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To Mediate or Not to Mediate - That Is Not The Question

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Today's state and federal courts have a single minded focus in encouraging litigants to resolve their cases. As a result, the question of whether counsel should consider mediation or other dispute resolution alternatives is no longer a novel one. The implementation of docket management processes, including scheduling, pretrial and trial management conferences, as well as an alphabet soup of court-sponsored ADR programs designed to encourage early resolution of cases, all but guarantee that counsel and their parties will have multiple opportunities along the continuum of the litigation process to discuss settlement of their cases.

Indeed, given the ubiquity of mediation and other ADR programs, it is virtually certain, either through the prodding of the courts or the suggestion of counsel, that there will be at least one or more formal settlement opportunities prior to trial. Whether denominated a mediation or a settlement or trial management conference, the question is no longer (as it was in 1990 when I was appointed to the bench) whether the parties and counsel will attempt to reach a negotiated settlement of their dispute under the umbrella of court-sponsored or private programs, but rather when such effort will take place and who is the appropriate person to guide such discussion—a retired or active judge, a practicing attorney or other ADR professional.

So, when is the best time to mediate? Pre-suit, prior to expert depositions, on the eve of jury selection, during evidence, or even post-verdict? The answer, in true mediation speak, is, "it depends." Because of the wide variety of cases that we encounter, ranging from personal injury to business disputes, to construction matters, to labor and employment, land use, trust and estates and educational conflicts, among others, there is no "one size fits all" answer to the question of when the best time is to engage in mediation.

Experience suggests the following. Pre-suit mediation is becoming increasingly popular in certain, but not all types of cases. As in most matters in which mediation is considered and utilized, cost of litigation, disruption of business processes and uncertainty of outcome strongly motivate the parties to seek an early and prompt resolution of the incipient claim. Typically there are other factors that bring the parties to the table pre-suit.

These often include the desire to shield one or both of the parties from public scrutiny and disclosure of confidential or embarrassing information. Matters involving high-ranking and prominent executives separating from public corporations can be the subject of productive pre-suit mediations. So, too, are catastrophic personal injury or death cases in which liability is readily acknowledged and insurance coverage is limited. Likewise, disputes involving municipal development projects in which delays due to litigation would effectively terminate the project are meaningful subjects of pre-suit mediation.

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In most cases, of course, the suit is filed and the long slog through discovery starts. The timing of a productive and successful mediation will obviously vary from case to case. My advice to counsel over the years has been that if settlement discussions are contemplated it is best to initiate those discussions as early in the process as possible at the time when sufficient discovery has been conducted that will allow each party to intelligently analyze its and the opposing party's position.

While there is often the temptation to conduct aggressive and protracted discovery on the theory that just one more deposition will make or break the case, this rarely is the case. In most cases, the contours of the case are well known early enough in the discovery process for the parties to initiate meaningful settlement discussions before extensive time and treasure are expended. In more complex cases, greater discovery may be required, but even then, mediation sooner rather than later can assist in determining how much more discovery is needed and can establish next steps to achieve a settlement. In many matters, either because of the nature of the case and disagreements about its settlement value, or because of the personalities of the parties or, as is occasionally the case, the litigation style of counsel, meaningful discussions will not occur until relatively late in the process, or even on the eve of or during trial. Even then, as experience demonstrates, it is not too late to consider a late scheduled mediation or to seek a brief trial continuance to engage in settlement discussions. Indeed, in certain cases that may be the most opportune time for productive discussions. Not infrequently successful mediations occur while post-verdict motions or an appeal is pending.

There are no absolutes that dictate the timing of mediation. As a general matter, earlier is better than later, but the decision when to enter into mediation should be the result of an individualized assessment of each case and the issues involved including the risk and cost of protracted litigation, the need to modify the views of your client or the opposing party, the personal or business needs of your client, and in some cases, the emotional toll that the litigation and court process can exact on the litigants.

For many parties and counsel the most important question is not whether, or when, but with whom to schedule a mediation. Fortunately there are now many choices, including retired and active state and federal judges, practicing attorneys and ADR professionals. With so many choices, what should counsel and their clients think about in selecting a mediator?

First, as one prominent trial attorney recently commented, a mediator should have the trust of both parties. Without it the process will falter, if not fail. Second, as the same attorney observed, the first rule of a mediator should be "to do no harm." An untimely or improvident observation about case value or potential outcomes can permanently derail a settlement. Third, the mediator should have the time, energy, commitment, patience and perseverance to guide the discussions to a successful conclusion. Especially in complex, multi-party mediations, settlement may not be achieved in the first or second session, but often is the result of the mediator's continued engagement including follow-up proposals, conversations and email exchanges. Fourth, if the parties require the mediator's suggestions regarding a reasonable values or settlement alternatives, the mediator should have the breadth of experience and knowledge to provide such recommendations based on

a candid appraisal of the merits of the case. Fifth, the mediator should have the ability to communicate effectively and empathically not only with counsel, but with their clients. The key to a successful mediation is not only the substantive outcome, but a process that allows the parties' views to be considered and validated.

Finally, an effective mediator should appreciate that not all mediations will be successful and that some cases need to be and should be tried. Trials establish value benchmarks, they provide credibility to counsel and they honor our system's promise that all citizens are entitled to a fair and impartial hearing. Plotting a winning mediation and trial strategy are not mutually exclusive. In fact, they reinforce each other and should be the focus of counsel and client from the moment filing an action is considered.

Judge Robert L. Holzberg (Ret.) leads the ADR Practice at Pullman & Comley, LLC. Prior to joining the firm, he served as a Connecticut Superior Court Judge for more than 22 years.

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