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Timing: An Overlooked Component Of A Successful Mediation

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As a seasoned mediator, I have found that timing is a key and underrecognized component of mediating successfully. We all know that experienced litigators carefully consider when to start mediation. That is when they have the chance to so decide. Sometimes a contract, often seen in employment cases, requires that mediation be started when requested by one party; a court may mandate early mediation; or an adversary may suggest going to mediation.

Is it best to try before positions have hardened and money has been spent on litigating? Or wiser to wait until the parties have an idea of what legal vulnerability exists — probably after some discovery has taken place. There is no universal answer — it depends on the case and on the attorneys' assessment of the situation. Indeed, the mediator rarely plays a role in deciding when to initiate a mediation process.

However, the mediator can impact timing in a number of ways. The neutral can suggest a date later than the one first proposed for a mediation session. This could enable the parties to exchange information beforehand, which may make arriving at a settlement more likely and/or more expeditious. The mediator can often help the parties agree on what information will be exchanged before the mediation. Delaying a mediation may allow parties or counsel to take care of some important outside issues, which will enable them to be more constructive about resolving the case.

In my experience, timing is very important and not always well considered, at several key points. Here are some common examples:

1. Inviting parties to tell their version of the events. Some neutrals make it a practice to ask the parties to speak, after their attorneys have spoken. Some do it in the joint session regularly; others only in caucus. This is intended to give the parties their "day in court," which can be cathartic and helpful. Other mediators do not do this as a matter of course, but leave it up to the parties and counsel to decide who will speak when.

2. Trying to limit inflammatory venting; it's unlikely to move the negotiation forward. A classic example is one party saying to the other party: "you are lying ... and you always lie."

3. Guiding a party or counsel away from excessive repetition of a position or point when the repetition is clearly annoying the other side. The challenges here for the mediator are twofold. First is deciding if/when this should be done. If the decision is yes, how does a mediator convey the message in a way

that does not make the person feel disrespected or silenced?

4. Deciding when to caucus. Sometimes one of the parties asks for a caucus and when this occurs, it is generally a good idea to go with it. More often the caucus is at the mediator's suggestion, but it should not be done too quickly or as a matter of rote. I have seen mediators cut off a constructive or potentially constructive dialogue because they had a preconceived notion, perhaps from a training outline, that it was "time" to caucus.

5. Conveying a first offer or counter-offer. Frequently one party wants to "get to the money" before the mediator thinks it would be constructive. Perhaps enough groundwork has not been done; maybe the parties have not really absorbed where the other ones are; they may not yet have made a realistic appraisal, with the help of the mediator, of what their options are. It may be the mediator's task to convince them to be patient.

6. Concluding that there is an impasse, which necessitates taking a different approach to the session. I have a great deal of trouble with the term "impasse" although many find it a meaningful concept. The difficulty is that there are often a number of times in a successful mediation when it seems as if the parties are too far apart to reach a settlement. With mediators' optimism, patience and some luck, the session can move forward. A true impasse is a more severe form of this, when the parties are ready to call it quits and we are working to keep them in the room. If so, what does one do then? An obvious tack is to move to another issue if one exists. Or to talk about what terms one would want in the settlement agreement were one to be reached.

7. Another option, if at an impasse, is to suggest a "mediator's proposal." It is a clearly evaluative technique and one which can end discussion of terms, at least temporarily. Some mediators frown on the technique; others use it very guardedly and as a last resort. If it is a tool that you in fact utilize, how do you determine when the mediation is at that point?

Pursuing settlement if a case is not resolved at the session also presents interesting timing issues. When do you make an initial follow up call or email? Most likely it depends on how the session ended and the sense you get from the parties of their readiness to hear from you and to continue negotiating. A much more intriguing question is when to stop. When the parties tell you that they don't need or want more contact it is easy — what about when they do not articulate that?

A related question is whether timing issues should be dealt with differently in a mediation where repairing a relationship is at stake versus one where the parties seek simply a clear and perhaps fast resolution of a specific dispute, with no interest in a continuing relationship? And what if the parties have capped the time they allot for a mediation session? This may be a clue that what they want is a solution, not a repaired relationship, and are willing to devote only a limited amount of time to it.

Understanding the importance of timing, learning how to manage it is essential. The main cues come from the parties. After establishing a relationship of trust in the premediation and session interactions, they may signal, if not tell you, to what they will be receptive.

The main advice I know is to stay aware of the importance of timing as you proceed and tailor your approach based on what you are seeing and hearing.

—By Nancy Kramer, JAMS

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