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Mediation Design: Start With the 'Why'

What reasons for mediation would lead parties and/or counsel to design the process a little differently? Here are some.

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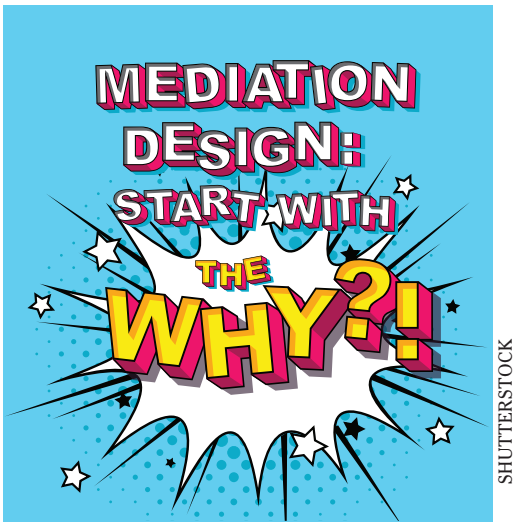
Mediation is an inherently flexible process. As such, participants can help design the process. But in order to do so effectively, it helps to understand why the parties have chosen to mediate. Cases settle all the time through direct negotiations between lawyers or principals. Going to mediation is a choice (unless ordered). The parties and/or counsel often have particular negotiating challenges that they believe the mediation will help with. It is important to consider those challenges when designing the mediation process. If you accept an off-the-shelf mediation process and a mediator who is not familiar with your particular challenges, you are less likely to have a conversation that meets your needs. So knowing the reason or the "why", is important in designing the process.

What reasons for mediation would lead parties and/or counsel to design the process a little differently? Here are some.

A problem on one side of the "v." This refers to when a party and their counsel or multiple parties represented by the same or different counsel are not really in alignment about goals. When the real issue is on one side of the table, the remedy might be a different approach to pre-mediation calls or the structure of individual caucuses at session.

An issue between a policyholder and an insurer. Where the defendant's insurer has reserved its rights as to certain potential coverage issues. This might require some separate mediation submissions or a phone call or two.

A particularly contentious relationship. If opposing counsel are not able to work together and interactions have been counterproductive, structuring the mediation to minimize contact may make some sense, particularly in the early stages.



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The challenge here is that counsel will not always identify this as the problem and the parties may not be aware of it. But a joint call might make this apparent to the mediator and allow the mediator to suggest some design options.

A need to be heard. Sometimes (almost always, actually) people need to feel that they have been heard and understood before they can move forward. Figuring out the right opportunity and setting for a plaintiff to be heard can be part of the mediation

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design process, particularly in places where having a joint session is not routine practice.

These are just some of the reasons you may choose mediation. Each of these reasons—and many others—could naturally lead to different mediation design choices. These include the following:

(1) Pre-mediation calls. Pre-mediation calls can be in any format and include any combination of mediation participants (e.g., lawyer, client, claims adjuster, expert or consulting witness, underwriter, subgroups of defendants or plaintiffs). There can be a single call with all counsel. There can be a call with all counsel, followed by separate calls with each counsel. There can be calls with a counsel and his or her clients, which can be particularly helpful in giving the mediator some advance notice and a chance to experience any misalignment on one side of the "v." There can be a separate call with insurers or defendants and insurers. There are many options depending on your "why" and the flexibility of your mediator.

(2) Written submissions. The chance to reach the mediator in a thoughtful written way in advance of the mediation is an important part of the process. But there is also flexibility. The first decision is whether to share submissions with all parties or a subset of parties, or to designate the submissions as confidential and share them only with the mediator. Shared submissions can do some of the work that a joint session does. Confidential submissions may allow a party to vent a bit in writing and serve the goal of allowing one side to be heard without jeopardizing the negotiation process. Coverage issues may need to be dealt with separately from the liability and damages issues, and shared with a subset of parties. Again, there are many options depending on the kind of problem you are trying to solve.

(3) Individual caucuses and joint sessions. When there is a problem on one side of the "v." and the case cannot move forward without some attention to that problem, it may make sense to address this issue much earlier in the mediation. An unlimited, unregulated joint session would not solve that problem, but an extended individual caucus before other parties are scheduled to arrive might. If someone truly does need to be listened to, figuring out the appropriate setting for that is also important. Perhaps there can be a joint session without lawyers' speeches, but the session can feature a few short statements from the principals. Sometimes, having a time-limited joint session with a variety of tone, content and issue restrictions to be enforced by the mediator makes sense. In some instances, a very limited joint session solely for introductions and for the mediator to set forth the rules for the day may be helpful. And sometimes having no joint session at all may make the most sense, particularly where there is not yet a productive working relationship between the parties and counsel.

> If opposing counsel are not able to work together and interactions have been counterproductive, **structuring the mediation to minimize contact** may make some sense, particularly in the early stages.

These are just three examples of mediation processes that can be designed. To structure a mediation process that has the best chance of success, start with your "why"—the reason for mediating—and then decide which process choices will most help you fulfill your goals for the session. Even better, if the parties agree on the "why" and collaborate in designing the process, they will have taken positive initial steps toward achieving a settlement.