

Buffalo Creek Disaster Mediation: Guidelines for Students

MEDIATION LOGISTICS

The mediations will take place on Thursday, November 17. There will be eight separate mediations running concurrently: each group will consist of 2 plaintiffs' lawyers, 2 plaintiffs, 2 defense lawyers, 2 or 3 defendants (e.g. non-lawyer representatives of the defendant, such as executives), and 1 mediator. Law firms should choose whom to play lawyers and whom to play clients (e.g. plaintiffs' or defendant representatives).

The mediators are all professional mediators from the Los Angeles area who have graciously volunteered their time to assist with the mediations. Instead of meeting in our regular classroom, each group will have a separate room in the law school in which to conduct the mediation. Room assignments are on a separate handout. Go directly to your assigned room. Do not go to the regular classroom first. After about 75 minutes of mediation, your mediator will "debrief" you about the mediation. When the debriefing is over, class is over. Do not return to the regular classroom. We will discuss the mediations on Friday, November 18.

Most mediators will know very little about the case, so the lawyers and clients will need to apprise the mediators of the principal facts and issues. Mediators will have received the 4 pages of "Materials for Mediators and Students," but that is the only information mediators should be expected to know, and some mediators will have read that information very quickly. Most will not have read the book.

MEDIATION PROCESS

Mediation is a form of assisted negotiation. A mediator does not "decide" or rule on any aspect of the case and does not make any judgment or award in favor of one party or another. Instead, a mediator's function is to assist the parties and their attorneys to reach a settlement mutually satisfactory to them. It is a voluntary, and confidential, process.

There are many different mediation styles. Some mediators will be more "facilitative" in their styles, giving much deference to the parties and counsel. Others are more "evaluative" or directive, openly sharing their thoughts as to the strengths and weaknesses of the legal merits of the case. Some will not hesitate to predict what will happen at trial if the case does not settle.

In terms of mediation process, we are asking each side to initially meet in a very short joint session, where all parties and counsel are together in the same room with the mediator. In that joint session, both sides will be expected to give a short opening statement of their positions on the facts and law (e.g., why they expect to prevail at trial and therefore why their opponent should be motivated to settle). These opening statements should be very short (no more than two or three minutes each side), in order for there to be enough time to conduct the rest of the mediation. Counsel can do all the talking, or they may choose to have the client say some words as well. It is up to attorney and client to meet ahead of time and practice their "script" for the joint session.

After the initial joint session, the mediator might keep everyone in the same room the whole time, or might ask to caucus privately with each side.

PREPARING FOR THE MEDIATION

Below are some guidelines and suggestions for students playing the role of the counsel and parties.

- When you are assigned the role of plaintiff, defendant, or counsel, play the role in the way that you think the person would act in real life. It goes without saying that this case has the potential to be highly emotionally charged. You will need to place yourself in the shoes of the party you are playing and think about how that person would be thinking and feeling, given the particular allegations and facts in the case. Now is the time to get in touch with your inner actor. Have fun with the role.
- Stick to the facts as you know them from the book. Where absolutely necessary, you can fill in the gaps in the facts in ways that make sense. Avoid bending the facts to gain an advantage in the bargaining.
- Prior to the mediation, think critically about your needs, interests, and priorities, and have a plan for achieving what is important to you.
- Also think about what priorities the other side is likely to have. Get inside their shoes and think about what is important to them, and use this knowledge to guide your negotiating moves.
- Make your mediator work hard to help you reach a settlement. If you are a pushover, you are not allowing your bargaining

opponents (or the mediator) to test their skills, and this will diminish the value of the exercise.

As you prepare for the mediation, attorneys and clients should meet and answer the following questions and address the following issues:

(1) Interests:

- a. What interests on your side are at stake in this mediation?
- b. What interests may be at stake for the other side?

(2) Facts:

- a. What additional information would you like to obtain from your opponent?
- b. What additional information will you be willing to reveal to your opponent? What information, if any, will be you careful not to reveal?

(3) Pressure Points:

- a. What pressure points will you make sure to raise with the mediator and/or the other side, to maximize the result for you/your client? Will you raise any of these points during your opening statement in joint session, or privately with the mediator?
- b. What pressure points do you expect the other side to raise to undercut your case and how will you respond when those issues are brought up?

(4) Bargaining:

- a. Set a realistic “target” number that you hope to reach in resolution.
- b. To best achieve your target number, plan your concession strategies. What will be your first monetary move in mediation? The second move? Third move? Typically, larger concessions are made in the beginning rounds of mediation, with the size of the concessions tapering in subsequent rounds.
- c. Consider whether there are any special non-monetary settlement points that would help you reach a settlement of the case.