



WHEN IS THE RIGHT TIMING FOR A MEDIATION

By Hon. Rebecca Westerfield (Ret.)

Mediation has become so embedded in the litigation process that it is typically no longer a question of if the case will go to mediation, but when. The California courts have repeatedly recognized “strong legislative policy” in favor of alternatives to court adjudication. The California legislature has acknowledged the advantages of mediation — simplicity, economy, privacy, greater opportunity for direct participation of the parties, timely resolution, certainty of outcome, and finality. Clients, particularly cost-conscious in-house counsel, are increasingly more sophisticated in their approach to mediation and expect their attorneys to be as well. Suggesting mediation these days is not a sign of weakness, but simply a recognition of what the court will expect, or at least encourage.

Concepts about negotiation have also evolved to focus on non-economic interests as well as economic solutions to disputes. This approach has made its way into the MBA programs, law schools, management trainings and even trainings for insurance adjusters. While haggling and bazaar-style bargaining over money (or other quantifiable factors, such as real estate, licenses, products or time) are enough for some people and organizations, other experienced negotiators and neutrals will consider a broader range of interests and explore the possibility of a resolution that will expand the “fixed pie.”

Timing, however, is key. Mediation should not be about identifying as reliably as possible the best settlement terms available at the time of the mediation rather the mediation should be timed to get the best settlement terms. “The right offer at the wrong time is the wrong offer.” This article explores some of the considerations involved in choosing the timing of the mediation deliberately and strategically, and preparing for the right time when it comes.

PLANNING MEDIATION IN THE CONTEXT OF THE LITIGATION

In planning litigation, trial attorneys often create calendaring systems to make sure no deadlines are missed or details are overlooked. Making the effort to consider mediation at different points in the litigation plan is just as important. The critical path to success in mediation should take as much focus and discipline in planning as trial strategy. A very patient golf instructor once said to me “If we don’t aim it’s a waste of time.”

Like most things in the litigation process, it is usually not a neat sequential linear path to a mediation event. The challenge is to be as little surprised as possible, to be able to respond to the unexpected, to minimize potential setbacks and to take advantage of openings. An effective calendaring system could include points that trigger consideration of mediation before the next litigation event.

For instance, is a motion for summary judgment anticipated? Is it likely that its greatest impact on a mediation will be before it is filed, after it is filed but not ruled on, or only after a ruling if it does not dispose of all the issues? Should a mediation session occur before or after making an offer of judgment under CCP §998 or FRCP 68? An offer of judgment ups the ante by shifting certain “costs” to the offeree if they do not get a more favorable verdict. In some cases, increasing the litigation risks before a mediation may be the right call — but it may cause the other side to view the offered number as a “step” in the negotiation dance rather than as the offeror’s “bottom line.”

Another timing consideration is when to begin the mediation. While the marathon one-day session is the traditional paradigm, there may also be a mediation process that includes shorter sessions at different

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THE RESOLUTION EXPERTS



points. In complex cases this can allow for different sessions with different participants, but sequencing multiple individual claims or fractionating issues may be efficacious even in simpler cases. And, as discussed below, a sequenced mediation can be used to help manage the discovery process.

“BIGGER-PICTURE” TIMING CONCERNS

Determining the right timing for mediation also requires knowing about issues external to the immediate dispute that can impact resolution. Is there an initial public offering on the horizon, a financial obligation coming due, an anticipated announcement by a regulatory agency, a change in tax laws, or a pending appellate court case that addresses the subject matter of the lawsuit or a key issue in the litigation? The attorney must appreciate the context of the dispute and know the client’s overarching needs to satisfy them.

There are disputes in which the parties may have a higher interest in preserving an existing beneficial business or professional relationship — unexpired service agreement, software license, supply contract, an ongoing business, or relationships with non-party entities such as customers. A client may have objectives that are unobtainable through the litigation — renegotiated contracts, buy-outs, exchange of property, a release that goes beyond the litigated matter. In these cases, the mediation should occur when the options can be explored fully, before the possibility of productive discussions is eroded by the demands of adversarial litigation. In a high-stakes dispute involving highly technical or scientific issues, the parties’ priority may be retaining control of the outcome. Early mediation in which an independent expert is engaged to assist the mediator before litigation begins may be advisable.

MEDIATION AND DISCOVERY

In some cases, it is helpful to involve a neutral even before the case is ready for mediation, particularly to help facilitate a reasonable and cost-effective discovery process. In a recent construction case, a half-day session was held in which experts on both sides shared information and the parties devised a plan for moving forward towards settlement discussions. Parties can work with a mediator to design a process for exchange of information reducing discovery costs and maintaining confidentiality under the mediation privilege. A mediator can monitor the case to help the parties determine the opportune time to have meaningful settlement discussions.

The conundrum of discovery is that attorneys cannot assess settlement as an alternative to a trial or arbitration outcome without reliable information, but formal discovery processes often involve considerable costs and delays without any guarantee about the usefulness of information obtained. While certainly some discovery battles may be necessary, costly discovery disputes can lead to runaway costs, heightened distrust and sometimes irrational attachment to the litigation.

There are a couple of dynamics worth noting that needlessly escalate the conflicts around discovery that a mediator involved at an early stage will try to allay. One is sunken cost fallacy, or the tendency to “throw good money after bad” in the belief that this will improve the ultimate outcome. Past attorney’s fees and costs should not influence judgments about future decisions (especially when they cannot be recouped through a statutory or contractual fee provision). In reality, past expenses often do create an irrational commitment to investing more resources into a case even when it may not make economic sense. Another destructive dynamic is *fundamental attribution error*, the tendency to attribute an understandable cause to one’s own actions and to attribute that same action by another to being unreasonable. Two common examples: “My discovery requests are necessary to evaluate the claim and assess risk. Your discovery demands are a tactic in a costly war of attrition.” Or “Your resistance to discovery is because you are hiding something. My resistance is because I am trying to be prudent about costs.” Prolonged litigation is likely to exacerbate these dynamics, while a well-timed mediation can help ameliorate them.

The mediator can insure that there has been a timely exchange of data and information that will make a mediation session more likely to succeed, while providing confidentiality for sensitive information through the mediation privilege. For example, parties may need revenue information and financial analysis to evaluate a claim of damages. Or, if a defendant is going to raise an argument about financial ability to pay, credible, current financial statements ought to be available before the mediation session (and before the plaintiffs’ expectations are fully developed) if they are to have any significant impact.

COVERAGE CONSIDERATIONS

Insured matters may require special consideration of mediation timing. A claim may trigger more than one policy. If the case involves continuous progressive

damages, several policies covering different years may be in play. Disputes may arise between excess and primary carriers, or among different lawyers of excess carriers. And a single claim or incident may trigger different types of policies, such as a commercial general liability policy and professional liability policy.

A policyholder (and, in most cases, a party suing the policyholder) will want to ensure that all potentially exposed carriers are on notice of a claim. Disputes among different carriers should be identified before mediation, and either resolved or attended to so that everyone knows who will participate in the mediation. It can be extremely frustrating and wasteful when a defending carrier comes to mediation and refuses to grant or use its settlement authority because of the absence of another carrier. Time spent on allocation and contribution issues among a defendants' carriers can antagonize and rankle plaintiffs who expect the mediation to focus on the underlying claims, making it more difficult to bring the case to closure. A mediator who is engaged early can assist the parties in addressing these issues, in reaching agreement as to who will participate before the mediation takes place, or in determining how to resolve the underlying case while leaving contribution issues for another day. In some cases, a "pre-mediation mediation" among multiple carriers is helpful, either with the mediator that will handle the underlying or with a different mediator if the carriers do not want the mediator in the "main event" to know the amount potentially available to settle the underlying claim.

Coverage issues are also often complex and can involve complicated factual determinations or policy language untested by the courts. A pre-mediation mediation of coverage can avoid the chewing up of time during the mediation of the underlying case resulting in inadequate time to reach settlement. Recently I was involved in a dualtracked, parallel mediation in which I mediated the coverage dispute and another neutral mediated the underlying case. The corporate policyholder knew it would be making some contribution to the settlement and having the dual processes at the same time allowed it to assess its exposure and ability to pay.

Timing considerations will matter even when there are no coverage or contribution issues. A case is not "ready for mediation" until the policyholder's counsel makes absolutely sure that all information requests from the carrier have been addressed and that the carrier has had all it reasonably needs to evaluate the case. Policyholder's counsel should also know how much

time a claims representative needs to obtain settlement authority — and, since the answer to that question may depend on the amount sought, plaintiffs' counsel should consider setting forth a demand well in advance of the mediation to allow the carrier time to work through the process of obtaining settlement authority. Making a demand for the first time in a mediation brief a few days before the mediation session is not helpful if the plaintiff wants an insurance carrier to take the demand seriously and evaluate it fully.

GETTING TO RESOLUTION

To bring a dispute to full closure, all necessary parties must be engaged. How or when will all identified plaintiffs be available? Are all the possible defendants known? Time is not right for mediation if there is an indispensable party absent from the table. In a construction matter, for example, is the architect, the engineer, a major subcontractor in addition to the general contractor available and ready to participate? Is there an indemnification provision that requires the consent to settle and involvement of a third party? Is the indemnitor ready to participate and if not, what processes are needed to get its involvement? These questions should not be afterthoughts in scheduling a mediation session.

A party can be engaged and ready for mediation, however, even if the party does not feel ready to settle. A party may be too emotionally embroiled in the conflict, too intimidated by the situation, or too confident in its own position. Working through these issues with the parties is often what mediators are expected to do. In some cases, the parties' deposition must occur first, to allow counsel to obtain necessary facts but also to give the parties the chance to tell their stories or to get a "taste" of what trial may be like. But party-depositions can harden positions and exacerbate animosity as well. Counsel simply needs to consider the value of such depositions in the timing of the mediation.

Counsel also need to be sure they give mediators the tools that they need. Lawyers and their clients have the right to expect a mediator to be thoroughly prepared for a mediation — to understand the legal arguments, to be knowledgeable about the central undisputed facts, to be appreciative of the different perspectives of disputed facts, to be skilled at handling a wide variety of personalities and emotions. But even the best mediators are hamstrung if they do not get information in a timely manner. The scheduling of a mediation should include a pre-mediation discussion

about how to ensure a productive session, including when information should be provided, the type of presentations needed or wanted, the use of joint and private caucuses, the decision-makers who should be available, and whether any additional persons (such as a party's tax advisor or an accounting expert) should be present or on call.

At the end of the day, some cases simply need to be tried. After all that is what the members of this Association of Business Trial Lawyers do well. It is also why ABTL and the private ADR sector have a responsibility to vigorously support a strong and independent judiciary and an adequately funded public court system. But a case should be tried for the right reasons, and not because the players did not consider when and how they could use the timing of the mediation process to its best effect. ■

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