consequences of an adjudication proceeding?

The data necessary to understand the adjudication option is usually developed in opening presentations. Opening presentations should thus be planned and formatted in a manner to best present the factual data necessary to appreciate the nature of the debate to be staged. The goal in the opening presentations is not to win the argument, but to understand it.¹

¹ A disturbing current trend in mediation practice is the pressure to eliminate opening presentations altogether. A full discussion of that trend is beyond the scope of this article. Suffice to say, while there may be some argument for minimizing, or even eliminating, opening presentations in smaller cases, in multi-party, multi-issue disputes opening presentations are an essential part of the mediation process. The commonly expressed fear of driving the parties further apart with emotional arguments can be cured with pre-mediation

The specific information needed to understand the reconciliation option includes the actual underlying interests and concerns each party has in conflict and the accommodations that can be made to deal with those interests and concerns. While this usually translates into arriving at a final acceptable dollar amount for settlement, other non-economic factors are often involved. It is also important to identify and understand the outcomes available in reconciliation that would not be available in adjudication. Such things as letters of reference, referrals, voluntary audits, financial verification procedures, future business opportunities, trade accommodations, discounts and even simple apologies should all be explored and developed.²

Data on the reconciliation option is usually developed in caucus sessions.

With that goal established, therefore, the pre-mediation organizational focus will be to plan, structure and format the mediation session to develop the information necessary to give the parties basis for making intelligent, fact driven choice between adjudication and reconciliation. Don't push settlement, push information.

commitments to maintain objectivity. The notion that opening presentations are not necessary because the parties already know everything about the case is, more often than not, simply inaccurate in these sorts of disputes. While each party may be familiar with their specific piece of the debate, rarely has anyone seen or gained an accurate impression of the nature of the overall dispute – a compelling piece of data in understanding the adjudication option.

² It goes without saying that a realistic evaluation of adjudicating the dispute - measuring the risk and reward involved in going to trial, defining the potential exposure and consequences of an adverse outcome, understanding true costs in time and money - are all important parts of the thought process in developing a reconciliation option. In the relative safety of a confidential caucus session with neutral mediator leading the conversation, these aspects of the dispute should be surfaced and realistically examined. Simply evaluating the litigation exposure, however, does not need to drive the entire caucus discussions. Settlement agreements need not be motivated by a simple fear of losing at trial. As noted, developing a viable, compelling reconciliation option can involve other things to consider as well.

The fact of the matter is . . . in complex, multi-party, multi-issue lawsuits, good information will usually push the settlement. More often than not, aspects of commercial certainty, cost containment, precedent, time factors, and the inherent difficulty in adjudicating these kinds of lawsuits will generally drive the parties toward selection of the reconciliation option to resolve these disputes.

Pre-mediation Organizational Meetings – Shape of the Table Issues

Logistical details, or “shape of the table” issues, should be agreed upon early in the mediation planning phase.

Location – facilities: The location of mediation session will be driven by the space requirements for opening presentations and caucus sessions. After establishing a probable attendance count for the mediation session, the size of a room necessary to accommodate all party representatives and their respective counsel for the opening session component of the mediation can be established. Following that, how many break-out rooms will be necessary to handle the caucus sessions? How will food and refreshments be handled? Is there accessible parking and access after normal working hours for late night work? Large law firms may have adequate facilities to handle multi-party mediations cases. If not, hotels or conference centers might be utilized.

While these factors might seem obvious to many, it is surprising to see how many mediations are scheduled without sufficient attention to requirements for simple accommodations.

Pre-mediation submissions. A schedule for submitting Mediation Statements to the mediator, their length, and whether they are to be private, shared, or both should be agreed upon in advance. Where possible, the parties might agree upon submitting a joint set of key exhibits for the mediator’s review in addition to separate Mediation Statements.

Resolve authority issues. Ideally, party representatives to a significant mediation should have full authority to enter into a final and binding settlement agreement under any terms and conditions

– without the need for further consultation. As described in the Florida Rules of Civil Procedure, for example, party representatives attending a court ordered mediation should be the, “final decision maker with respect to all issues presented by the case”³ In cases of insurance adjusters attending mediations on behalf of an insured, one would expect to see a representative of the carrier with full authority to pay policy limits or the plaintiff’s last demand, whichever is less.⁴ Unfortunately, corporate and insurance representatives often attend mediation sessions without full authority to settle and often with significant limitations on authority in place. If the absence of authority, or serious limitations on authority come as a surprise to everyone else at the end of a long, intensive mediation session, significant setbacks to ever reaching a reconciliation can occur. Invariably, someone will feel misled and deceived, giving rise to questions of good faith.

Part of pre-mediation planning for multi-party, multi-issue mediations should therefore include a forthright discussion about who will be attending the mediation and the authority they will bring. Any limitations of authority should be confronted and acknowledged and resolved before the session is convened.

In cases involving governmental entities with sunshine law restrictions on their decision making powers, full details of all steps necessary for securing final approval of any settlement agreement reached should be discussed and understood.

Co-Mediators. As the scope and content of the mediation session begin to come into focus, a discussion might be had concerning the need for a co-mediator. In many instances the sheer number of players and volume of component parts to a global reconciliation will warrant more than one person facilitating claim resolutions.

Closure Requirements. No pre-mediation planning session should be completed without a detailed analysis of the scope and content of any settlement documents that would be necessary in the event a reconciliation is reached. Counsel for all parties should implement procedures for the advance preparation, review and approval of settlement agreements including release and dismissal forms,

³ FlaRCP 1.720(c)

⁴ See, FlaRCP 1.720(b)(3)

indemnity provisions, confidentiality terms, lien releases, mutual non-disparagement terms, as well as any other special conditions to accompany resolution of the case. In multi-party cases, one or more volunteers might be selected from among counsel to draft and circulate proposed settlement documents for general approval as to form before the mediation session commences. As will be discussed later, this simple step will save valuable session time and avoid potential road blocks to a complete resolution of the dispute.

Planning for Opening Sessions – Understanding the Adjudication Option

Scope of Opening Presentations. Opening presentation planning begins with a general agreement on the kind of information that will be needed for counsel and their clients to fairly consider the “positional debate” that will highlight their adjudication option. Opening presentations are the best opportunity for everyone to reach an understanding of what the lawsuit will entail. Due to limitations of time, however, focus should be placed on surfacing only the factual contentions that make up the controlling issues in the dispute - the, “center of the case” – as opposed to process debates and inconsequential arguments. A general consensus can be reached in this respect by careful issue refinement exercises facilitated by

Once a topical outline of the data to be presented by each side is established, reasonable time should be allocated to allow each party to fairly provide an overview of their side of the positional debate. It is not necessary to exhaustively explore every conceivable argument each party may wish to make at trial in the opening presentations. As a general proposition, however, if the basics of the positional debate are not fully aired in the opening session phase of the mediation, if any party leaves the opening session feeling their respective side of the argument has not been fully expressed, those parties will continue advancing their positional arguments in the following private caucus sessions with the mediator. In multi-party mediations, controlling caucus time is critical. When a mediator gets tied up in caucus with one party extolling the merits of their positional debate rather than recognizing vulnerabilities and exploring reconciliation options, valuable caucus time with other parties is lost. Caucus session time

should not be wasted in voicing aspects of the positional debate that were not expressed in the opening session.

Use of Experts in Opening Presentations In many disputes the controlling issues will center on testimony to be provided by experts. In those cases, an appreciation of the adjudication option might well include a preview of counterbalancing expert presentations; how well they are delivered, how persuasive they sound. Some consideration, therefore, should be given to whether the parties might want to provide direct input from experts during the opening presentations. While using experts in mediations can be helpful, however, it should be undertaken with caution. When opposing experts opine in each other's presence, they tend to stray into cross examining each other with technical debates over methodology rather than presenting positive conclusions. This can be confusing and diversionary. Further, some more forceful experts tend to go beyond simply presenting opinions and inject themselves into the parties' negotiations. If allowed, they can end up taking over the mediation session.⁵ If experts are to be used, therefore, some consideration might be given to limiting their participation to simply providing information during the opening sessions.

Tone and Demeanor in Opening Sessions. Ground rule agreements should also be reached on the appropriate tone and attitude to be adopted in the opening presentations. In most commercial disputes, a factual, objective approach with a direct and informative delivery will be far more successful than confrontational or unduly argumentative presentations. Emotional accusations, ad homonym attacks should be discouraged. Again, the goal here is sharing information – not winning arguments or attempting personal intimidation. With that said, however, it should be remembered that a key function of opening presentations in the mediation of many cases can giving the parties an opportunity to vent – to the mediator or to each other. In planning the mediation opening presentations the question of whether the specific case is one in which party participation for this purpose would be productive

⁵ In some instances, the parties and their counsel may consciously prefer to allow their respective experts a broader level of participation in the mediation process.

should be explored. Where appropriate, maintaining flexibility for the parties to air their concerns could be productive.

Discuss and agree upon the opening presentation equipment that will be needed; power point projectors, screens, exhibits, easels, flip charts etc. Be sure arrangements for the utilization of those devices are made.

In addition to setting rough time limits for each parties' direct presentations, explore whether time should be allocated for rebuttal presentations. Establish general ground rules for questions during the presentations – “clarifying” questions can be helpful in understanding what is being said, attempts at cross examination can be harmful.

Many times it may prove helpful to break out sub-groups for private opening presentations to explore aspects of the adjudication option that might best be discussed among a few rather than the many. If appropriate, time should be allowed for this contingency as well. (See discussion below, “*Setting the Mediation Session Agenda*”, footnotes 6, 8)

Planning for Caucus Sessions – Developing the Reconciliation Option.

Caucus sessions are used to develop the reconciliation option – to develop and define the deal. Caucus sessions should be focused on defining the respective parties' interests and concerns in the dispute, and identifying accommodations they are willing to make to each other in order to deal with those interests and concerns. In commercial settings, this usually takes the form of principled negotiations – bartered steps toward a mutually acceptable accord.

While parties may have pre-determined overall settlement goals, the precise terms of the deal which will evolve through the negotiation process are usually not predictable. For the most part, the final deal arising from a mediation session in multi-party, multi-issue cases is discovered, not foretold.

In multi-party, multi-issue cases, global settlements will consist of a series of component party settlements resolving the body of issues making up the whole dispute. Logistical questions arise with respect to the order or sequencing to be used to develop resolutions to the subsets of disputes making up the overall problem. Caucus session work should have a logical “negotiation pathway” which appropriately sequences reconciliation of individual component issues in a march toward a global reconciliation of all issues.

The best negotiation pathway will vary from case to case. There are several options available for consideration. Among the potential negotiation pathways discussed below are, “Top Down”, “Bottom Up”, “Issue Group”, “Money Group” and “Key Issue.”

“Top Down” Negotiation Pathway. As the name suggests, a “top down” negotiation pathway calls for the negotiation of a final settlement of the main claim and counterclaim first, which is then followed with settlement negotiations of the underlying cross claims, third party and fourth party claims. In this pathway, the primary defendant accepts settlement with primary plaintiff, then seeks to recoup some or all of the settlement funds from indemnity or contribution claims asserted against the lower tier defendants. A “top down” pathway may look something like this:

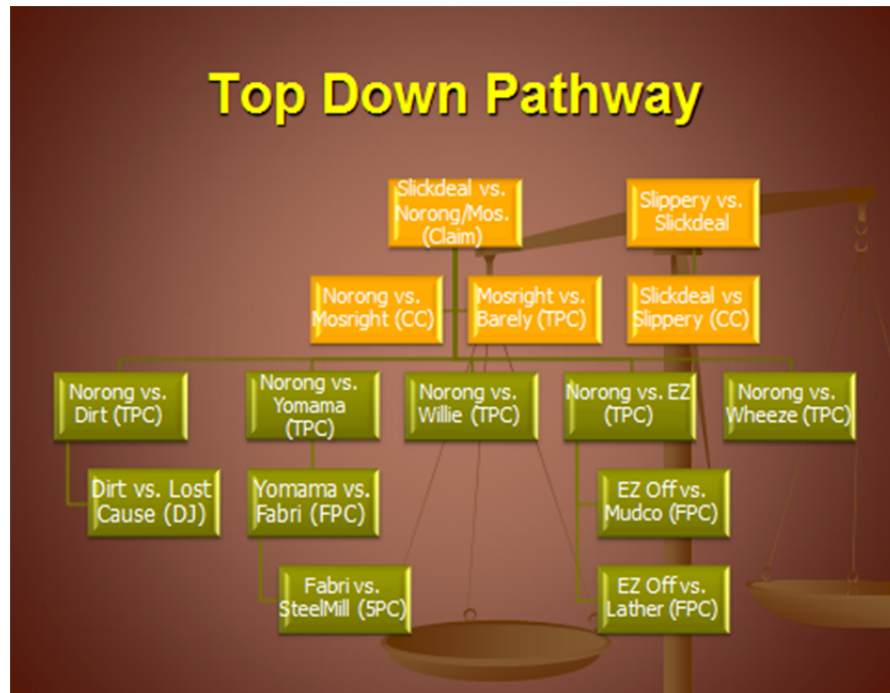


Figure 3 “Top Down” Negotiation Pathway – settle claims asserted by parties in gold first

In our model case, the goal would be to negotiate a settlement of the main claim by the Owners (Slickdeal) against the Prime (Norong) and Designer (Mosright) first, then work downward to settle the cross and third party claims. (In our example we have also included a “topside” resolution of the dispute between the bonding company (Slippery Mutual) and the Owner as well).

There are some benefits to a top down negotiation approach. In some cases, the relationship between the Owner and the Prime or the Designer may warrant a prompt resolution of their dispute regardless of the outcome of the secondary claims. An expedient resolution of the topside main claim may, for example, serve to enhance or protect a valuable, ongoing business relationship between the principal players in that dispute. Further, the main claim may present significant variables in exposure that are time sensitive – drawing out the settlement of the main claim until the lower tier claims are resolved may adversely impact the prospects of resolving the main claim.

There are, however, also definite downsides to a top down negotiation path.

For one thing, in our Boggy View model case reaching a final settlement of the main claim puts the prime contractor and designer at risk of not raising dollars to adequately recoup financial commitments made in that resolution. Third party defendant subcontractors and vendors may not buy into unilateral concessions made by the prime contractor or designer to the owner in settling claims involving their work. By settling the main claim out first, the contrasting evaluation of litigation costs versus settlement value may change for the smaller third party contributors. What was once a formidable 20 day global trial of everyone's issues now becomes a more manageable and less onerous one day, single claim trial which adds strength of the third party contributor's settlement position. Unilaterally negotiating top claims down doesn't usually help securing contributions from the bottom claims.

On a more practical note, during a multi-day mediation session where significant focus is placed on settling the main claim first, the third party defendants have lots of down time in their respective caucus rooms awaiting outcome of those negotiations. (In fact, if a "top-down" pathway is selected, it might be best to divide the mediation session in two parts to be held on separate dates. Deal with the main claim settlement negotiations in the first session, then separately deal with the third party defendants when they will become the primary focus of session settlement negotiations).

"Bottom Up" Negotiation Pathway – In a "bottom up" negotiation path, settlement efforts would begin with claims against third party and fourth party defendants first. With those resources in hand, as well as information gathered in negotiating those claims, an upward approach is made to reach settlement of the main claim and counter claim later in the process.

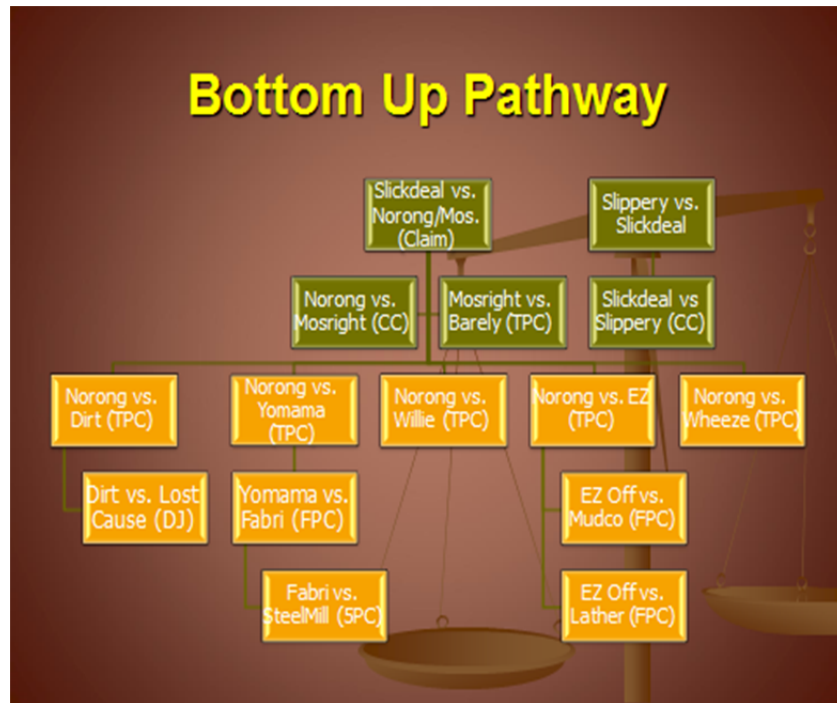


Figure 4 “Bottom Up” Negotiation Pathway - settle claims by parties shown in gold first.

In our model case, the prime contractor (Norong) would work downward to negotiate third party claims against its subcontractors (Dirtduab, Yomama Steel, Slick Wille Sealants, EZ Off EFIS etc.). At the same time, the third party defendant subcontractors might work down to settle claims with the fourth party and fifth party defendants as well. The point here would be to gather resources available then return to attempt settlement of the main claim.

A primary benefit to a bottom up negotiation path is that the prime contractor defendant can approach main claim negotiations with more certainty as to what resources are globally available to help defray settlement costs. By negotiating the lower level claims first, the prime defendant will know what’s been offered as well as having gained a reasonable expectation of what more might be available.

One downside to a bottom up negotiation path is the fact that the main claim plaintiff (Owner) is kept waiting until the

outcome of third party claim negotiations are determined. Further, the final settlement amount of the Owner's main claim is not necessarily decided by outcome of third party claims. The primary defendants' obligations to plaintiff are not always driven by available indemnification or contribution from secondary defendants.

“Top Down - Bottom Up Blend” Negotiation Pathway In this process the parties would start with a top down negotiation simply to establish parameters of global settlement of the main claim. Where possible, the parties might even engage in one or two rounds of “top down” negotiations simply to more sharply define potential main claim settlement ranges. In any event, based upon information concerning the probable amount necessary to secure a top down settlement, the parties would then proceed with bottom up settlement negotiations. By offering final or interim settlement scenarios to define the resources available from below, the parties return to top down negotiations. Now armed with a better understanding of real and potential resources from the underlying claims, more informed negotiations can be held with the main claims.

If time and circumstances permit, the parties might return for a second round of all, or some, of the lower level claims. This might also be a good time for the prime defendant to consider “pay and chase” options (funding the third party defendant subcontractor's share of a global settlement, then continuing indemnification/contribution claims separately) or “pay and assign” options (paying out whatever it takes to settle the main claim with an assignment of its claims against the underlying third party defendant subcontractor to the plaintiff Owner).

The obvious benefits of a blended “top down / bottom up” negotiation path is that it keeps everyone in game until path is clear for everyone to get out. It also preserves the opportunity for carving out third party defendants with partial settlements and assignment of claims if necessary.

The challenge presented by a blended procedure is time management during the caucusing phase. There will be long waits between caucuses with the different parties. A blended negotiation

pathway also requires focused, attentive mediation services; the process features concurrent, interdependent negotiations with different parties involving different issues. Using more than one mediator will be productive in these situations.

“Issue Group” Negotiation Pathway – In this process, settlement negotiations are channeled to deal with related groups of claims having common nucleus of facts. If issue refinement exercises for the global dispute reveals a relationship among the many claims that lends itself to sequencing efforts to reach settlement, this process may prove useful.

In our model case, we might thus see initiating settlement of the cladding issues first (shown in red as Norong, EZ Off EIFS, Mudco and Lather) as follows.

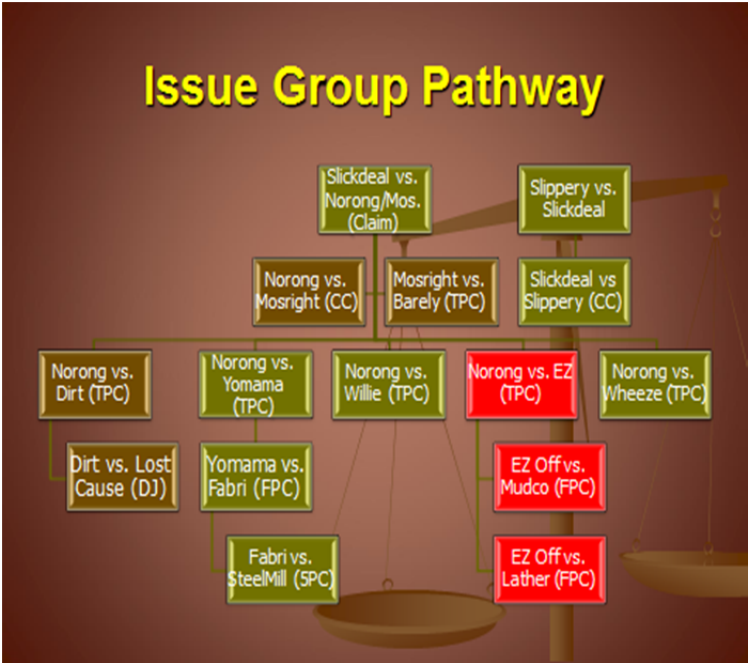


Figure 5 “Issue Group” Negotiation Pathway – settle select issue group claims (here, exterior cladding) shown in red first.

The benefits to following an issue group negotiation pathway is that it allows focus on a smaller group of parties – which can often be separately scheduled and completed without

involvement from others to dispute. This allows the mediator and the affected parties to deal with a more manageable body of data, results in less down time between caucuses, and less crowds and confusion during mediation sessions.

An issue group negotiation pathway works best (if not exclusively) when the claims are capable of independent consideration and resolution – irrespective of other aspects of the main claim. In our Boggy View model, for example, settlement of the site preparation claims is not dependent on, or related to, a settlement of the structural steel claims; each has different and independent damages and factual foundation. One note; settling parties exiting the dispute early after an issue group negotiation will generally want some protection against being brought back into suit by other non-settling defendants. In instances where there is no relationship between the claims settled and the claims remaining, the chances of being dragged back into the lawsuit are minimal. In instances where there may be a basis giving rise to a non-settling party to seek, for example, a contribution claim against a settling party, indemnification measures should be discussed to protect the settling parties.

“Key Issue” Negotiation Pathway – In cases where issue refinement measures have revealed one claim, or one aspect of a claim, might make other claims inconsequential or of lesser importance, a mediation session might be planned to deal with the “key” issues first.

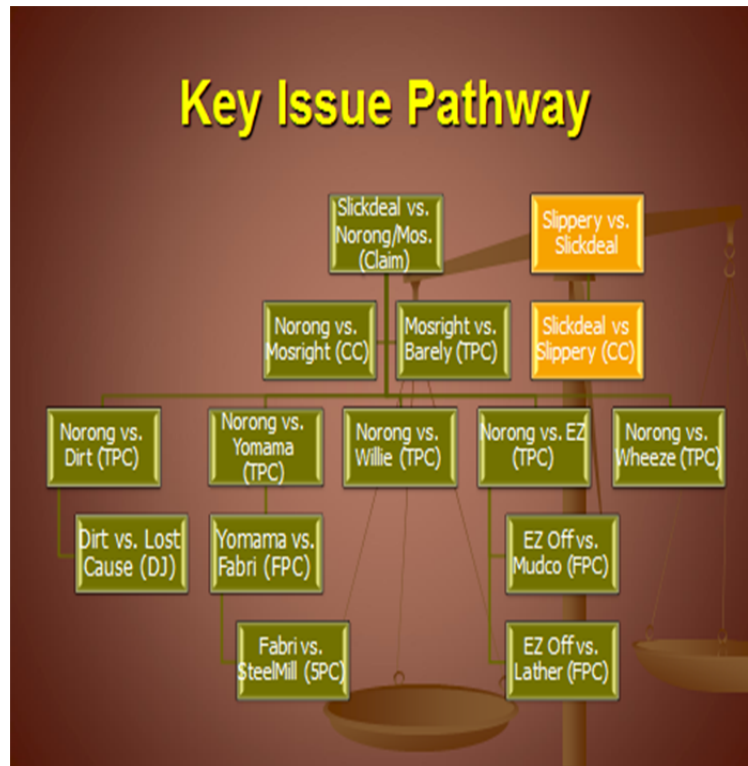


Figure 6 – “Key Issue” Negotiation Pathway – settle pivotal claims (here, bond claim shown in gold) first.

For example, in our model case the economic status of the prime contractor Norong (and its subcontractor third party defendants) may be such that the only source of relief for the Owner Slickdeal may be through the performance bond issued by Slippery Mutual. If there is no bond, there is little point in pursuing other financially destitute parties. Tackling settlement of the claim and counterclaim involving the validity and coverage of the bond may thus be a matter of priority.

Another “key issue” negotiation pathway might be presented in cases with significant damage questions. Oftentimes, the debate over liability lessens when the amount and logic of the damage claims reach common ground. Many times the nature and extent of damages available will serve to drive the entire lawsuit.

When the only resources available to cover asserted claims are insurance policies that come with significant coverage issues, focusing on those issues early may prove helpful. As with the bond

situation in our model, if there is no insurance coverage and no other available assets, there is no pragmatic value to pursuing claim – however compelling the liability arguments might be.

While the benefits of a key issue negotiation pathway will include a sharp reduction of litigation costs when resolution of less consequential issues becomes unnecessary, the process does present challenges. “Issue refinement” is a critical talent for mediators and counsel. Agreeing on the key issues can be difficult. Participants in the lawsuit tend to get focused on arguments they think they can win – without really analyzing the overall good a victory on that matter will produce.

Other negotiation pathways might include addressing the “Big Dollar Claims” first – attack the issues in the case having the highest economic impact. Alternatively, taking a “Little Dollar Claims” pathway to attack the small dollar claims first, can often build momentum toward reaching resolution of the remaining disputes.

Pre-planning the appropriate negotiation pathway for the caucus sessions of a multi-party, multi-issue dispute is a critical step. As will be discussed below, having everyone on board for the sequence and timing of events in this phase of the mediation session can be a major key to success.

Confirming and Documenting The Mediation Session Plan

Once the overall session plan is adopted – either by the Mediation Steering Committee or the group as a whole – a letter or email message should go out to all parties from the mediator recording and confirming the planning decisions reached. As discussed earlier, consideration might also be given to converting the agreed mediation session plan to another Stipulated Case Management Order. This will serve to bring in Court in to backstop the agreed mediation session commitments as well as provide a forum for resolving procedural disputes that may arise as the plan unfolds.

Setting Mediation Session Agenda for the Boggy View Condominium Association Construction Defect Case

With the “shape of the table” planning decisions made to handle the logistical requirements of the mediation session (conference room space, break out rooms, food and refreshments, etc.) the time has come to prepare a working agenda for our model Boggy View Condominium construction defect case. Based upon issue refinement and information gathering work completed to date, we have decided to schedule a three day session utilizing a “top down/bottom up” blend negotiation path following the opening presentations. A working agenda for the mediation, along with footnotes describing practice suggestions for each phase, may thus look something like the following.

Agenda - First Day

Opening Sessions - All Parties (*Exploring the Adjudication Option*)

- Owner/Plaintiff’s Opening Presentation – Owner/Plaintiff’s side of the, “positional debate” making up main claim against Primary Defendant Prime Contractor and Designer⁶
 - Liability overview
 - Damages overview
- Primary Defendants’ Responsive Presentation - Defendant’s side of the “positional debate” – touching upon defenses common to all defendants⁷

⁶ The Owner/Plaintiff’s opening presentation would typically assert a global claim as to the primary defendant with the expectation that the primary defendant will then sort out who should be paying what part of the total claim among the named third party defendants. While it is possible for the Owner/Plaintiff, through itemized damage presentations or even direct liability discussions, to implicate a specific third party defendant in its opening presentation, the consequences of that undertaking should be evaluated in advance. The plaintiff may be focused on one claim for one number against the primary defendant, but settlement negotiations will necessarily involve the primary defendant pursuing component claims against several third party defendants. Nothing in the plaintiff’s opening presentations should unnecessarily compromise that task.

⁷ With all parties (including the Owner/Plaintiff) present in the room, the Defendant’s presentation at this stage should be limited to common defenses

- Owner Rebuttal to General Defenses;
Owner issues global demand⁸
Owner retires from group meeting – defense group remains assembled
- Defendants’ Presentations on Their Claims against Third Party Defendants
 - Confidential discussions among defense group concerning third party indemnity and contribution claims; what are the contentions underlying the positional debate on this aspect of adjudication option?⁹

against the Owner’s claims shared by all defendants at all levels, i.e., the owner’s interference in construction, its failure to properly maintain the property, flaws in Plaintiff’s damage calculations, and perhaps insurance coverage issues that would preclude recovery on certain claims. As will be seen later, in this model the primary defendants will have a private opening presentation session with the third party defendants alone to present the positional debate making up the third party claims and defenses.

⁸In order to more effectively initiate the settlement negotiation process in multi-party mediations, it is important that the plaintiff appear at the mediation session with a clear demand. The demand may be a re-publication of an earlier unanswered demand, a new demand based upon pre-mediation negotiations, or even a fresh demand made in response to points raised during the opening session. The limited time available at a multi-party mediation session, however, should not be spent in formulating the plaintiff’s original demand; a prompt transition from the opening presentations (describing the adjudication option) to the caucus sessions (developing the reconciliation option) requires a clear starting point in the form of a prompt demand.

⁹The Defendants’ opening presentations describing their claims against the third party defendants, and the responses to those claims, need not be conducted in the presence of the Plaintiff. Holding these discussions without the Plaintiff in attendance will generally promote more forthright informational exchanges among the defendants’ camp.

- Defendant/Third Party Defendant Group Session - Collective evaluation of Owner claims by all defendants.¹⁰

Primary Defendants and Third Party Defendants now retire from the joint defense group meeting and relocate to individual breakout rooms to begin the first of the “bottom up” caucus negotiations.

Preliminary Caucus Session – Primary Defendants and Third Party Defendants.

- Formulate plan for individual demands against third party defendants¹¹
- Initiate first round demands against third party defendants

Agenda - Second Day

Caucus Sessions – Round One - Defendants and Third party defendants (*Developing the Reconciliation Option*)

- Primary Defendants continue concurrent negotiations with third party defendant

¹⁰ Again, in the security of a “defendants only” discussion group, it is often helpful to get a realistic consensus among the many defendants as to the overall exposure presented by case. In addition to candid exposure evaluations, what are the defense group’s realistic estimates of fees, costs, time, and consequences of proceeding with adjudication? The idea is to re-focus the defense group from a relatively myopic visualization of their one part of the lawsuit, to a broader appreciation of the litigation as a whole. A month long trial is a month long trial, and the attendant costs of legal representation are the same – even if the matter at stake for a particular party involves a dollar claim that is a relatively small piece of the larger dispute.

¹¹ To the extent possible, it is best for the primary defendants to pre-plan what their opening demands will be on the third party claims and have those demands ready to advance immediately after the opening session. It is often the case, however, that events taking place during the opening sessions (among all parties, as well as sessions involving only the defendant/third party plaintiff and third party defendants), will significantly impact what the third party demands will be and the direction the “bottom up” negotiations will take. Some flexibility may be required adjust the third party plans accordingly, but care should be taken to launch the bottom up caucus sessions with clear demands as quickly as possible.

subcontractors and cross-claimants; all facilitated in private caucus sessions by mediator(s)¹²

- The negotiations in the concurrent third party claims might include “Cadillac” settlement proposals (contemplating a resolution of the third party claims regardless of whether there is a global settlement) or “Ford” settlement proposals (resolving the third party claims only if there is a global settlement, with the understanding there will be further demands on the third party defendant if a global settlement is not reached).
- In concurrent multi-party caucuses, keeping an accurate record of separate negotiation steps for each party is critical. To avoid miscommunications in this respect, use flip charts or dry erase boards in each caucus room (particularly in the primary defendants’ room) to record the several demands, offers, counter offers from each of the third party defendants as they arise.
- When there is one proposed settlement number coming from more than one funding source in same caucus room (insured and insurer, different insurers for same insured, different co-third party defendants on same issue, etc.) it is also essential that there is an accurate record and confirmation of the specific components of the single number going out in the negotiations.

Caucus Sessions – Primary Defendant’s First Response to Plaintiff (*Developing the Reconciliation Option*)

¹² Armed with initial demands from the primary defendant for each of the third party claims, the mediator (or mediator team) initiates private caucus meetings with each third party defendant to present those demands and solicit a response. Timing is critical here. Typically, there will be several third party defendants engaged in concurrent negotiations with the primary defendant and only one, or perhaps two, mediator facilitating those discussions. The caucus time available should not be unduly focused on revisiting the positional debate making up the adjudication option.

- When the primary defendant concludes its first round of “bottom up” negotiations with the third party defendants, and has developed a better feeling for what resources are potentially available from those sources, it may be a good idea to go back and respond with an obtainable counter to the main claim.¹³ At the same time, a report might be made to the primary plaintiff concerning where each of the the third party defendants are with respect to their piece of the main claim, along with other matters that will affect the reconciliation option (insurance coverage issues, underlying factual developments, etc). This also a good opportunity to generate some movement downward on primary plaintiff’s global demand.

Caucus Sessions – Round Two - Defendants and third party defendants (*Developing the reconciliation option*)

- Based on primary plaintiff’s movement, the main defendant now returns to the third party defendants with follow up demands on their particular pieces of the whole claim. The effort to be made here is to generate movement upward with additional contributions from third party defendants.
- In the process of re-visiting the third party defendants, it is important to keep everyone apprised of status of negotiations with primary plaintiff’s main claim. The focus here should still be working toward a global settlement, with each party well informed on where their particular piece of the resolution comes into play.

¹³ At this point, the primary defendant will have clear first round offers from the third party defendants in hand which, coupled with any contributions the primary defendant (or its carrier) wish to make, will generate a sum certain to advance to the Plaintiff. There is often some temptation here to add to that number an additional amount the primary defendant thinks may, or should be, collectable from the third party defendants. At this stage of the negotiations, however, great care should be taken in advancing or even suggesting sums that have not been committed.

Agenda - Third Day

Caucus Sessions Round Three; Partial or Final Closure

- Partial Settlements - While a global settlement is the ideal, in the event there are third party defendant holdouts that may be compromising that goal, this may be the time to begin consideration of partial or, “carve out settlements” which resolve the claims that can be settled, and leave open the claims that cannot be settled. There are several variations of carve out scenarios:
 - “Pay and chase” settlements - in which the main defendant will fund full settlement then continue to pursue indemnity from non-settling third party defendants.
 - “Pay and assign” settlements - in which the main defendant pays the Plaintiff a cash amount coupled with an assignment of its indemnity claims against the non-settling third party defendants. This may also apply to situations in which an insured may choose to settle with an assignment of a potential bad faith claim against a reluctant insurance carrier.
 - In the final analysis, a global settlement resolving all claims as to all parties is clearly the preferred outcome. Often simply initiating a “carve out” discussion will stimulate full participation in a global settlement.

- Documenting the Deal. As discussed above, careful pre-mediation planning would include prior development and approval of settlement documents by all counsel. Ideally, therefore, at this stage the parties would simply utilize previously circulated and agreed form settlement agreements, releases, stipulations of dismissal etc. With appropriate advance planning, reaching a final documented resolution should be nothing more than simply filling in names and numbers.

In instances where advance preparation of the form of settlement documents has not occurred, however, it will become necessary to record and have the parties sign off on the deal at the conclusion of the session.¹⁴ This can be a critically dangerous point in the mediation.

After several days of intense negotiations culminating in what might be difficult concessions on all sides, nerves are stretched and tempers are often short. The settlement reached at this point might be likened to a “fragile flower” that can quickly be crushed with prolonged debate and wordsmithing over the precise language of a settlement agreement.

If the parties have the stamina and temperament to continue with a final contract negotiation, proceed accordingly. It is always better to have a “final” deal documented as quickly as possible. In multi-party, multi-issue mediations, however, counsel and the parties might be more comfortable with signing a simpler, bullet point agreement recording the general accords of the resolution.¹⁵

“Downstream Mediation Activities”

What to do when the case doesn’t entirely settle.

If the case, or any component of the case, cannot settle, an objective analysis should be made as to exactly why it cannot settle – what is the mutually recognized roadblock to reconciliation? Absent outlier subjective or emotional factors, the points blocking settlement will usually be either unresolved questions of law or unresolved questions of fact. Once those issues are precisely articulated, the question might be asked, “What additional information would be helpful in shedding light on the areas blocking

¹⁴ It goes without saying that, absent a written agreement signed by the parties, there is no enforceable settlement of the mediated dispute. Mediation confidentiality typically precludes any participant’s verbal commitments from being introduced into evidence.

¹⁵ The finer points of drafting a settlement agreement at the conclusion of a mediation session are beyond the scope of this article.

settlement? What additional legal or factual input is needed?”

Having established the outstanding questions, the next task is to collectively agree upon a cost effective and timely process for gathering the answers. How can we quickly and efficiently go about developing more information on areas of dispute blocking settlement? In this process we work to devise and schedule “downstream mediation activities” aimed at cooperatively gathering the additional information necessary to give reconciliation a chance. It is important to note all downstream activities can be conducted under umbrella of mediation confidentiality, as part of the ongoing mediation process. In short, we adjourn the mediation session, independently or collectively complete the agreed downstream activities, and reconvene to work with the information developed.

Downstream Mediation Activities – Examples - Legal Issues

There are a number of options for developing further legal data that might help reach a reconciliation:

- Counsel for the parties might simply conduct further legal research, prepare written briefs to be exchanged as additional mediation submissions.
- The parties can retain a mutually agreed legal expert (a retired judge, experienced specialty practitioner etc.) to conduct a private hearing on the legal issue – then announcing a “ruling” to parties which might be a preview of what the actual court might do. By prior agreement, the ruling can be binding or non-binding as to the issue.¹⁶

¹⁶ Another option available in the event the remaining legal issue would be determinative on the claim or a critical component of the claim, would be to place a “High/Low” settlement number on the outcome. If the plaintiff wins the issue before the private judge, the defense pays the “high”; if the defense wins, the plaintiff accepts the “low”. The defense is thus protected with a cap and the plaintiff is protected with a minimum recovery. Either way, the case is over.

- The parties might utilize the mediator as messenger or embassy to the Court in order to facilitate a formal hearing and ruling on key legal issue.

Downstream Mediation Activities –Examples – Factual Issues

A number of options also exist for developing additional factual information to help break negotiating logjams - again, unless otherwise agreed, all under the umbrella of mediation confidentiality;

- The parties can initiate cooperative joint investigations, inspections, or testing programs to confirm specific site conditions
- A jointly executed formal or informal document production and review session often reveals valuable information,
- A cooperative joint neutral expert evaluation to determine the best remediation measures and actual repair costs estimate,
- A joint financial audit or economic damage analysis.
- Private joint interviews with key witnesses or cooperative, limited scope depositions
- Joint focus group presentations to gather data on potential jury reactions.
-

The only limit on downstream mediation activities is the creativity and level of cooperation exhibited by counsel, the parties, and the mediator.

Conclusion

Clearly, advance planning is a critical key to successfully mediating multi-party, multi-issue disputes. Through pre-mediation organizational planning sessions in one-on-one meetings with the mediator, designated party group conferences, or through a Mediation Steering Committee, every effort should be made to get organizational “shape of the table” and formatting decisions resolved early. At the same time, the parties can confirm authority

requirements, pre-approve closure documentation, and establish rough guidelines for effective time management during the session itself. Wherever possible these organizational decisions should be memorialized in written agreements or stipulated case management orders. Structure the mediation time together carefully while maintaining sufficient flexibility, but above all, have a plan. Don't let these mediations simply happen.