Practical Considerations for Mediating Complex Cases

By Jane I. Milas – September 8, 2016

Complex cases—those that involve numerous parties; complicated technical, scientific, or industry-specific issues; and/or large dollar amounts—may at first appear to present insurmountable obstacles to mediation. Yet these are precisely the sort of cases that call out for mediation. In these major cases, the cost of litigation, both in terms of dollars and the time involvement of the parties' key personnel, can easily overwhelm even a sophisticated and successful business. The negative publicity and hard feelings among the parties in a high-profile commercial case can affect business development and future business opportunities. The public nature of litigation, with its open hearings and accompanying public access to court documents, can subject parties to inaccurate media reports and unwanted public scrutiny. Mediation, when structured and handled appropriately, can mitigate or avoid many of these collateral consequences of litigation.

Complex cases, however, call for careful consideration in order to structure a successful mediation. This article will outline some particular issues and practical tips to keep in mind when mediating a complex case.

Define with Your Client What Counts as a "Successful" Outcome

Any lawyer who has mediated a case—large or small—has probably heard the mediator say that the mediator and lawyers know a mediation is successful when all parties are similarly unhappy. While an unhappy client is not the goal of mediation, this tongue-in-cheek observation highlights an essential step in any mediation: The lawyer and his or her client must set reasonable expectations for a mediated result. Clients need to understand that mediation is not a trial in which there is a "winner" and a "loser."

In a case with two parties and relatively straightforward legal and factual issues, setting reasonable expectations means discussing with the client the strengths and weaknesses of each party's case, the potential cost of future litigation, and the relative probabilities of success. That discussion will yield a range of acceptable settlement amounts as well as potential resolution of any nonmonetary issues.

In a complex case, this sort of targeted discussion generally is too simplistic. Minimizing the preparation needed in order to set reasonable expectations and short-circuiting the process of client educating is one of the best ways to ensure that a mediation in a complex matter fails. Instead, make sure that you have your clients' "buy-in" to the benefits of mediation and to doing the work necessary for a successful process. Then, discuss with your clients the strengths and weaknesses of each party's claims and/or defenses in advance of the mediation, think through possible outcomes with each party in mind, and learn from your client what ideal and acceptable resolutions of the various issues presented by the case might look like. Set reasonable expectations about the extent to which your client will be able to influence the settlement terms

that apply to each and every party and the degree to which compromise might be required to achieve settlement.

Obtain the Major Players' Commitment to Participate in the Mediation Process
In a complex case, it is imperative to obtain the commitment to participate fully in a mediation from at least those parties who appear to have the bulk of the exposure. For example, a large construction case with allegations of defective design, faulty construction, delays, payment issues, code violations, and work requiring repair and replacement may involve design professionals, the general contractor or construction manager, subcontractors, suppliers, payment and performance bond sureties, and the owner's representatives. The list of parties can easily exceed 20 or more entities. The more parties from whom you can obtain agreement to participate in the mediation, the better, but in a complex case there often are parties whose exposure is more limited and narrow. A successful mediation can be structured without the participation of these "bit players" as long as the major players commit to mediate. Without the major players, the mediation stands little chance of success. Even if the factual and legal issues are such that potential liability can be apportioned with little or no overlap, parties will be disinclined to settle with one opponent when they will still have to litigate with other major parties.

To ensure buy-in from the major players, consider drafting a mediation agreement with the assistance of the mediator. While no one wants to add another layer of complexity to an already complex matter, a mediation agreement can serve several useful purposes. Although parties can withdraw from participation in a voluntary mediation scenario, parties are less likely to simply pull out of a process to which they have agreed in a negotiated writing. And, the mediation agreement can also outline the parties' responsibilities for payment of mediation expenses and set a schedule for mediation-related discovery, position statements, and mediation sessions.

The mediation agreement should cover these recommended topics:

- An initial outline of the kind of information exchange the parties need—e.g., mutual exchange of documents, a limited number of depositions, etc.—to be supplemented if necessary with the assistance of the mediator.
- A provision for the exchange of expert reports and any power point or other presentation materials the experts intend to use at the mediation. The agreement may indicate that the reports are for purposes of mediation only.
- A provision for a written submission to the mediator, exchanged with the parties, containing a summary of the facts, theories, and opinions on which each party intends to rely.
- A schedule of key information-exchange dates, together with potential dates and locations for the mediation.
- An outline of the anticipated way in which the mediation will proceed—e.g., initial joint session with all parties followed by breakout sessions, timed presentations of expert opinions or findings, opening statements by parties, or any other particular process the mediator and the parties intend to follow.

- A listing of the anticipated fees and expenses of the mediator, the time frame required for payments, an allocation of those fees among the parties, and provisions concerning the confidentiality of information exchanged and of the mediation itself, as well as privilege or other applicable protections under any state or federal rules of evidence.

Obtain the Court's Cooperation in the Mediation Process

In complex cases, mediation often occurs after a lawsuit has been initiated. Claims, counter-claims, cross-claims, third-party actions, apportionment complaints, and various other pleadings have already been filed among the parties. Indeed, the proliferation of pleadings is one factor that often drives the client's willingness to consider mediation. It is important to involve the court in the mediation process to the greatest extent possible. Courts routinely encourage alternative dispute resolution efforts; some courts have special programs to facilitate court-supervised mediation. To the extent the court becomes interested in the mediation process, the mediation takes on more significance.

Parties should consider whether they want to stay the case pending mediation. If the parties don't want to stay the entire case, they may nonetheless be open to staying discovery in the court case to allow mediation sessions, with more limited discovery, to go forward. A mediation agreement with a schedule can be useful to show the court that the parties are serious about mediating the matter, and to obtain either a stay of the litigation or court rulings that can work in tandem with the mediation. Discussing ways to meet the court's scheduling requirements while facilitating the mediation process will help the lawyers control litigation costs and increase the likelihood of a successful mediation process.

In the event there are "bit players" who do not voluntarily participate in the mediation, the parties may be able to use dispute resolution mechanisms available through the court to foster participation of these outlying parties in settlement efforts. Most courts have settlement conferences, pretrial conferences, status conferences, or other conflict resolution vehicles short of a trial. These court proceedings can open up settlement discussions with the "bit players," who must appear at them.

Not All Mediators Are Well Suited to Conduct Complex Mediations

Not all mediators are comfortable mediating complex cases. A complex matter requires a mediator who is able to oversee a process that frequently includes discovery. The mediator must enforce deadlines and understand technical and scientific data. Most critically, the mediator needs to have the experience and authority to command the respect of the parties, even when they are being asked to pay more, or settle for less, than their ideal scenarios. The most successful mediators can make each party feel that it has been fully heard and its position has been seriously considered.

But how to find a mediator with the requisite qualities? *Your* complex mediation should never be that mediator's *first* complex mediation. In a multiparty case, create a list of potential mediators from among those with whom the parties have dealt directly and regarding whom the parties

have received feedback from trusted sources. Consider the mediator's style, approach, and knowledge. In a very large matter involving many parties and stakeholders, two mediators working as a team may be an effective way to manage the process, as long as the mediators are comfortable working together and the economics of the case support a team of mediators.

Using Discovery in Aid of Mediation

Extensive, sometimes runaway, discovery drives up the cost of litigation in complex matters. Because the desire to avoid an out-of-control discovery process is one of the most compelling factors in favor of mediation, discussing discovery in the context of mediation may seem like heresy.

Even so, in a large case involving technical and scientific evidence, it is virtually impossible to have a successful mediation without some discovery. And the stakeholders are not limited to the parties themselves but may include their insurance carriers, sureties holding bonds, banks or other financing sources, state or municipal agencies, boards of trustees, or building committees. To facilitate a mediated resolution, the parties and stakeholders need sufficient information to assess their potential exposure and that of other parties, the likelihood of success on the merits, and the dollar amounts of claimed damages or other relief. It is critical to the success of the complex mediation that any information obtained as part of the limited discovery process be shared and fully reviewed with all the relevant stakeholders as part of the mediation preparation.

The limited discovery process, ideally set forth in the parties' mediation agreement, can and often should result in exchange of written articulation of claims and defenses, exchange of expert reports, and the inspection and copying of documents.

The Mediation Session: Part Art, Part Science

Scheduling a mediation session in a complex case is both an art and a science. If the schedule does not allow enough time for all parties to be heard, or for them to fully accept a negotiated settlement, the mediation will be doomed to failure. On the other hand, allow too much time, and momentum is lost. The parties have too many opportunities to become unproductively adversarial. A skillful and experienced mediator should guide the parties as to the appropriate number of days to schedule for a mediation. Even a very complex mediation loses its focus and momentum if it goes beyond four consecutive days.

When scheduling mediation sessions, the mediator and parties should consider who the decision makers are and what information should be presented as part of the mediation itself. For example, in cases involving complex issues driven by expert analysis, power point or other visual presentations by the experts summarizing their findings—with strict time limitations to ensure the process moves along—can be very useful in helping to focus the issues for decision makers and stakeholders. Any tool that challenges the parties' assumptions about the merits of their position facilitates movement toward a negotiated resolution.

It is a fundamental principle, yet one that is sometimes breached, that decision makers and stakeholders should be present for the mediation. Being available by phone is not the same as having people with decision-making authority present to participate in the process, listen to and assess what is being said by the experts and the mediator, and evaluate the positions of the other parties. It also is fundamental that when insurance coverage plays a major role in complex litigation, representatives of the respective carriers with authority to settle must be present and participate. Nothing derails a carefully planned mediation more quickly than the unavailability of a claims representative for a key party. The parties and mediator should require in-person participation by all key stakeholders.

Conclusion

Mediating large, complex cases presents interesting challenges. The human and financial costs of litigating such cases, however, highlight the importance of thoughtful, carefully structured mediation as a means to resolve the disputes and allow the parties to move forward.

Keywords: litigation, woman advocate, mediation, mediation agreements, complex litigation, settlement, multiparty cases

Jane I. Milas is the managing director of Garcia & Milas, P.C., in New Haven, Connecticut.