5 Keys to Early Mediation Success When Project Disputes Arise

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Many construction, development, and real estate purchase agreements provide for early mediation as a condition precedent to arbitration or court litigation. Early mediation sessions usually fail, only to be followed months later by additional mediation sessions that succeed. If most cases are settled later, why can't they be settled sooner before incurring the time and expense of legal battles?

Here are five keys to improving your odds of success at early mediation.

First, ask your attorney to interview a few of your project employees who will need to testify in support of your case. Obtain their email and text files first and search for key words to locate messages that would be problematic or supportive of your case. The interview should focus on the tough questions that will be asked by your opponent in a deposition or at trial. If the opponent agrees, consider stipulating to a short list of the key employees on both sides, the same or very similar search terms, and the exchange of the responsive emails sufficiently in advance of mediation to let the impact of those documents sink in. Many cases hinge on email and text admissions made contemporaneously during the project. They also hinge on the credibility and substance of key witness testimony.

Second, obtain and exchange with your opponent preliminary expert reports on the technical issues in the case. While expert reports at this stage will be developed without the benefit of depositions or full document discovery, many experts can provide a reasonably accurate forecast of the merits based on preliminary information. Encourage your expert to be candid with you, and you should be candid with the expert. Doing so will arm you with the information needed to assess and settle your case early.

Third, ask your attorneys to provide a range of expected attorney fees, expert fees, and related legal costs that will be incurred at the following stages: costs through early mediation; costs up to the start of trial; costs through the conclusion of trial; and costs during any available appellate proceedings. Ask them to provide the assumptions they employed when estimating these fees and costs. Ask your attorneys to explain whether your fees are recoverable and, if so, what

percentage of those costs is likely to be awarded by the arbitrator or judge if you prevail. You should assume that your opponent will incur its own legal costs that are within 25 percent to 33 percent of your costs, and that they will seek reimbursement of those costs from you should the costs be recoverable under contract or applicable law.

Fourth, in conjunction with the above, consider the mandatory exchange of pre-mediation settlement offers. If possible, this should be done under rules that prevent the recovery of fees and costs by prevailing parties who fail to obtain a better result at trial. This method may add considerable risk to any party that rejects a settlement offer. As part of the "first offer" analysis, ask your attorney to prepare his or her own evaluation of the settlement value of the case. Parties who value their case significantly higher or lower than their attorney often need further education of the risks and merits of the case, or at least a second opinion from another attorney. Getting the initial round of offers on the table often takes the first half of the first day of mediation. Given that most mediations are only one day, you can waste precious time waiting until mediation to exchange initial offers. Performing the settlement valuation and exchanging first offers in advance of mediation allows the mediator and parties to focus on the gap between the newly established goalposts during mediation.

Finally, ask your mediator to plan at least one pre-mediation session with each party to focus on the tasks above and any other steps to optimize chances for an early settlement. Some refer to this process as "Guided Choice Mediation." The mediator may suggest a meeting between dueling experts where the mediator is the referee. The mediator may also suggest a particular negotiation plan, face-to-face meetings with decision-makers, or other measures aimed at preventing a stalemate at mediation. Equally important is not using precious mediation time to simply meet the parties, get a feel for their positions, extract the first offer and counteroffer, and plan next steps in real time.

The failure of an early mediation is usually not the fault of the mediator. Nor is it a sign that the case is incapable of settlement. The failure typically results from an under-considered process and the lack of investment by the parties in priming the mediation for success.

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