

NEWS & INSIGHTS

To Mediate Or Not To Mediate

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Mediation is a technique used frequently in civil disputes to resolve them short of a trial or arbitration hearing. Many construction contracts and other legal agreements incorporate mediation clauses. However, the success or failure of mediation depends on more than simply writing these clauses into a contract. After representing parties in the mediation process and serving in numerous cases as a mediator, it has become apparent that there are certain criteria which make it more likely than not for a mediation process to end in a successful settlement. Below are a few notions to keep in mind:

1. **Timing is extremely important.** There are certain aspects pertaining to the timing of the dispute which make it more likely that the parties will resolve it. For example, a mediation process at the initial stages of a dispute, perhaps before litigation is instituted, may make the most sense from a cost savings standpoint. At an early

stage, the parties do not get as invested in “winning” the dispute, nor do they invest as much in legal fees, expert costs, etc. Therefore, it would make most sense to settle a case early in the process. Intermittently, the reason that the matter has escalated to the point of a mediation process is that the parties have become fairly entrenched in their view and are unwilling or unable to find a middle ground. For example:

- a. At the processes onset of the problem, thought and judgment must be given to the timing of a mediation.
- b. After some discovery/document review has been exchanged.
- c. At the end of the preliminary pleadings and discovery.
- d. On the eve of trial/the arbitration.

2. **Both parties need to evaluate the risk.** Parties with a dispute settle their case typically to avoid a possible adverse outcome in litigation or to manage the cost involved in obtaining a result. Litigants may see little risk in the litigation, the timing may not be propitious for a settlement. It is necessary for each party to take a realistic view of what litigation will cost, both in terms of time and money, as well as what the true adverse potential is of the case. To do this, parties must have a realistic view of the case as a whole.

3. **Both parties must have a realistic view.** It is vital that parties spend time thinking through what could be wrong in a lawsuit or with their position. Failure to do so can cause early mediation to be ineffective. If each party is convinced of the correctness of their own position, mediation may not get far at that stage. After some discovery process is undertaken, it may allow each party to take a closer look at what they are saying and address any vulnerabilities in their own position.

4. **Mediation is not just a mathematical calculation of cost, value and negotiation.** In many cases, relationships or the continuation of a relationship can be at stake. Future relationships, including later opportunities to collaborate or work together may be important. Business reputation or a reputation for astute business practices may be on the line. While these various factors are not present in all disputes, when they are, they are paramount and often trump the actual short-term financial resolution of the matter at issue.

In short, mediation is becoming the most popular tool to resolve construction and business-related disputes when they arise. The increasing number of mediations, and the number of cases resolved through the mediation process dwarf the number of cases resolved through trial or an arbitration hearing. While it has become increasingly likely that parties will participate in a mediation process in most disputes, and often settlement is a desirable outcome, consideration of the timing of the mediation process can be critical to its success. Every dispute is different, and there are several factors to analyze.

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