

# The Evolution To Planned Early Multi-Stage Mediation

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The deeply-felt norm of conducting mediation on a single day is eroding as everyone adjusts to the realities of the coronavirus crisis and people appreciate the benefits of spreading out the process over time. This post describes the evolution around the world to what I have called "planned early multi-stage mediation."

## One-Day Mediations

For many lawyers and mediators, it is an article of faith that they should try to complete a mediation in a single day if at all possible. They value one-day mediations to focus everyone's attention on the issues and build momentum toward settlement. As a result, it was not unusual for "marathon mediations" to extend well into the evening as mediators push to nail down a settlement before letting people go for the night. Part of the rationale before the crisis, when everyone met in person, was based on the logistical challenges and expense of reconvening mediations, especially when people traveled long distances to attend.

The pressure to settle cases in one day also creates problems, however, particularly in undermining the quality of parties' decision-making. Even when mediators avoid intentionally exerting pressure, if everyone assumes that mediation normally should involve only one session, parties can feel pressed to settle. Toward the end of a long mediation, they may settle just to "get it over." Parties may agree to settlements they later regret because they don't have the time, resilience, or information to analyze their cases more carefully. As a result, some parties may renege on agreements, perform them inadequately, file suit to rescind them, or even sue mediators or their lawyers for pressuring them to settle.

## Planned Early Multi-Stage Mediation

Even before the coronavirus crisis, some mediators recognized problems with the strong efforts to complete mediations and recommended using at least two sessions. For example, Canadian mediator Rick Weiler suggested that commercial mediators should consider offering "a more client-centered process involving multiple sessions."

In our book, *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*, Michaela Keet and Heather Heavin and I suggest planning for two possible sessions in case parties need more information and time to be ready to settle than in a single mediation session. In the first session, mediators could help them identify what they would need to be ready to settle. This might include "homework" to (1) complete specifically-needed discovery, (2) obtain expert opinions, narrowly-focused arbitration awards, or court rulings on critical legal issues, and/or (3) consult with important individuals or entities relevant to the dispute. If parties are ready to settle at the first session, a second mediation session would not be needed. If parties plan for the possibility of a second session, however, they are less likely to feel pressured to settle in the first session.

## The Coronavirus Effect

The coronavirus crisis created constraints on travel and in-person interaction, so mediators quickly shifted to conducting mediations by video. In short order, most people in substantial civil cases became proficient in using video, which became the new normal. Writers around globe, including Greg Bond, Rosemary Howell, Charlie Irvine, Jonathan Lloyd-Jones, and John Sturrock, have discussed how the shift to video has affected the mediation process.

Since people weren't traveling to convene a mediation in a single location because of the crisis, there is less need to try to complete a mediation all in a single day. Indeed, because of "zoom fatigue," there is a value in not trying to get it done in one day.

As a result, mediators have been experimenting with multi-stage mediations. New York mediators Andrew Nadolna and Marc Isserles, California mediator Frank Burke, and UK mediator Marcus Bowman all have described flexible mediation procedures in which the process is divided into numerous stages over a period of time.

Using a multi-stage process offers numerous advantages. First and foremost, it provides the opportunity to improve the quality of decision-making. Instead of pressuring people to settle in an arbitrary time period as their cognitive capabilities deteriorate over time, people can flexibly design processes to get the information they need to make careful decisions.

Even before the crisis, mediators functioned as dispute system designers, coordinating exchanges of information, planning for the attendance of necessary individuals, arranging meeting logistics, and scheduling times when everyone would convene.

Multi-stage mediation requires - and enables - mediators to create even more value by doing more process design. With video, lawyers and clients would not only save travel time going to mediations, but they also can avoid the "dead time" waiting while mediators caucus with the other side.

Freed from the constraints of one-day mediations, mediators can schedule a series of conversations with particular individuals in a sequence that would be most helpful. In consultation with the parties and/or lawyers, mediators can plan several steps that might unfold over a specified period, such as a week. When parties and lawyers are not meeting with mediators, they can collect information and consult with others so that they can be more effective when they do meet with the mediator and/or other side.

Using a multi-stage process also can help solve the recurring problem of lack of participation by actual decision-makers in large organizations. People with authority to settle, such as high-level executives, usually aren't willing to invest the time to travel to a mediation and endure a lengthy process where their input isn't needed for most of the time. With a multi-stage process conducted by video, these decision-makers could be engaged for the limited, critical times when their input is necessary. This would be especially helpful toward the end of the process when parties need to make hard decisions, though it might also be helpful at early stages to help them understand the context.

## Evolution to Multi-Stage Mediation

Mediation is inherently flexible, and multi-stage mediation provides even greater opportunities for mediators to tailor the process to help parties make good decisions. The articles linked above, especially Marcus Bowman's piece, offer specific ideas for mediators to improve their services.

Alas, there is no end in sight to the coronavirus crisis, at least in the US. So multi-stage mediation is likely to become the new normal for cases above a certain size and complexity.

This would be part of an evolution of mediation practice in recent decades. When I started mediating in California in the mid-1980s, mediators generally didn't communicate much with parties or lawyers before the mediation session, there was a substantial initial joint session, and mediators used caucuses sparingly. Over time, mediators increasingly arranged for substantial written and/or oral communication before convening all the parties, many mediations began without a joint session, and mediators often conducted mediations completely in caucus.

Multi-stage mediation is likely to continue this evolution. Even after people are comfortable meeting in person, many will want to continue using a multi-stage process because they appreciate its advantages and they will take it for granted as a normal way to mediate.

Some mediators jokingly use the term "game day" referring to the time when all the participants convene in one location to mediate. Using this metaphor, lawyers and mediators have done an increasing amount of "pre-game" preparation in recent years. If the parties don't quite settle on game day, mediators sometimes provide "post-game" assistance to get the parties over the "finish line."

With multi-stage mediation, the lines defining the beginning and end of the "game" may get blurred to the point that mediation is seen as a single process continuing over a period of time with a series of communications designed to promote agreement.