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Timing is everything

Posturing your case for resolution at mediation

By Guy O. Kornblum

Mediation is a positive event in civil litigation if the parties are ready to resolve a case *and* the case is ready to be resolved. Both must be present for there to be a good chance of a successful resolution in mediation.

Anyone who has been involved in dispute resolution knows how laborious and often mysterious the process can be. Mediation allows the parties involved in the dispute to sidestep the litigation process, while also getting results. How do we make sure the parties are ready to talk and be effective in the process?

Serious consideration should be given to the timing of mediation. Obviously, an earlier settlement of the case is preferred since it avoids costs which reduce a plaintiff's share of the settlement. For the defendant, reducing litigation costs should be an obvious goal.

An effort should be made to work toward mediation *as early as possible* so that the client can reach financial and recuperation goals. It is the attorney's responsibility to recognize the advantages of mediation and resolution for the client. In doing so, counsel must be mindful of the best timing for the parties to mediate.

When compared to the expense of prolonged litigation, mediation usually is cost effective. From a plaintiff's perspective, the client obtains an early use of the funds, rather than the hope of financial recovery later, while also saving money on pre-trial and trial costs, as well as a possible appeal. Litigation costs often surprise clients, particularly if expert testimony is needed. Thus, at a mediation, a major factor in considering whether to settle is the future expense of proceeding without settling.

Also, there may have been efforts to settle the case directly. Demands and offers may have been exchanged with the parties ultimately recognizing that this process is likely not to be effective and that a neutral needs to be involved to improve the chances of a resolution short of trial.

Is the timing right?

Are the parties ready and interested in achieving a fair settlement? Mediation works only if the parties are ready to resolve the matter. They must come with a good-faith belief that the matter can and should be settled and have a rational and reasonable evaluation of the case. If the plaintiff's expectations are not supported by the facts of the case as then known, or the defense is looking for a "fire sale," mediation will be a waste of time and money.

The keys to a successful mediation are:

- The first time the adjuster or person with the purse strings learns about the case *cannot* be just before or at the mediation. They need to be knowledgeable about the merits of the case *before* the mediation takes place in order to have sufficient authority for productive settlement discussions can take place at the mediation.
- Also, the parties must be willing to exchange mediation statements that contain a thorough outline of their respective positions. In my view, the mediation is likely to be unsuccessful if they do not. In addition, the mediation statement needs to be a real and comprehensive outline of a party's position *with exhibits to support it*.
- Further, the mediation statements should be exchanged and provided to the mediator well before the mediation day. I urge the exchange to take place at least *two weeks* before that day, and more if possible, in order to give the opposition and mediator time to digest your position and evidence.
- Also, consider providing the mediator with a private letter pointing out additional information for the mediator only. This can include a response to the anticipated points you expect from your adversary.
- I highly recommend a conference with the mediator before the mediation day to hear how the mediator expects to conduct the mediation and what the expectations are from you and your client to get the case in the best position for resolution.

The point is that this preparation process is essential to posturing the case for the best chances of a successful settlement on the mediation day.

Ask the other side what is needed to evaluate the case

So, how do you find out if the parties are at the point where settlement discussions would be productive either directly or through a neutral? One way is to have a dialogue with the opposing counsel. That is, ask counsel about the client's view of the case. While opposing counsel may not reveal all, a certain amount of candor is called for. And it does not hurt to inquire: Are you and your client at a point where we can have a meaningful discussion? Who knows? This opening to communication about settlement may lead to direct negotiations (Heaven forbid!), and perhaps even a settlement without a mediator.

If the answer is "No," find out what is needed to get to a point where mediation makes sense. Perhaps the parties can agree on a limited discovery plan or exchange of information that will allow each side to evaluate the case.

Research shows that a key factor in litigants' willingness to use mediation is the recommendation and encouragement of their attorneys. For example, "a majority of parties in domestic relations cases (68% of men and 72% of women) who chose to use mediation said their attorneys had encouraged them to try it, whereas less than one-third (32% of men and 18% of women) of those who rejected mediation had been encouraged by their attorneys to use it." (R. Wisler, When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations, 2 Pepp. Disp. Resol. L.J. 199, 204.)

So, it is counsel's job to assess what is needed to reach a point where negotiations – direct or at mediation – make sense.

Use the mediator to determine the right timing for mediation

Mediation is a process, not a day. Mediation involves an objective intermediary

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who negotiates with the parties to avoid or end the highly confrontational and tension-filled process of litigation. From the plaintiff's perspective, it is a means of essentially selling the lawsuit to a defendant, who buys off the expense and exposure of ongoing litigation.
It involves an exchange of offers and counteroffers made in more of an informal business environment, rather than a formal courtroom.

So, avoid waiting until the mediation day to find out that the other side is neither prepared nor interested in settlement. It is advisable to have a *pre-mediation conference* at least two weeks before the mediation occurs. This is a good time to find out if the other side is really interested in settling. In some instances, ask the mediator to contact the opposition to find out if there is real interest in settlement, and if the "check writer" with authority to settle is going to be present at the mediation.

You do not want a situation where a "potted plant" attends on behalf of the other side and attends with no or inadequate authority to resolve the case. This occurs when an insurance representative seeking authority to settle must speak to someone at the "home office" who is not present at the mediation and not subject to the dynamics of the process. This is true even in remote mediations where the parties do not have direct personal contact. In many instances the parties attending do not have direct contact because they are in separate "rooms" from the start. So, a "Zoom Mediation" does not necessarily change the dynamics of the process. However, the absence of those with the ultimate authority does change those dynamics and significantly lessens the chances of a settlement being reached.

Have the right approach in your settlement discussions and at mediation

Being prepared for mediation means having the appropriate attitude before you begin the process. Hostility, anger, finger-pointing and accusations are not part of the mediation process. Diplomacy, salesmanship and patience are the bywords. The parties and their lawyers may be firm, tough and even hard-nosed at times, but they need to do it politely and diplomatically. This is where the client enters the business process of resolving disputes and learns to step outside of the courtroom. The demeanor of all should be consistent with this "business like" approach to negotiations.

If mediation does not work, keep the door open for further discussions

While a case may not settle at mediation, that is not the end of the road for a potential resolution. Many cases settle in the weeks following the mediation, particularly if you have an experienced mediator who follows up with the parties. Following mediation, the parties may have gained a different perspective on the case and reevaluated their positions. That can be a major event or "evaluation changer" which could produce more movement toward a center point.

Also, the mediator will often comment on issues and provide views on each side's case. The mediator may offer the pros and cons of settlement versus proceeding further. This provides an objective, third-party view of the matter, which may be very valuable as an objective analysis of the merits of the dispute.

Third, the parties may be so far apart that settlement is not likely. While one hopes that this is a very rare occurrence, there are cases that need to be tried for reasons that are logical or illogical (e.g., personal vendettas, etc.). While we like to believe that we can control our clients and influence them regarding resolution, there may be instances when the clients simply cannot come to terms with a settlement that works for all concerned. So be it. Again, this should be a very rare occurrence. By negotiating directly and perhaps even mediating, you will find out where the parties are in their settlement efforts.

Mediation offers the opportunity for the client to participate in the process and hear the views of those involved, including the mediator. That is positive because the client hears what the other side has to say and can consider the points and counterpoints of the case and factor those into the decision-making process. Many times, the client's perspective on settlement will change as mediation progresses. But it will not work unless counsel and their clients have the right attitude and are genuinely interested in resolution. The timing needs to be right for participation in the process of trying to resolve the case. Thus, counsel needs to assess whether the case is ready by engaging in a preliminary inquiry as outlined above to determine if the stars are aligned for a meaningful and good-faith discussion of the case and its resolution.

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