Mediation Timing in Commercial and Employment Disputes

The Timing "Tug of War" and the Effective Use of "Pressure Points"

BY BARTON A. BIXENSTINE

One general counsel, when asked why her company had virtually supplanted arbitration with mediation, responded with three words: "Speed, cost and control."[1] Selecting the appropriate time for mediation is a critical element of that control, that can have a substantial cost impact.

Clearly, "[d]espite the skills of a trained experienced mediator, the right people with the right information in the right frame of mind are necessary to settle a case in mediation."[2] But, what is the "right information," when will the parties have it, and when are they most likely to have the "right frame of mind?"

Though the answers are case-specific, the earlier mediation is scheduled, the greater the contribution to settlement leverage from avoiding the financial,[3] time[4] and emotional costs of litigation, and avoiding the risks to relationships and reputations that can arise from the litigation process itself. Particularly if the immediate litigation stakes are modest compared to the financial and other costs of litigation, the incentives to early mediation may be substantial, unless they are neutralized by other considerations (such as setting precedent, deterring future claims or showing toughness or resolve), or unless one or both sides, prior to being challenged through discovery, are wedded to unrealistic expectations.

Yet, in many disputes, until some point in the discovery process, factual and/or legal uncertainties, anger at the opponent or unrealistic expectations may deter the parties from scheduling mediation, or drive them to negotiating positions too disparate for mediation to bridge. There may be core credibility issues or other tactical reasons for a party to pursue discovery until key facts are "on the record." Decision-makers understandably may not be prepared to negotiate (and defend a decision to settle) until they have some level of confidence in estimating the litigation stakes, the potential outcomes and their likelihoods, and their resulting settlement leverage. If the estimated litigation stakes (immediate or otherwise) are high enough compared to the estimated financial and other costs of litigation, a party may have strong incentives to pursue the litigation process to reduce uncertainties and/or attempt to alter the parties' relative negotiating leverage.

THE MEDIATION TIMING "TUG OF WAR"

The tensions can be substantial. What level of case assessment confidence is needed as a foundation for meaningful negotiations, given the litigation time, expense and risk of trying to get to the desired level? Can early (perhaps mediated) exchanges of information and documents create a foundation for mediation prior to pursuing most formal discovery, or do credibility or trust issues dictate creating a record for some witnesses or factual issues as a prelude to productive negotiations? A party may believe that the case can be disposed of by motion, but at what cost and risk? While additional information gained by continuing the litigation process may improve each side's ability to assess their case, will "[p]olarization of positions increase[] with the passage of time … making successful intervention of mediation more unlikely"?[5]

These may be difficult questions, but if it remains true that "two-thirds of cases … settle without a definitive judicial ruling,"[6] then well-timed mediation can benefit the parties whether the case settles or not. Well-timed and well-handled, mediation can yield either a settlement or else a clearer picture of why continued litigation is necessary and a framework leading to productive negotiation at a later date.

1. FACTORS IN SELECTING THE BEST PRESSURE POINT

Each case is different, but the following considerations often bear on mediation timing:

- The estimated stakes in the litigation compared to the expected litigation costs (financial, emotional, relational and reputational).
- The extent of factual/legal uncertainties and the extent to which discovery can be expected to meaningfully reduce them.
- The time-adjusted value of money.
- Relationships, familiarity and attitudes.

2. POTENTIAL PRESSURE POINTS IN A LITIGATED COMMERCIAL OR EMPLOYMENT DISPUTE

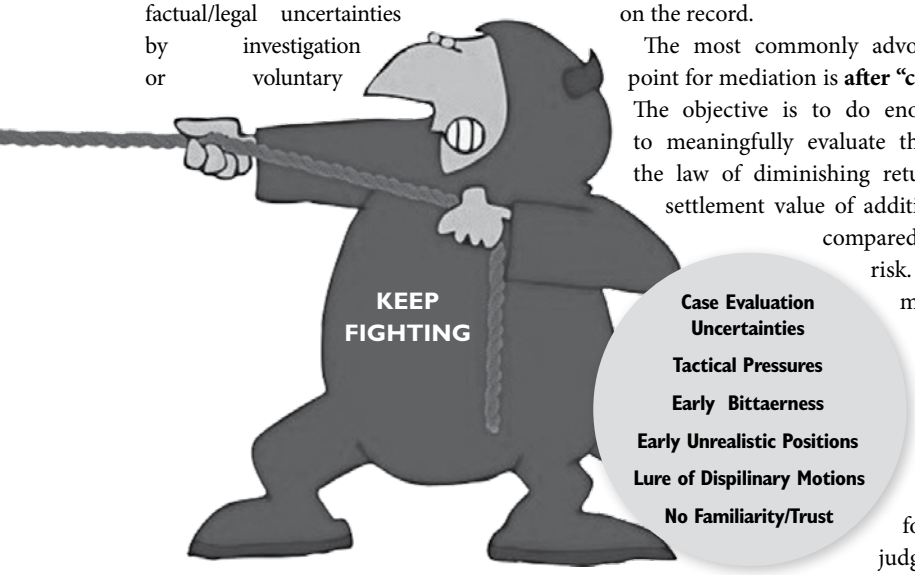
For disputes that may be amenable to mediation, there are points in the life of

the dispute that may be described as mediation "pressure points." These are points at which the failure to reach a settlement will result in one or more parties incurring significant additional litigation costs in the near future and/or facing litigation risks from a the continued litigation process, a court ruling, or trial.

a. Prior to filing of the Complaint, or to incurring the first substantial discovery expense.

In some disputes, there may be incentives to conduct pre-dispute mediation, or mediation before the first substantial discovery expense. Because most litigation costs are yet to be incurred, such early mediation maximizes the "cost of defense" contribution to a settlement offer, maximizes plaintiff's recovery proportion in a non-contingency case, and maximizes the time value of money in a plaintiff's valuation of settlement offers. Other incentives may include preserving valued relationships, avoiding damaging lawsuit publicity, and avoiding a hardening of attitudes from pursuit of litigation. Applied to an ongoing category of disputes (as in pre-litigation mediation within commercial/construction contracts or employment ADR programs), it may achieving a net reduction in overall dispute costs. Many of the same incentives apply to conducting mediation **prior to incurring the first substantial discovery expenses.**

Some of these incentives may arise in low stakes cases, in cases where the likelihood of a plaintiff's verdict is either low or high (including some high stakes cases with where liability is not in reasonable dispute), in some commercial/construction disputes between parties who value their ongoing relationship, and in some class action disputes with relatively low stakes. Some of these incentives may have power in cases where the parties are able to productively reduce factual/legal uncertainties by investigation or voluntary information and document exchanges, particularly where the parties or their counsel have a level of confidence in the professionalism of the opposition.



In many if not most cases, however, there may be significant obstacles to conducting pre-litigation or pre-discovery mediation. Perhaps most commonly, a party may believe there are factual/legal uncertainties that should be narrowed, and which cannot be narrowed through early voluntary information and document exchange because of issues of confidence or litigation tactics (e.g., where credibility issues dictate concealment of key rebuttal or impeachment witnesses, documents, or arguments).[7] Also, early on in the case, negative attitudes and/or untested expectations may prevent realistic settlement discussions.

b. After initial discovery (but before key depositions) or after "core" discovery

Sometimes, the point **after initial (often paper) discovery but before key depositions** can be a pressure point. Some of the incentives already discussed may still have power, and a party or other key witness may have personal or professional incentives to avoid being put on the record.

The most commonly advocated pressure point for mediation is **after "core" discovery.** The objective is to do enough discovery to meaningfully evaluate the case, before the law of diminishing returns limits the settlement value of additional discovery compared to its cost and risk. Conducting mediation at this point avoids the loss of defense settlement leverage if a motion for summary judgment fails, and avoids the risk to the plaintiff of a complete loss if a dispositive motion is granted. Even so, "[l]awyers often want to complete discovery before mediating and are afraid to suggest mediation out of fear of appearing weak."[8] If the estimated litigation stakes are high enough, there may remain pressure to pursue any litigations steps that could clarify or improve a party's settlement leverage.

c. Additional potential pressure points

A pressure point can arise **prior to preparing a dispositive motion,** due to the possibility that a dispositive motion can end or narrow the case, the expense or pursuing/opposing a motion, and the prospect that all sides may be forced to lay most if not all of their "cards" on the table in submitting or defending against the motion.

Some of those reasons will create a pressure point **after the motion has been filing but before a response,** and again **after the filing of a dispositive motion but before a ruling.** Finally, there is the trial-related pressure point **before beginning trial preparations**, when failure to reach a settlement will lead to each side incurring the time and expense of preparing for trial, and the risk of a loss at trial.

3. SELECTING THE BEST PRESSURE POINT

Obviously, every case has its own dynamics, and there may be no ideal pressure point at which to mediate. Even so, erring on the side of earlier mediation may carry less risk. ***An inconclusive mediation session need not be a failed mediation***. Conducted properly, it can de-stigmatize the parties in each other's eyes. It can raise the level of professional trust between opposing sides, even as each side gains insight into the other side's presentation strengths and weaknesses. While "[m]ediation is not the place to learn new [factual] information about the case for the

Continued on Page 42

first time,"[9] a mediation session can clarify and prioritize factual/legal issues, identify technical issues and a process for resolving them, and thereby focus the parties' subsequent litigation efforts to save litigation costs. If the parties also commit to resume negotiations at a (perhaps unspecified) later date, they may prevent attitudes from hardening as could otherwise result from continued litigation, and enhance the possibility that negotiations can later be successful.[10]

While there is no formula for deciding on mediation timing, the parties to a dispute might consider these guidelines:

- Commit by contract or early in the life of the dispute (when doing so suggests no admission of weakness) to pursue or at least consider mediation at some point.
- Schedule mediation at the earliest feasible "pressure point" in the dispute.
- Once the parties have agreed to mediate, direct the mediator as his/her first responsibility to assess whether there are factors that may make mediation premature.

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[1] January 2007 interview with Nancy Vanderlip, Vice President & Gen. Counsel, ITT Indus., conducted and reported by Thomas J. Stipanowich, "Arbitration: The 'New Litigation'," 2010 U. Ill. L. Rev. 1, 26 (2010).

[2] Roger J. Peters and Deborah Bovarnick Mastin, "*To Mediate or Not To Mediate: That Is the Question*," Dispute Resolution Journal (May/June 2007) 43, at 47.

[3] "According to the Cornell survey, the saving of money was the single most often cited "trigger" for mediation (cited by 89% of the sample) …" CPR ADR Suitability Guide (2006), at 9.

[4] "'Time is money, and yet time is the one thing that can be easily overlooked when analyzing the costs of litigation." Benjamin F. Tennille, Lee Applebaum, and Anne Tucker Nees, "*Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases* ," 11 Pepp. Disp. Resol. L.J. 35 (2010).

[5] This is the view expressed in the Beverly Draine Fowler, et al., "*Planning Mediation Programs, A Deskbook for Common Pleas Judges*," at 8-25 (2000), available at http://www.supremecourt.ohio.gov/Publications/pmd.pdf, [hereinafter Ohio Deskbook].

[6] Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994).

[7] "In a study of federal court-annexed ADR by the RAND Institute for Civil Justice, the two problems with federal mediation most frequently cited by the surveyed participants were the parties' lack of readiness and the parties' associated need for more discovery to inform negotiations." Ohio Deskbook at 8-23 (2000).

[8] John Lande, "Planned Early Negotiation: A New Role for Lawyers and Mediators," American Bar Association Section of Dispute Resolution, Advanced Mediation and Advocacy Skills Institute, Fort Lauderdale, FL, November 12, 2010, at 8. Available at http://meetings.abanet.org/webupload/commupload/DR020600/otherlinks_files/ABA_mediation_institute_early_negotiation_Nov_10.pdf

[9] Matthew W. Argue, "*Mediation: Dos and Don'ts for Attorneys Representing Clients in Mediation*," 2009 J. Disp. Resol. 18 (August / October, 2009), at 20.

[10] A 1997 study of 300 cases in New York Commercial Division's ADR system showed that 52% of the cases settled during the formal ADR process, and that an "additional 16% of the cases settled after the conclusion of the ADR process, but owed their settlement in some part to the ADR process." Ari Davis, "*Moving from Mandatory: Making ADR Voluntary in New York Commercial Division Cases*," 8 Cardozo J. Conflict Resol. 283, 291 (2006).

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