

Timing of Mediation

By Joseph Stine



Most of us have heard the expression "being at the right place at the right time." If you are in port for the day from a cruise, being back at the dock at the right time means the difference between catching the ship and

having it leave you behind. You want a tour guide who returns you dockside before the passenger gangway is pulled aboard yet not so early that you miss the opportunity to see as many sites as possible before the ship departs.

Timing is as critical in mediation as it is in touring. A well-timed mediation with a well-prepared client can resolve the dispute; a mistimed mediation involving ill-prepared parties can worsen the conflict. Going to mediation when the dispute is ripe for resolution can make the difference between obtaining a favorable settlement for your client and poisoning the atmosphere for constructive negotiation.

Extensive experience as a mediator and litigator has taught me some valuable lessons on selecting the right time to go to mediation. Allow me to share a few of them with you.

Pre-Litigation Mediation

Litigation is not a prerequisite for mediation, but mediation may be a prerequisite for litigation.

In considering mediation before litigation, first determine whether you are contractually obligated to participate or at least offer to participate in pre-litigation mediation. Many contracts contain a dispute resolution protocol that requires mediation before resorting to the courts. For example, the California Association of Realtors standard form for residential purchases has a broad mediation requirement applicable to most buyer/seller disputes; an attorney who files a lawsuit based on a residential sale without first seeking to mediate the dispute jeopardizes his client's ability to recover attorney fees as the prevailing party.

There is also legislation promoting pre-litigation mediation for certain types of disputes. For example, state law establishes ADR as the initial dispute resolution forum for most common disputes between homeowners associa-

tions and their member owners. The Davis-Stirling Act generally requires that the association and member offer ADR, including mediation, to each other before either party can commence an action to enforce rights under the Act or as set forth in the development's governing documents.

In other instances, mediation before litigation, though not required, makes abundant sense because the projected cost of litigation is disproportionate to the modest size of the claim.

For example, mediation is very useful when representing victims of minor injury / modest loss accidents by facilitating settlement without the need to make a large litigation investment. Astute claimant's counsel in these cases should consider suggesting mediation to the insurance adjuster before the claim is assigned to defense counsel. Mediation may allow the injured client to obtain a higher net recovery through an early settlement that avoids the significant costs associated with a typical personal injury action. Overburdened insurance adjusters may embrace mediation as a means of efficiently disposing of minor claims with clear liability so as to permit them to focus on claims with high damage exposure.

Another good candidate for pre-litigation mediation is an interpersonal or other relationship dispute with small financial stakes, but a large emotional overtone. An inheritance dispute was recently settled in my office after cost-conscious counsel convinced their clients to go to mediation before commencing expensive litigation among mistrustful prospective heirs. Partition actions between hostile co-owners of property may be avoided through mediation. Litigation between the owners of adjoining properties over easements, encroachments, or boundaries can destroy neighbor relations; nipping these disputes in the bud through mediation preserves and, in some cases, restores neighborhood peace.

Early Litigation Mediation

From the outset of a lawsuit, the Superior Court urges civil litigants to resolve their case through mediation or other forms of ADR. Resolution by trial is disfavored. Plaintiffs are required to serve with their complaint a pre-printed court advisement endorsing ADR

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and a form that a defendant can use to signal a willingness to participate in ADR. The message is clear: litigants are encouraged to opt out of the traditional tract to trial and settle their civil dispute through ADR.

In many instances, a good time for mediation is shortly after all parties are before the court, all answers and cross-actions filed, and perhaps some modest written discovery completed. The pleadings should advise you of the essential legal and factual issues. Responses to strategically targeted discovery requests will penetrate the pleadings by pinpointing essential documentary and other evidence underlying your opponent's case. If you have been diligent about gathering evidence from your client, you may be prepared for a meaningful mediation within the action's first 90 days.

Document-based actions are particularly well-suited for mediation during the initial stages of a case. Written contracts, deeds, and other records of a transaction are what they are and typically mean what they say on close inspection. Months of litigation will not change these documents. Depositions may give context or clarification to them but will not alter their content.

For this reason, breach of written contract actions, common count collection actions, and real property actions based on writings are particularly well-suited for early litigation mediation. Most of the essential evidence is on paper. Turning over every evidentiary rock may not be a prudent investment of your time or your client's money. If the process does not produce a settlement, there will still be ample time to uncover the case's nuances through depositions and other expensive formal discovery prior to trial.

Another benefit of early mediation is to obtain an insightful face-to-face assessment of the opposing counsel and party at the outset of the case. In talking to counsel on the phone, you often get his best "spin" as to the credibility of a client who, in reality, may be neither articulate, trustworthy, nor compelling. Spending time discussing the case in an informal meditative setting may reveal much about the other attorney, his client, and how well they work together. Mediation, even if it does not produce a settlement, can be invaluable in "sizing up" who you are going to be dealing with and what to expect down the road.

Mid-Litigation Mediation

Mid-litigation is a common and often most opportune time for mediation.

After several months in litigation, you receive a notice to appear at a Case Management Conference (CMC). A discussion of mediation and other forms of ADR is at the heart of this brief status conference. At the CMC, you will have an opportunity to select a court-approved mediator to mediate the case for a modest \$150 per hour for the first two hours. You also can provide input to the court on the deadline for completion of the mediation.

A critical fact to be considered in scheduling a mediation is the attitude of your client regarding case settlement. It may take time for a client passionate about his cause to realize that he may not prevail at trial despite his professed moral certainty as to his claim. A party emotionally invested in seeing himself as the victim and the opposing party as the villain views the case as a morality play of right versus wrong. Getting a client to make some concessions to end the dispute may take time and test your abilities as a counselor. Make sure that your client comes to the mediation with a willingness, however reluctant, to make some accommodation to the adverse litigant as part of the negotiation process.

In many cases, the scheduling of mediation will guide your case preparation. Before the session, you will want to complete sufficient discovery to be well-versed in the action so that you can intelligently negotiate a good settlement that factors in probable trial outcomes. Experienced litigators recognize mediation as a pivotal event in the case; working backwards from that date, they develop a discovery plan that prepares them and their clients to negotiate a settlement that is preferable to making a further investment in litigation.

"Eve of Trial" Mediation

It is never too late for mediation if the parties are motivated to avoid the inherent risk and cost of trial. Some cases need to fester for a year or more before the parties and their counsel can get serious about ending the dispute.

In almost all instances, you should and will have a very thorough knowledge of the evidence and law by the time of the trial readiness conference. Discovery is generally completed and the legal issues fleshed out. The case is what it is, nuggets, warts, and all!

Mediation in the waning days before trial can and often does produce settlements. At this point, it is difficult to bluff your way through - you know what you have and so should your opposing counsel. It is a ques-

tion of how comfortable you and your client are about letting someone else (i.e., judge or jury) decide the outcome versus eliminating the inherent risk of a bad result by accepting good but less-than-best trial outcome terms in a settlement. All parties have much to potentially lose by turning the decision over to a judge or jury; they also may have much to gain and sometimes much to save (e.g., cost of trial) by settling after the arguments have been developed and evidence fully exposed.

As such, an eleventh-hour retention of a mediator to sit down with trial-ready counsel can be money well spent by facilitating a settlement that may not have been possible for a variety of reasons during the earlier stages of the action.

Conclusion

Mediation at an opportune time is where disputes commonly come to die. Parties go on with their lives without the stress and cost of the conflict. Attorneys move on to other cases.

Disputes have a life of their own. Some are ready for settlement with a minimal investment of time and money. Others need to season a bit while the parties, like boxers in the opening round of a match, feel each other out to determine what the opponent's "got." Still others need months to ripen to a point where the parties are motivated to avoid the further cost and downside risk of trial.

Mediation may make settlements possible in the early, middle, or late stages of a dispute. In representing clients, we should initially evaluate and continually reevaluate the prospect of using mediation to turn conflict into consensus. This evaluation is as much of our job in litigation as conducting adequate case investigation and discovery.

If we do it well, we can use mediation at an opportune time to achieve a good settlement for a client looking for a way to bring the dispute to a beneficial, pragmatic end.

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