ALM | LAW.COM

New York Law Journal

Ten Ways To Know When To Undertake Mediation

By Robert J. Jossen
November 17, 2023

Practitioners often wrestle with the question "when is the best time to undertake mediation of a dispute?" Is it before litigation has ensued although the controversy has arisen? Is it at the outset of the litigation once the complaint has been filed? Is it only after there has been some discovery, an exchange of documents and perhaps a few depositions? Or is it on the literal eve of trial?

The answer to this perplexing question, of course, is unhappily "it depends!" But in my experience as both a litigator and a mediator, there are some helpful observations which can be offered to bring light to this question.

One, it bears emphasis that mediation works only when both sides genuinely want to settle the dispute. Mediation is not adjudicative but a negotiation process with the assistance of a skilled mediator to help the parties achieve a settlement. Even the best of mediators cannot succeed unless both sides desire to resolve the dispute. So, the temperature of the parties, in terms of their openness to reach a settlement, is an important factor in timing.

Perhaps one of the most vivid examples of this principle was the settlement of the Dominion-Fox defamation case on the very eve of trial. The $787.5 million that Fox News agreed to pay Dominion Voting Systems to settle the lawsuit was reported to be one of the largest defamation cases in U.S. history. *See New York Times, April 18, 2023.* It was achieved in a highly pressured and rushed mediation because the parties, or at least one of them, were so anxious to settle without a trial.


Robert J. Jossen

Two, will there be a continuing relationship between the parties or does the dispute mark the cessation of any business dealings? If the former, there should be a greater interest in trying to reach an early settlement to facilitate the continuation of the relationship in a constructive manner. If the latter, there may need to be a period of active litigation before the parties will be ready to seriously consider a settlement.

This principle applies in employment situations where the employer-employee relationship is expected to continue, as contrasted with situations where the employment has been terminated and there is no possibility of it being resumed.

Three, have the parties attempted to work out their differences on their own? If there has been an unsuccessful serious effort to negotiate a resolution of the dispute without the assistance of a mediator, the parties may need to engage in litigation before they are prepared to entertain a resolution of the dispute. Many contracts have a provision which requires a period of self-negotiation or

mediation before the parties are permitted to sue or arbitrate. These pre-litigation conditions are intended to give the parties a real opportunity to resolve their differences without the need for formal adjudicative processes.

Four, how complicated are the issues and how much is involved in the dispute? As a general proposition, the more complicated the issues, and particularly if there are factual issues, the more likely there will have to be a period of significant discovery before the parties are prepared to work through mediation. Likewise, if the dispute turns on legal questions, the parties may feel the need to seek judicial determination before a trial on a motion to dismiss or for summary judgment.

An experienced mediator can help the parties recognize the strengths and weaknesses of their respective positions. However, the mediator is not a substitute for a judicial decision.

The dollar amount of the controversy also is a critical factor. The larger the amount and the greater the gap in parties' positions, the more likely that early mediation is not an attractive alternative to full scale litigation. I do like to point out to parties that the costs of active litigation, both in terms of legal fees and lost time or productivity from participants, are significant considerations to bear in mind when deciding whether to mediate and settle or to litigate.

The fact is that often the savings in legal fees and participants' productivity will help fund an earlier resolution of a dispute.

Five, are there consequences to the resolution of the dispute beyond the present conflict? If one party is concerned that a negotiated resolution will lead to other similar disputes, for example in employment controversies, or with a party who has similar contractual arrangements with others, mediation may be less attractive than fighting in court.

To be sure, confidentiality can provide some assistance in this situation, but it is not necessarily fullproof. At the same time, if a party is worried about a public message to others, an unsuccessful judicial outcome certainly is not advantageous.

Photo by: Zolt4n/Adobe Stock

Six, are there personal or emotional issues tied to the dispute? If so, it is highly unlikely that the parties will be in the mood to seek early constructive mediation. For example, does one party feel that the other engaged in deception, lies or even fraud? Did the dispute cost someone personal gain or even a lost promotion? Did the dispute result in one party losing out on a significant business opportunity?

Such factors often cloud judgments of the participants and may get in the way of a realistic and sensible appraisal of the dispute. An effective mediator can help the parties address such matters and reason with the participants not to allow emotions to affect what should be a practical business decision. Sometimes just a face-to-face candid conversation between the affected participants can help to clear the air.

Again, in my experience, the parties often need time—and sometimes active litigation—for tempers to calm and reason to prevail with respect to the dispute.

Seven, do the parties have enough information about their respective positions to make a candid assessment regarding the dispute. Occasionally, one party or the other is not aware of a critical document or series of facts that might affect the outcome, or at least the strength of their case as they perceive it. Sometimes in mediation I suggest to one party that they share a significant piece of information with the other side, rather than hold it back for later use.

This kind of exchange can help move the mediation process along. Also, as a strategic matter,

since the information at hand ultimately will have to be disclosed, there is questionable benefit in holding it back.

Eight, are the critical decision-makers knowledgeable about the dispute and involved in the settlement process? In some disputes, especially involving large or complex organizations, the decision-maker has not been made aware of the details of the dispute or is not fully engaged when mediation, especially early mediation, begins. In such situations, the person overseeing the dispute may be reluctant to reach a settlement.

It is for this reason that mediators typically insist that the participants in the process have clear authority to reach a settlement, or, at the very least, have immediate access to the person with such authority.

Nine, do the parties have an accurate understanding of how much really is at stake in the dispute? If the party seeking damages has an unrealistic or inflated opinion of the damages suffered, it may take the involvement of an expert from the other side to shake this appraisal.

The mediator can help by expressing the opinion that the plaintiff's damage claim is unrealistic, or that the defense is undervaluing the monetary exposure it faces. But the parties must be open to hearing the mediator express such opinions and if they are not ready to do so, then mediation is premature.

Ten, have the parties selected a mediator in whom they have confidence as to thoroughness of preparation, understanding of the dispute, personality, and creativity to help the parties reach a settlement? To be sure, this is an elusive factor. Many judges are quite adept in helping the parties reach a settlement and the parties have little say in who will conduct the mediation.

But judicial time to assist with mediation often is limited by the pressures of a busy docket with multiple litigants and the demands of other cases ready for trial or disposition. A mediator selected by the parties should be asked as to availability to prepare for and conduct the mediation in an efficient and thorough manner.

In conclusion, while timing may affect the prospects for successful mediation, diligent counsel should use their best judgment as to when the process is most likely to succeed. There is no substitute for counsel's assessment based upon knowledge of one's client, the opposing side and opposing counsel, as well as a realistic analysis of the strengths and weaknesses of the case.

If after a serious attempt the mediator concludes that the process is premature, you will no doubt learn that from the mediator. Sometimes, it takes multiple attempts to reach a settlement!

Robert J. Jossen *is a mediator and arbitrator of complex commercial and financial disputes at FedArb.*