

By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

MEDIATION AND THE ABSENT PARTY

Sometimes a person importantly affected by an agreement reached in mediation is not present at the mediation. What are the concerns? What are the ramifications? What are the remedies?

While I will briefly mention about domestic mediations, namely divorce, where decisions are made which affect a child, I want to more fully discuss non-domestic cases where a person is affected by an agreement and the parties may not have considered such consequences. Let's take the divorce situation first which involves custody, visitation, decision making and other matters involving young children. It is almost always prudent for the children not to be present in the mediation. The children are already feeling stress from the separation of their parents and any conflict between them. To involve children directly in a process where they experience first hand possible animosity between their parents and may feel they are placed in a situation of having to side with one of their parents over the other is impossibly difficult and unfair, and would be frowned upon by various practice standards. In those few cases where the views of the child, usually an older yet still minor child, are important for the parents, a private meeting between the child and the mediator may be considered. Even here, steps are taken to remove pressure from the child feeling that what he or she says will be interpreted as choosing one parent over the other. For instance, the child might be told that she or he did not have to make any comments, and if comments or opinions were to be made, the child could choose which of these comments, if any, might be conveyed to the parents and all other comments would remain confidential, except those that would indicate the child is at physical or emotional risk. Having these necessary process guidelines explained to the parents by a mediator highly trained in the arena of family conflict, it is usually easier for the child. In most mediated divorce or separation cases, the decisions are made by the parents without involvement of the children except possibly at the conclusion of the mediation, when the parents may choose to convey together with the children the terms and specifics on which the parents have agreed.

In many non-domestic mediations, it is prudent for the mediators to raise the issue with the parties of the involvement in the mediation process of a person other than the parties, such person who is directly affected by any term of agreement or decisions reached in mediation. It is a matter to be carefully considered. There is of course the question of whether an agreement reached in mediation is legally binding on the absent person. Apart from the legality issue, many agreements and decisions affect others. So the practical question is how well, if at all, the absent person will react to the decisions or terms of agreement. Most people can more easily accept a decision or agreement that he or she had some say or involvement in.

There are different possible approaches that I would like to discuss:

1. Deciding to involve the absent person in a follow-up mediation
2. Reaching only a tentative agreement to be discussed later with the absent but affected person.
3. Contacting the person during the course of the mediation.
4. Where affected persons are too numerous to attend the mediation, providing for ratification such as in the case of a labor agreement, or allowing exceptions to be filed such as in a matter pending in Orphans' or Circuit Court.

An example of the first approach would be family members, perhaps in a state of disagreement, considering appropriate care for an elderly parent. It might work better for the parent not to have to hear opposing views concerning the parent's physical or mental condition, or whether being cared for in one or more of the children's' houses is feasible or preferable to care in an institutional setting. The first mediation session can result in a need for information such as the cost and attractiveness of assisted living or a nursing home. With some contentious matters resolved, the follow-up mediation may be one that the parent can comfortably attend, and often with a sense of relief because most such disputes or conflicts spill over and negatively impact the absent person's well-being for months prior to the mediation.

The parties may opt for the second approach and arrive at a tentative agreement, tentative until it is first discussed with the affected person who was absent at the mediation. Until such discussion takes place, the terms of agreement remain tentative and will not be implemented. In such a case, the absent person never attends the mediation but is nonetheless still involved in the final outcome. Again using the example of the aging parent, a judgment may be made that the person is physically, emotionally or otherwise incapable of attending a mediation which could result in confusion, uncertainty or other unfavorable aspects, but the person can still be involved in the decision-making in a meaningful and satisfying manner to them. This is also the case with business partners or financiers and others who may be assisting in the payment or funding of an outcome chosen by the parties in a mediation, and also occurs in employment matters when new terms of agreement need to be checked out with other regulations and contracts in place before signing off. The absent parties have a stake in the implementation of the contracts and it's imperative that they are involved, but not necessarily in the mediation itself.

The third approach happens with some frequency in civil matters where the person with final authority may not be able to attend the mediation. The person with authority to approve settlement above a certain dollar amount may be a manager in an insurance company with offices in California. This is not an ideal situation because the person with authority does not get a first hand "feel" for the case or how the parties may impress a jury. But these cases happen and it is important that arrangements be made ahead of time for the manager to be able to be contacted promptly and most importantly to be available for the entire time the mediation is ongoing. The mediation gets interrupted or paused from time to time while telephone calls are made to such out of town folks. The mediator may or may not be involved in these calls. It is important in such instances that the mediation process not become evaluative where the mediator suggests or recommends terms of settlement contrary to the definition of mediation by our Court

of Appeals, Title 17 With the assurance that the mediator's role remains as an active neutral, this approach may work in many cases so long as the person with authority understands the process and is not a mere "bad cop". Mediators and parties may choose this approach since the person with authority to approve often has many such cases and the person's personal stake in the matter may not be too high. Other mediators may insist at all times that anyone with authority and capability must attend in person the mediation sessions.

The fourth situation involves times when absent persons are affected but not otherwise available to attend because they are so numerous. In general, it is oftentimes difficult for some people attending the mediation session to decide for herself or himself what might be a satisfactory resolution of a conflict. This difficulty can be multiplied many times where a person is not just speaking for himself but for a group or class of people. What will these people find satisfactory? Here, the fourth approach might be implemented. The mediation may include decision about the process itself for how to involve such absent people. For instance, the group or class might be given details of the proposed agreement with comments invited for a specified period of time. Or the tentative agreement might be made subject to ratification by a stated percentage of the class members, or the agreement may be made subject to the filing of exceptions in court. All of these process decisions can be made during the mediation prior to being instituted as way for a better outcome and a long-lasting outcome for many.

When the mediator knows or has a sense that an interested person may not be present at the mediation, ideally the parties should be contacted ahead of time and given options to consider, including inviting the person to the first mediation session, and short of that choosing from the above options or others of their own. Part of a mediator's job is often working with the parties on the process design prior to the mediation session itself. The most important things to consider are Who should attend and why? Who should not attend and why? Are their specific confidentiality provisions that need to be agreed to? And how can the absent persons somehow be involved meaningfully in the process?

An agreement reached in mediation that leaves some people feeling excluded or that ends up in litigation, is not a good agreement. Mediators who are alert to the impact of not including the otherwise absent person will provide their clients with a better process for a better outcome.

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