

A Pot Committed (No, Not That Kind) Mindset and Why You Should Bet on Early Mediation

By Ann T. Marshall
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In mediation, we often come across parties who have invested so much into litigation, in terms of either time or money, that they are driven to continue with a case even in the face of likely loss. The world of gambling calls this "pot committed."^[1]

A poker player is pot committed when there is no better option than continued play of a losing hand.^[2] The term is often used to justify continued play where the player has bet significantly into the pot (the sunk costs philosophy).^[3] I have experience with this from years of playing high-stakes, professional Texas hold 'em poker. And, by that I mean, all the movies I've watched about gambling.

Sage poker players know, however, that it is unwise to keep playing a losing hand based on the amount bet.^[4] In fact, truly being pot committed has little to do with the amount bet and everything to do with the remaining chip stack and the player's ultimate goal.^[5] If, for instance, the goal is to stay alive in tournament play, one may actually be pot committed if losing the hand will eliminate the player from the tournament. The amount already bet, however, should not drive continued betting.

In litigation, if a party has spent a significant amount of money or has devoted a vast amount of

time and energy to a case, they are prone to being pot committed. Even in the face of near-certain loss, the pot-committed mindset can drive a party to not settle and proceed to put even more at risk.

It can be difficult to convince someone that it is smart to end a case with a net loss outcome. After all, when faced with unappealing options, it is easy to be distracted by the prospect of a low-chance win. Identifying and discussing the mindset behind pot commitment can help. This discussion can include:

- big picture/goals (there is no tournament!);
- the initial "bet" may have been justified, but it is smart to reevaluate;
- lawsuits (like gambling) are not business investments; and
- benefits of settlement (protect the remaining chip stack; i.e., time/money/energy/resources that can be used better elsewhere).

Smart players avoid being pot committed.^[6] And they are also keenly aware of others who may be



suffering from it—playing with a pot-committed player brings its own problems.^[7] In current times, it may be easy to let delay creep into cases. But with more time, parties may increase their litigation spend. Early mediation is a fantastic way to avoid the pot-commitment problem altogether.

While it may be easy to identify when not to mediate, when is the right time to mediate? As with all things legal, “it depends!” There are, though, a few guidelines that can help decide the right timing for a particular case.

First, parties need enough information to be able to have a dialogue about settlement, and to do that, everyone needs key information. Consider what is critical to the analysis of a case. The parties should exchange key evidence, such as eye-witness testimony, central documents or property surveys, so they can understand their case’s strengths and challenges. “Key information” may translate to one round of written discovery exchange and possibly some depositions.

Second, fees and costs should be kept low, while getting enough information to mediate, so as to avoid the pot-commitment problem. Keep in mind that erring on the side of “too early” is typically more efficient than erring on the side of “too late.” If, during a mediation, it emerges that parties’ settlement ranges are nowhere close due to a distinct issue or two, the mediation can pause so that the parties can complete a negotiated and discrete proceeding, with an agreement to return to mediation afterwards. This may be seen in a case with competing expert opinions, for instance, where their depositions may be needed to make progress in negotiation.

Third, a common decision is whether to mediate before, or after, a dispositive motion. In making

this decision, keep in mind that leverage a party may have with a strong, pending motion, will be lost or significantly diminished if the motion is denied.

Timing, as they say, is everything. Every case has unique needs that present different windows for negotiation. And just as a mediator can assist with reaching an ultimate resolution in a case, so too can she help with negotiating the timing of the mediation. This can include a negotiation of discovery phases, discrete discovery needed to resume mediation, and other time-related issues.

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¹ Gibson, Neil, “Understanding What It Means to Be Pot Committed,” December 10, 2014, <https://www.pokernews.com>, <https://www.pokernews.com/strategy/understanding-what-it-means-to-be-pot-committed-20050.htm>

² *Id.*

³ Walker, Greg, “Pot Committed,” <https://www.thepokerbank.com/strategy/concepts/pot-committed/>

⁴ <https://www.pokerlistings.com/strategy/odd-talk>

⁵ *Id.*

⁶ Little, Jonathan, “Feeling Pot Committed,” <https://jonathanlittlepoker.com/potcommitted/>

⁷ <http://dictionary.pokerzone.com/Pot+Committed> (bluffing is not advised when playing against a pot-committed player)

