MANAGING LARGE COMPLEX MEDIATION

Multi-Party Disputes In The Public And Private Sectors

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I. What is a “Large Complex Case”?

A. Big dollars?

B. Complicated facts?

C. Complex legal issues?

D. Multiple parties?

1. Horizontal or single dimensional multiple parties, i.e. one plaintiff and multiple defendants, or multiple plaintiffs and one defendant, or multiple plaintiffs and multiple defendants

2. Vertical or multi-dimensional multiple parties, i.e. plaintiff, defendant and third party defendant (insurance, indemnification or contribution)

3. Both horizontal and vertical, i.e. multiple plaintiffs suing multiple defendants, some or all of whom are having coverage disputes with their insurers.

E. Multiple parties in the public sector?

1. Administrative agencies

2. Elected public officials

3. Appointed public officials

4. Interested citizens

5. Citizen advocacy groups (local and national)

6. The media

II. How does the mediation of a large complex case differ from any other?

A. If just big dollars, complicated facts and/or complex legal issues, not much

B. If multiple parties, potentially a whole different animal

1. Each party may have different positions, interests, wants and needs

2. Certain parties may be aligned on certain issues, but realigned on other issues

3. The way the parties are aligned in the lawsuit caption may differ from the way their real interests are aligned, i.e. the interests of some plaintiffs may be more closely aligned with those of some or all of the defendants than with the other plaintiffs, and vice versa

C. If Multiple parties in the public sector

1. Same issues as multiple parties in private sector, **plus**:

2. Public policy issues

3. Open meeting laws vs. confidentiality

4. The media vs. confidentiality

5. Political ramifications for elected officials

6. Generally resolution requires legislative approval

III. Preparation for the large complex case

A. In most two party disputes, even involving big dollars, complicated facts and/or complex legal issues, mediator preparation generally entails

1. Studying a pre-mediation memorandum (with all significant documents attached) obtained from each party

a. Confidential for mediator and not exchanged by parties?

b. Exchanged by parties, but with a confidential, “for mediator’s eyes only”, supplemental letter or memorandum?

2. Sometimes having a pre-mediation telephone conference with the attorneys for the parties

a. Jointly or separately?

B. In multiple parties disputes (private or public sector) substantially more preparation generally required

1. Still need pre-mediation memoranda

a. Obtain long before first formal mediation session

2. Often need to do extensive background research and preparation

3. Before the first session, need to begin to ascertain real, as opposed to nominal, alignments of parties and more about the positions, interests and needs (problems, issues, goals, strengths and weaknesses) of the various parties than is generally contained in the pre-mediation memoranda

a. face to face interviews?

b. questionnaires?

4. Need to determine who needs to be at the table

a. Who decides – parties? their attorneys? sponsoring organization? mediator? some facilitated collaborative decision?

(i) If all parties who are affected by decision have opportunity to be heard, much greater chance of buy-in by all interested parties and a satisfying and enduring resolution

(ii) appearance of fair and open process

b. Who are the “stakeholders”, i.e. parties with a real interest in the outcome, and are they included?

c. Who are the decision makers, and are they included?

(i) With multiple parties in private sector, every party will usually be a party to the settlement, and needs a decision maker present

(ii) With multiple parties in the public sector, some stakeholders, i.e. citizens and citizen advocacy groups, need to be heard but often are not parties to

the actual settlement and do not need real decision makers present

(iii) For those parties who do have decision makers present, be certain they have full settlement authority

(iv) In large complex multiparty cases this is often complicated by the need for institutional approvals, i.e. Board of Directors or legislative body. In such cases, the mediator should try to insure that the decision makers present are persons whose recommendation to the Board or legislative body will carry weight and likely be adopted

d. Who are the people with power to veto, reject or sabotage any agreement, and are they included?

e. Should the "troublemakers" be invited, or is it better to exclude them?

f. As to the stakeholders, decision makers, people with power to veto and troublemakers

(i) Should they all be there, or are there representatives who can adequately represent their interests?

(ii) Will they all "buy in" if only participating through representatives?

g. Are there issues for which there should be public input? Official (political or administrative) input?

(i) If so, who are the proper representatives and how do you get them to the table

5. Should you invite pre-mediation memoranda from any additional parties being invited to the table?

a. Interview them?

b. Send them the questionnaires?

6. Need to assess amount of time likely to be required and how to best allocate and use it

a. Opening joint session may well require half a day, and even a whole day in a really large complex case with numerous multiple parties in the public sector

(i) Absolutely critical that all parties feel they have had an opportunity to really be heard by not only the mediator, but by the other parties

b. With multiple parties in private sector, sometimes possible to complete in one day, but in really large complex cases additional time is probable

(i) Should mediator plan for additional consecutive days or for a number of days interrupted by recesses?

c. With multiple parties in the public sector, multiple days almost certainly will be required

(i) Consider how to best schedule the sessions to minimize the down time for the parties

(ii) Consider whether “homework” can be given to the parties to make the sessions more productive when they occur

d. Begin to determine the order of caucusing with the various parties

(i) With only two parties, the order is less important, but, with multiple parties the efficient use of time depends in part on the order of the meetings

(ii) There is no good general rule; it really depends on the particular facts and circumstances in each case and how the mediator initially assesses them

IV. Mediation philosophy

A. Facilitative, Evaluative or Directive?

1. With multiple parties in private sector, in commercial cases, most mediators move from facilitative to evaluative, and sometimes even to directive, as the day goes on

2. With multiple parties in the public sector, while mediators may move a little way down the same continuum, it is probably more important to remain much more facilitative throughout the process, or at least until much later in the process

a. When dealing with public policy issues, elected officials, interested citizens and citizen advocacy groups, the resolution is not dependant upon some evaluative or directive assessment by the mediator of the risks and rewards of litigation or arbitration

3. With multiple parties, even more than in two party mediations, the mediator may well be the only one to have a real grasp of the "big picture" and the opportunity to see possibilities for resolution that will not be obvious to the parties

a. As a result, even while being facilitative, and whether dealing with multiple parties in private sector or the public sector, the mediator probably needs to be more proactive than might be necessary in a two party mediation

b. Although the distinction may be subtle, there is a difference between being more active or proactive and being evaluative and directive

V. The opening joint session

A. To do an opening joint session or not – the controversy continues

1. Those opposed (mediators and advocates) argue

a. The parties can't even be in the same room – their positions will become more polarized at best, and at worst the mediation will blow up before it really gets started

b. Everyone already knows everyone else's position – it is a waste of time

2. Those in favor argue

a. The parties (not their lawyers) need to vent, need to tell their story and need an opportunity to feel that they have been heard, all of which distinguishes real mediation from judicial type settlement conferences

b. If done well, it may be most important part of the mediation process and sets the stage for everything that follows

3. **DISCLOSURE AND DISCLAIMER** – I am a proponent of the opening joint session; I rarely allow myself to be talked out of it; I don't think I have ever been sorry I did it; and I have almost always regretted not doing it. My bias certainly influences the following discussion of its purpose and how it is best done

4. The benefits of an opening joint session are as applicable to large complex multiple party case in the private sector as to simple two party disputes, and with multiple parties in the public sector, may be an essential prerequisite to making any meaningful progress

5. The opening joint session is really two joint sessions, (1) the mediator's introduction and (2) the substantive opening joint session

B. Mediator's introduction

1. What is the purpose?

a. Primarily for benefit of parties, secondarily for lawyers

b. Make parties comfortable and relaxed

c. Create safe environment

(i) Mediator has no power

(ii) Confidentiality

d. Mediator begins to establish knowledge of process, knowledge of case, impartiality, integrity, rapport and trust

e. Begin the absolutely critical process of changing the way the parties think about their dispute and the resolution of it

(i) Not about who is right or wrong, but perceptions, perspectives and misperceptions

(ii) Not about rehashing the past, but reshaping the future

(iii) Not about winning or losing, but it is just a business problem that needs a solution

(iv) The dispute may be an opportunity for positive growth and change

(v) It is the parties' problem, not their lawyers', and they should use their lawyers more for legal advice and counseling during the process, and less as their advocates to speak for them

f. View the mediator's introduction as an abbreviated Mediation 101 for the parties

(i) Although the mediator's introduction is primarily for benefit of parties, as a secondary bonus the mediator often can subtly influence how the lawyers will approach the rest of the day, and the dynamic between the lawyer and the client. The mediator can not only empower the parties to deal with each other, but to work more productively with their own lawyers and take control of the resolution of their own dispute

2. Most mediators probably do a mediator's introduction in joint session, even if they then skip the substantive opening joint session

C. Substantive opening joint session

1. Much of the controversy swirls around whether to hold a substantive opening joint session

a. An extraordinary mediator and trainer once said, in response to those who argued they could not even have certain parties in the same room together, that any mediator who regularly skips the substantive opening joint session and separates the parties into caucus rooms is a mediator who is afraid of conflict himself, so how can he help anyone else work through conflict.

2. What is the purpose of the substantive opening joint session?

a. Each party's opportunity to be heard by the other parties, not just the mediator and their own lawyer

b. Each party's opportunity to understand the other's perceptions and perspectives on the dispute, even if they don't agree with them

c. Each party's opportunity to express the personal, physical, emotional and economical impact the dispute has had and for each party to understand, often for the first time, how the dispute has affected the other parties

d. Each party's opportunity to achieve the extraordinary catharsis that almost always occurs during this process, which tends to clear the way for meaningful settlement discussions

e. To expose misperceptions held by each party, often about the other's motives and actions, which also tends to open the door to real problem solving

f. Although it sometimes leads directly to meaningful settlement talks in joint session, most of the time, it sets the stage for more productive caucuses. Often, after a particular difficult and emotional substantive opening joint session, the mediator will go into the separate caucuses and hear parties acknowledge that they never really understood how the other party felt, or why she did what she did. Often the joint session exposes the misperceptions of the parties about the other's motives, and, although they still disagree, they are now able to at least negotiate in good faith.

3. Who speaks – parties or lawyers?

a. Based on the foregoing purposes or goals for the substantive opening joint session, the parties should be expected to do most of the talking in this part of the mediation

b. Try to keep the lawyer's role in the substantive opening joint session to a minimum

c. Lawyers' opening statements, which tend to be adversarial closing arguments, are counterproductive

d. Invite the parties to speak freely and openly. In the mediator's introduction, they should have been told that they are going to hear things they don't agree with, maybe even

things that make them angry, but they need to listen and try to understand how the other parties feel, and when it is their turn to speak, they will probably say things that the other party does not agree with and that will make the other party just as angry, but before they can solve the problem, they each need to understand how the other perceives it and feels about it.

(i) If the mediator is not afraid of conflict, understands how to monitor it, when to intervene, and what interventions to use, it is not only all right, but often healthy, to let the situation get worse for a little while before it begins to get better. When the parties have really had their say, with a little help from the mediator, one often can feel the tension going out of the room and the climate changing

4. What is the mediator's role during this often tension filled substantive opening joint session

a. Bring peace into the room

(i) Listen actively – watch emotions and body language

(ii) Help the parties to listen actively

(iii) Demonstrate understanding of facts, issues and positions by paraphrasing and asking neutral informational questions

(iv) Relieve tension be reframing adversarial issues in more neutral and benign language

(v) Demonstrate empathy and sensitivity, but always retain the appearance of complete impartiality

(vi) Be vigilant as to when intervention might be necessary

(vii) When intervening, always attack the problem, not the parties

(viii) Once the decision to intervene is made, be sure to retake control quickly and firmly, but with a light touch and maybe even a little humor, i.e. "Okay,

it looks like it is time for me to put on my referee's striped shirt, blow my whistle and call a time out"

b. Prepare, prepare, prepare. The mediator can never know too much about the dispute, the parties and the lawyers, or be too prepared. While this is extremely important even in the small two party dispute, it is vital in the large complex multiple party case

5. Do you discuss settlement during the substantive opening joint session?

a. Sometimes, but not generally

b. Less frequently in large complex multiple party cases than in the smaller two party disputes

c. Good practice to ask the parties and their lawyers if they would rather separate into private caucuses before addressing settlement proposals

d. The lawyers and parties almost always want a chance to talk to the mediator privately in caucus before getting into the real work of trying to settle

e. Often what the mediator heard and observed in the substantive opening joint session provides real fodder for the first caucuses

VI. The caucus stage

A. How should the parties be grouped for the first round of caucuses?

1. Although various parties may have common interests, it is often best to allow each party, or distinct group of parties with clearly similar interests, to have a separate opening caucus

a. This insures each has a full opportunity to be heard by the mediator

b. Avoids any chilling effect that might occur by being combined with others who initially appear to be similarly situated, but might not be for reasons not yet apparent and which the affected parties are uncomfortable discussing in front of the others

c. If mediator did separate interviews or questionnaires as a part of the pre-mediation preparation, then the mediator may have basis for combining certain parties or reasons for separating them

d. Always safe to ask the parties and their lawyers before beginning the caucuses, but generally best to even do that on a one on one basis to avoid any chilling effect of the party or lawyer having to answer in front of other parties who assume they are similarly aligned

e. After the opening caucuses, the parties sometimes may then be combined in groups having similar interests

B. Who should the mediator caucus with first, and then in what order should the rest of the caucuses occur?

1. Be sure to tell everyone not to read anything into who the mediator caucuses with first, what order the caucuses take, or how much time is spent with any party or group of parties

a. Amazing how something so unimportant and innocuous can be misunderstood by the parties and undermine the mediator's appearance of impartiality and credibility and the parties' trust

2. No general rule – the order is case and fact sensitive

a. Sometimes, the decision is based on certain facts or positions uncovered by the mediator in pre-mediation preparation or in the joint session that require immediate understanding, exploration or other attention as a prerequisite to moving on

b. Sometimes, the decision is based on certain facts or positions uncovered by the mediator in pre-mediation preparation or in the joint session that indicate a particular party will be a problem or will be particularly helpful in achieving resolution and should be visited first

c. Sometimes there appear to be threshold issues that, if even tentatively or conditionally resolved, will expand the options or opportunities for settlement, i.e. an insurance coverage dispute which, if resolved, would provide a source of payment or contribution to an overall resolution

d. Sometimes, the decision is based on certain facts or positions uncovered by the mediator in pre-mediation preparation or in the joint session that give the mediator, with a grasp of the overall “big picture”, some ideas about how the dispute might be resolved that dictate the order of initial caucusing.

(i) Remember, the larger the number of parties in multiple party cases, the more the mediator, even while in a facilitative mode, should probably be more proactive than might be necessary in two party disputes, because otherwise there is almost no way to achieve a timely exchange of all of the settlement ideas among so many parties and groups of parties

C. Sequencing and scheduling the caucuses

1. Unlike the usual two party mediation, where we go to caucuses immediately after the joint session, and continue to shuttle back and forth all day until settlement and closure, in large complex multiple party cases that is rarely possible, and the amount of downtime for multiple parties is a constant problem

2. As early as possible, the mediator should determine how much time the next round of caucuses (whether the first round or subsequent rounds) should require and the order the mediator wishes to follow, and begin scheduling them.

a. The caucuses may require multiple days

b. Minimize down time for parties and their attorneys by sequencing the caucuses and only having the parties and their lawyers available when it is their turn

c. The caucuses may take place in a variety of locations, and in large complex multiple party cases it is often more efficient and less expensive for the mediator to go to the location of the respective parties or their lawyers for some of the caucuses

d. Although not generally advisable for the first round, and not really preferable ever, if necessary to keep the process moving efficiently, sometimes some of the subsequent caucuses can be done telephonically

e. At the conclusion of the first caucus with each party, particularly if it is a large multiple party case and considerable time will pass before the next caucus, it is a good idea to try to provide the parties with some “homework” to keep them engaged in the process until their next caucus

f. Good idea to tell the parties and their lawyers that you may call from time to time with specific questions that arise as you caucus with other parties. If considerable time is passing between caucuses, for whatever reasons, it is a good idea to find an excuse to contact the parties just to keep them in the loop and actively involved

D. The opening - what do you want to achieve in the first caucus with each party

1. Give parties and attorneys a chance to tell mediator everything they wanted to say but didn’t want to say in front of the other parties.

2. Find out whether each party really understands how the others perceives the dispute

3. Begin to deal with the emotional components of the dispute

a. Emotions are almost always present

b. To ignore them is to increase your risk of failure

c. Have a strategy for dealing with the emotions?

d. In their recent book, *Beyond Reason*, Roger Fisher (one of the co-authors of *Getting to YES)* and Daniel L. Shapiro offer what they call **“**a strategy to generate positive emotions and to deal with negative ones.” At the outset, they recognize that for a negotiator in the heat of the moment to observe, correctly identify, ascertain the real cause of, and develop an appropriate response to any one or more of the literally hundreds of human emotions that might be present would be a virtually insurmountable task. Instead, Fisher and Shapiro propose a manageable method for dealing with this broad range of specific emotions by focusing on five core concerns that arguably are responsible for many of the individual emotions.

Fisher and Shapiro define core concerns as basic human desires that are important to virtually everyone, and therefore will almost certainly be important to all of the participants in any negotiation - the parties as well as the lawyers and other players. As a result, by addressing these core concerns, a negotiator, whether a party, a lawyer or a third party mediator, should be able to generate the kind of positive emotions that foster better personal relationships and encourage mutually beneficial agreements among the negotiators.

The five core concerns identified in *Beyond Reason* are appreciation, affiliation, autonomy, status and role. Fisher and Shapiro explain that everyone wants to be appreciated, and in the context of negotiation that means everyone at least wants their ideas acknowledged as having merit, even if one does not entirely agree with or accept them. Affiliation means that people want to be treated as colleagues, not adversaries. By autonomy, Fisher and Shapiro suggest that everyone wants their freedom to decide respected. People want their standing to be given recognition. And finally, they all want to have a role that feels fulfilling.

4. Encourage the parties to reexamine some of their assumptions coming into the mediation and they will probably recognize that some of their perceptions, particularly about the other side's behavior and motives, may in fact be <u>mis</u>perceptions

5. Should the mediator solicit settlement offers in the first round of caucuses?

a. Generally not, but instead just try to have the parties define the starting playing field, so mediator can learn whether all parties are in the same ball park or even in the same universe

6. Everything the mediator does in the first round of caucuses should be aimed, in part at least, at continuing to build trust and engender confidence, which the mediator is putting in the bank to draw on in the later phases of the process.

E. The middle game - what should mediator be trying to do in the subsequent rounds of caucusing?

1. Begin moving the parties from rehashing the past (who did what to whom) to reshaping the future (how do we resolve this problem)

2. Begin moving the parties from positional bargaining (legal positions and posturing) to interest based bargaining (what are their real interest and needs)

a. Explore the difference between the legal and factual positions they and their attorneys assert in the litigation and their real personal, business, professional and economic interests

b. Have each party discuss what they think the other parties' real interests are, as distinguished from their asserted legal positions

c. This is often the first real breakthrough - finding out that the real interests of multiple parties might be reconcilable, and that it has nothing to do with whose factual or legal positions are right or wrong, or who might win or lose in court

3. Begin having the parties distinguish what they said they wanted, from what they really need

a. Then get them to talk about what they might be willing to give up in order to get what they really need

4. Encourage the parties to explain how they see this dispute playing out if they don't settle and what they perceive to be their best case outcome, i.e. their best alternative to a negotiated agreement (BATNA)

F. The closing – what should the mediator do in the late stages of caucusing?

1. Should the mediator move from facilitative to evaluative?

a. With multiple parties in private sector, yes. The parties and their attorneys expect it; believe that is, at least in part, what the mediator is being paid for; and it is often the most effective impasse breaker

b. With multiple parties in the public sector, tread very cautiously. The parties don't necessarily expect or want the

mediator's personal opinions, and the kind of interests and public policies at issue are generally not susceptible to objective evaluation. It is not likely to be a successful impasse breaker, and may undermine the trust the mediator has established over the prior days or weeks and bring the process to a quick end

c. Whether dealing with multiple parties in private sector or the public sector, however, it is time for the mediator to be more proactive, i.e. merging all of the information obtained throughout the entire process and trying to fashion approaches and opportunities for resolution and floating them by the various decision makers. The mediator, without becoming evaluative or directive, can be a leader, not just a messenger. The art is in making the decision makers think the ideas are their own, not the product of the mediator's evaluation, direction or decision

2. Should the mediator encourage parties similarly situated to negotiate as a group or separately?

a. The likelihood of global settlement is greater if parties similarly situated make their offers as a group

b. If offers are made on behalf of a group of parties similarly situated, the mediator should encourage a response to the group

c. In the event of an impasse, the offeree may want to respond to each offeror individually, and should be encouraged to do so.

d. Similarly, in the event of an impasse, the offerors may want to submit separate offers to the various offerees, and should be encouraged to do so

3. If global resolution seems unlikely, the mediator should begin to explore partial or piecemeal settlements.

a. Can some parts of the dispute be resolved as to all parties?

b. Can all of the disputes between some of the parties be resolved?

(i) Separate settlements among some of the parties may put considerable pressure on those parties holding out

(ii) Sometimes a claim against a recalcitrant party can be assigned from one settling party to another settling party as a component of a full settlement between those two parties

c. Just because a global settlement of all disputes among all parties can not be achieved does not mean the mediation of a large multiple party case was a failure. The mediator should try to achieve a resolution of as much of the conflict, or as many of the sub conflicts, as possible. Such partial settlements often set the stage for a subsequent resolution of the balance. Even if the unresolved portion of the dispute is never settled, the mediation will have benefited the parties by having narrowed and better defined the remaining dispute for more efficient and cost effective resolution by traditional litigation, arbitration or public process.

d. When most of the dispute can be resolved, but there are specific issues about which there is no agreement, consider a settlement that resolves all but those specific issues, and submits them to binding arbitration

(i) ideally, the arbitration submission can be carefully crafted to produce a speedy and cost effective process

4. Should the mediator ever meet with the parties in either a joint session or separate caucuses without their attorneys being present?

a. Often mediators suspect that the attorneys are putting on a show for their clients. Sometimes, however, it appears the clients are putting on their own show for their attorneys, and the mediator senses that the parties may be far more receptive to conciliatory and collaborative bargaining if they could do so without feeling it would be some sign of weakness in front of, or betrayal of, their own counsel

b. If the mediator has a prior relationship with the attorney and has gained the attorney's trust over time, it is not too difficult to arrange a meeting with a party without

counsel, or even a joint session with multiple parties without their counsel

c. Sometimes the mediator can ask to meet first with the attorney alone, then with the client alone, and then together, and it helps flush out useful information about everyone's real interests as distinguished from their legal positions

d. Sometimes the attorneys actually suggest such a meeting

e. It is not advisable to ever meet with the parties alone without first having obtained their attorney's consent

f. If the mediator is going to meet with the parties without their counsel present, the mediator should probably remain facilitative and not evaluative, not pressure the parties in any way, and refrain from giving any legal advice or criticizing a party's attorney in any way. It is really an information gathering and trust building caucus. It can be very effective it getting past certain impasses that result from the particular dynamics that sometimes come to exist between the attorneys and their own clients over time.

5. When all else has failed, what about a "mediator's proposal?"

a. With multiple parties in private sector, the mediator's proposal can be the ultimate impasse breaker

b. With multiple parties in the public sector, the mediator's proposal can be an effective tool to generate rethinking by various parties, and may lead to further progress, but is less likely to be an ultimate impasse breaker in and of itself, in part, because of the kinds of public and political interests usually involved

c. Probably not advisable to offer a mediator's proposal for global resolution without the consent of all parties, or for partial resolution without the consent of all the parties involved in the partial resolution

d. Probably not advisable to make a mediator's proposal if asked to do so by one or some of the parties without the agreement of the others

e. Even if requested by all parties, a mediator's proposal should probably not be given until the very end of the process as a last ditch effort to break impasse. Once the mediator gives a mediator's proposal, for all practical purposes the mediator is finished. If it does not settle, the mediator will almost certainly have lost his appearance of neutrality, impartiality, credibility and trust with at least some of the parties. If it doesn't result in a resolution, the mediator should be prepared to call it a day.

6. At the end, should the mediator ever agree to arbitrate the remaining unresolved issues?

a. If parties request it

b. Should mediator ever suggest it?

c. What about "baseball arbitration"?

VII Settlement Documents

A. The mediator should always try to end the mediation with a written enforceable settlement agreement

1. Although some mediators draft settlement agreements, the better practice is to require the parties and their lawyers to do so

2. Usually, a handwritten memorandum of the mediated settlement in the form of an agreed term sheet is prepared by the lawyers and signed by all of the parties

3. The memorandum of the mediated settlement generally provides for the incorporation of the agreed settlement terms into formal definitive settlement documents, and often includes a timetable for completing the formal documents

4. The memorandum of the mediated settlement often recites that, even in the absence of the formal documents, the parties intend the memorandum of the mediated settlement to be fully binding and enforceable

5. The memorandum of the mediated settlement often recites that A.R.S. §12-2238 is waived with respect to the memorandum of the mediated settlement to the extent that the disclosure of the memorandum of the mediated settlement is necessary to its enforcement

6. The memorandum of the mediated settlement often includes a provision that, in the event of any unresolved disagreement as to the form and substance of the formal settlement documents, upon notice from either party, the disagreement is to be submitted to the mediator, who is then to act as an arbitrator, and resolve the dispute as to the form and substance of the formal documents and do so in the form of a final and binding arbitration award

(i) When such a clause is included, the mediator is almost always strictly limited to incorporating the agreed upon terms as reflected in the memorandum of the mediated settlement into appropriate formal definitive settlement documents, and is prohibited from changing any of the agreed terms of the settlement

7. When institutional or legislative approval is required, the memorandum of the mediated settlement always provides that it is subject to and conditional upon such approval

(i) Often the appropriate decision makers signing the agreement are required by the terms of the memorandum of the mediated settlement to seek such approval in good faith and with all due diligence

(ii) Sometimes the memorandum of the mediated settlement provides what is to happen if such institutional approval is not able to be obtained, i.e. return to mediation? go to binding arbitration?

(iii) With the consent of all of the parties, and with a clear understanding of the extent to which confidentiality is to be maintained, the mediator may agree to appear before or communicate with the body whose approval is required in order to support the process and the memorandum of the mediated settlement that resulted from the process

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Sherman Fogel is a principal in the Phoenix law firm of Sherman D. Fogel, Professional Association. For more than forty years he has represented plaintiffs and defendants in commercial litigation in federal and state courts, arbitrations and mediations. Mr. Fogel has regularly served as a neutral since 1974, having arbitrated or mediated more than 1000 cases, ranging from small consumer matters to large complex commercial disputes having multi-million dollar demands, and one case having a ten billion dollar claim. He served for fourteen months on a national panel of mediators and arbitrators in connection with a federal court class action settlement, and for almost two years on an Arizona panel in connection with a state class action suit. Several years ago he spent almost five months managing the mediation process and facilitating the discussions between the neighborhood and developer representatives resulting in a mutually acceptable consensus recommendation to the City of Phoenix for the future development in the Camelback East Primary Core (the prestigious 24th Street and Camelback corridor). Recently he devoted almost two years mediating the renegotiation of the second half of a 40 year contract and a 20 year extension regarding the sale of effluent by the Cities of Phoenix, Scottsdale, Mesa, Glendale and Tempe to the Palo Verde Nuclear Power Plant for use in cooling the nuclear reactors, which was necessary to insure the future generation of electricity for Arizona and several surrounding states. He has been a member of the Panel of Commercial Arbitrators of the American Arbitration Association since 1974, a member of its large complex case panel, and a member of its Panel of Commercial Mediators since 1994. Mr. Fogel is a member of the American Arbitration Association Arizona Commercial Advisory Council and the State Bar of Arizona Alternative Dispute Resolution Section Executive Council, serving as Chair for 2008-2009. He is a former member of the Arizona Supreme Court Committee on Examinations and Admissions. He is a member of the Arizona, Maricopa County, Illinois and American Bar Associations; a Founding Fellow of the Arizona Bar Foundation; and a member of the Association for Conflict Resolution and the Arizona Chapter of the Association for Conflict Resolution. Mr. Fogel served as a Judge Pro Tem in the Arizona Court of Appeals in 1985, 1993 and 1995. He frequently lectures on arbitration and mediation at programs sponsored by the American Arbitration Association and the State Bar of Arizona, and recently served as a member of the Faculty at the American Bar Association Advanced Mediation and Advocacy Skills Training program and a member of the Faculty at the Association for Conflict Resolution Advanced Commercial Mediation Institute. He has been selected for inclusion in the 2008, 2009, 2010 and 2011 lists of *The Best Lawyers in America* in Alternative Dispute Resolution. He was recently chosen for inclusion as one of Arizona's Finest Lawyers in 2010, and selected for inclusion in the 2010 *Best Lawyers "Best Law Firms" Rankings* by U.S. News and World Report in Alternative Dispute Resolution. Mr. Fogel can be reached at 602-264-3330 or mede8@msn.com.