

DECISION ANALYSIS

Trial Consultants

JURY MEDIATION HANDBOOK

**A Guide to Understanding the Planning and Process
of an Innovative New Resolution Tool**

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JURY MEDIATION HANDBOOK

Jury Mediation is a new resolution tool that allows litigants insight into a jury's reaction to a case in order to better assess their risk of settling as opposed to going to trial. A group of mock jurors who match jurors from the venue listen to case presentations and deliberate or discuss the issues in front of the parties in order to give them a "reality check" of their prospects of succeeding at trial.

Benefits of *Jury Mediation*:

1. While traditional mediation is a facilitated negotiation and trial is a forum for advocacy, *Jury Mediation* is a hybrid of the two: a facilitated negotiation using feedback from the advocacy forum.
2. Through *Jury Mediation*, the parties and the lawyers understand the **process** by which jurors will decide a case; how a jury interprets the evidence and the law.
3. In *Jury Mediation*, the parties are able to hear a jury's voice when they consider the risks of trial and the potential resolution of the case.
4. Unlike trial, *Jury Mediation* has a great deal of flexibility designing procedures to accomplish the goals of the parties.
5. Even if case does not settle, a *Jury Mediation* gives the parties a great deal of information about how to refine their case presentations for trial.
6. *Jury Mediation* improves the ability of litigants and their attorneys to better utilize information about jury decision making to forecast potential trial outcomes.
7. *Jury Mediation* saves tens of thousands of dollars in jury research costs.

The following five steps are the main steps in the *Jury Mediation* process.

1. Identify issues that are obstacles to case resolution.

- Differences in perceived dollar value of settlement.
- Disputes over the meaning of the evidence.
- Differences in how particular witness testimony will be received.
- Significant differences over expert credibility and their opinions about the case.
- Disputes over the interpretation of law in the case.
- Differences in attorney skill, experience and track record.
- Significant emotional attachments to the issues in the dispute.

2. Guidelines for a successful *Jury Mediation*.

1. *Jury Mediation* works best when both parties truly want insight into how a jury will view their cases – not as a tactical ploy to gain advantage.
2. The *Jury Mediation* is not a trial and not meant to be predictive of a case's actual outcome.
3. The rules of evidence are loosened – there is less time to establish foundation and more reasonable argument is allowed, without objections.
4. The *Jury Mediation* is geared toward obtaining a jury's overview of the case in an opening statement form. It is not meant to get a jury's detailed view of the evidence or the law.
5. *Jury Mediation* is more dynamic than a normal mediation as it involves the unpredictable reactions of laypeople to the case.
6. The parties may be surprised and even disappointed by what they hear from jurors. However, this feedback helps them to assess their real risk and to help them refine their cases.
7. When considering verdicts and damage awards in a *Jury Mediation*, there are factors that can increase or decrease the chances of positive trial outcomes that the trial consultant and mediator can offer insights into.
8. Although the jurors in a *Jury Mediation* may not be able to agree on a verdict, analyzing the nature of the split jury also provides useful feedback for the litigants.
9. Jurors may give feedback on both the substance and style of the witness and lawyer presentations.
10. The mediator will also serve as a judge in the *Jury Mediation* process in resolving disputes about presented material.
11. The trial consultant facilitates the *Jury Mediation* and offers insights into and context for the jury decision process.
12. It is critically important for the litigants to observe the project guidelines and the agreed limits on presentation of material as the parties may invalidate the results by gamesmanship.
13. There will be strictly observed time guidelines.
14. There will be no objections during the presentation of the cases.
15. The decision to disclose or withhold evidence is up to the parties but a more accurate read is obtained with full disclosure.
16. The parties should practice their presentations to get the best timing and best read from jurors.
17. Parties and lawyers should decide on what kind of feedback they want: jury only response or a trial consultant's probing into the issues of importance.
18. Although the process can be conducted in a shorter timeframe, two weeks are needed to put together an optimal *Jury Mediation* in order to get the best results.
19. Parties should understand that the feedback from the *Jury Mediation* may change the settlement posture of the case.

3. Best preparation steps for the *Jury Mediation*.

1. The parties agree on the length of presentations.
2. The parties agree on the witnesses to be presented live or on tape, if any.
3. The parties agree on the documents to be presented.
4. The parties agree on expert testimony that will be presented, if any.
5. The parties agree on the date of group.
6. The parties agree on the location of the group.
7. The parties agree on the number and the composition of the recruited jurors.
8. The parties agree on the start time of the project.
9. The parties agree on demonstrative exhibits used, if any, and the presentation equipment.
10. The parties must practice their presentations to ensure they can stay within the time guidelines. In past projects, we have found that counsel can exceed the scheduled presentation time as much as 50%. When they are held to their scheduled time, they do not get to present some elements of the case which they may consider important for a jury to consider.
11. The parties should use an opening statement as a model for the presentation while allowing for some argument.
12. The parties decide whether to conduct the mediation immediately following the groups or to schedule for a later time.
13. The parties agree on neutral statement of case.
14. The parties agree on whether the jury will just have a general discussion of the case or consider verdict questions.
15. The parties agree on whether damages will be discussed.
16. The parties agree on whether jury instructions will be used.
17. The parties decide if they want written jury responses to the case.
18. A budget for the project is approved.
19. The parties will send full payment of the approved project budget to secure the dates of the project and to initiate the project. No project will be initiated until payment is received.
20. The parties agree that any postponements or cancellations will incur costs.

4. Conduct the *Jury Mediation* – Exemplar Half-day Agenda

The following schedule is an example of a typical *Jury Mediation*. Other schedules and project configurations can be designed (e.g., full day project), depending on the nature of the case and the needs of the parties.

8:00 – 8:30am:	Jurors fill out confidentially agreement and questionnaire
8:30 – 8:45am:	Trial consultant and mediator introduction of project to jurors
8:45 – 9:30am:	Plaintiff case presentation (including witnesses and exhibits)
9:30 – 9:40am:	Short break
9:40 – 10:25am:	Defense case presentation (including witnesses and exhibits)
10:25 – 10:35am:	Plaintiff rebuttal
10:35 – 10:45am:	Jury instructions
10:45 – 11:45am:	Juror deliberation

Jury Mediation Handbook

11:45 – 12:15pm:	Focus group discussion with moderator
12:15 – 12:30pm:	Final questionnaire and verdict preference measurement; jurors are released
12:30 – 1:30pm:	Debriefing discussion between mediator and trial consultant
1:30 - on	Parties continue mediation with designated neutral

Note: In presenting their respective cases, the attorneys usually deliver an opening statement type of presentation. Then, it is anticipated that each side can call up to two witnesses with only 5-7 minutes each of direct and cross-examination. If more witnesses are needed or longer testimony, we may need to extend the presentation time slightly. However, we want to make sure that we have ample time for the jurors to discuss the case.

5. Interpreting the results of the *Jury Mediation*.

- It is important to consider what the jury discusses and doesn't discuss in evaluating what is important and unimportant to them.
- We evaluate how many times the jurors mention particular issues.
- We consider the strength of jurors' opinions on particular issues.
- It is important to look at how much time the jury spends on particular evidence, how they use that evidence, and how they evaluate the personalities in the case.
- We look at how the jury interprets legal questions in the case.
- We consider what raises questions for the jury or how they may be confused about issues in the case.
- We evaluate what the jury feels are the strengths and weaknesses of each side's case.
- We consider how the jury adds to the case from their own personal experience or attitudes.
- We consider what issues the jury wants to hear more about.
- It is important to look at how the jury constructs a combined story of "what happened".
- While the parties may convene immediately to mediate the case, it is important to understand that the parties may not settle right away but may need some time to process the results and discuss their settlement position among themselves.

For additional information, please feel free to call Richard Gabriel or Susan Hoyt at Decision Analysis (310) 979-0999.