8 Reasons to do Early Mediation

By Amy Lieberman

I recently served as a mediator in a dispute where the defense counsel said, "I'm uncomfortable, because this is my first early mediation. We have no documents or depositions. As a rule, I don't mediate until discovery is complete. That way I know everything I need to know. I don't think we'll know enough to get this settled."

By the end of the day, the case was resolved. This may not happen in each instance, but in my experience, over 90% of the time, a case will resolve in mediation – regardless of whether the mediation is done early in the process or years into the litigation.

What is "Early Mediation"?

"Early Mediation" occurs when a demand letter has been sent, and the would-be plaintiff agrees to hold off on filing the complaint pending the outcome of mediation. It can happen when a complaint has been filed, and the defendant has asked to hold off on being required to answer pending mediation.

Early mediation can also occur when mediation is offered by the EEOC after a charge has been filed, but before investigation, or in an employment, real estate or commercial dispute where mediation is a mandatory step to be followed before an arbitration or a lawsuit can be initiated.

In each of the above instances, little or no discovery has been done. Often, only one side's view of the dispute is known. The defense has not yet had the chance to share its own view of the facts and potential defenses.

So, can you get a case resolved at this point? Absolutely. The success rates prove it.

There is one large negative to early mediation: you don't know all there is to know to thoroughly evaluate the case and advise your client.

There is a huge positive, though: you can resolve the case early, saving your client a ton of money in defense costs. And, a happy client is a return client.

Consider These 8 Reasons to Do Early Mediation

1. **Follow the Money.** You can find out whether insurance is involved. What is the deductible? How significant is the concern about costs of defense?
2. **Discover the Power.** Who has the real decision-making authority? The client? The adjuster? The CEO or president? Who has influence – a spouse, perhaps?
3. **Learn the Financial Condition.** How large is the entity? Is the company solid financially, with an ability to fund long-term litigation, able to pay a substantial judgment, or is bankruptcy a risk if there is a huge loss? Is the plaintiff funding the litigation on an hourly basis, or is there a contingent fee arrangement?
4. **Share Perspectives.** There is much that makes up a party's perspective: not only their view of the facts, but also what they recall, who they have talked to, what they have overheard, how they feel, what their lawyer has told them, and what their concerns are about the future. Knowing the full picture, including underlying motivations and interests, will open up wider options for resolution.
5. **Gain the View of Counsel.** What does your opponent think about the strengths and weaknesses of their case? What legal claims or defenses might they assert? Is a motion for summary judgment likely and what are the risks it will succeed?
6. **Avoid the Publicity of a Lawsuit.** Does any side care about bad PR? A lawsuit is forever public. Parties often do not want the world to know that they either sue people, or that they got sued. Mediation, and the ultimate resolution, is confidential.
7. **Settle with Non-Monetary Relief.** Not every claim is about money. Claims can often be resolved with a genuine acknowledgement of harm done and/or an apology, a new position in a company, a re-structured deal, a letter of reference, a new split on a partnership agreement. The earlier the mediation, the more likely a non-monetary resolution is possible. Valuable non-monetary options can decrease the amount of actual dollars paid.
8. **Plan for Critical Information.** If it turns out that crucial information is needed before a decision can be made, a schedule can be set to get that information, in the form of documents, depositions, expert reports or a ruling on a motion. The door to settlement has at least been opened, and a second session can be set after the information is obtained.

The Bottom Line

The cost of litigation is so high, and the time it takes to get to trial so long, that it pays to do early mediation. Most of the time, the matter will resolve. And, if not, both lawyer and client will sleep better knowing they made their best efforts to mitigate any potential future losses.

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