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Mediation Notes

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Groundhog Day Revisited

In honor of Groundhog Day (both the holiday and the 1993 film starting Bill Murray) I thought I would devote this edition to the problem of TIME – that is, timing-related issues that repeatedly surface in mediation.

Can a mediation be held too soon? Too late? When is just right? You do not have to have ten depositions and a robust understanding of all the testimony to begin mediation. Frankly, the longer you wait to mediate, the harder it can be to settle. Once significant money gets invested, you have a sunk cost problem that can make it hard for attorneys and clients to recover costs or psychologically embrace the need to limit their losses and run. Plaintiffs who have waited "too long" in their minds for a settlement may feel an injustice has been done by the delay and feel less inclined to compromise.

Carriers that exhaust most of their litigation budget do not have a lot of incentive to settle on the eve of trial against questionable liability. I have mediated many cases prior to suit as a lawyer and mediator, and I do not think the impasse percentage between "early" mediation and later mediation is that different. I think part of the reason for waiting to mediate is because a lawyer wants to have some confidence in his or her ability to predict outcomes and evaluate whether a deal seems reasonable, so the inherent desire for more time and information is always present. Information increases confidence, and the more confidence you have in your ability to predict the high/low or best/worst, the better you feel your advice is to the client on the merit of an offer.

We lawyers naturally want to feel good about our advice, and we think more data equals better predictive ability. That is

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mostly true. However, the data suggests that in litigation one's ability to predict the outcome is not proportionally increased by more discovery and expert depositions—more information nominally increases our confidence in our predictive ability, but the cost associated with it is disproportionate to the true predictive value of the additional information obtained. In short, if you spend twice the time and twice the money ($40K in legal fees versus $20K), you might feel better about your advice, but your ability to predict the outcome is not doubled. We lawyers have to temper our desire for "knowing" all of the facts against the cost of obtaining that information. Clients make decisions with imperfect information all of the time. Litigation is no different.

There is little downside to an early mediation—you simply need to share information quicker than discovery rules or informally to evaluate cost, exposure and risk. There is a balance that has to be achieved, but the scale should tip toward holding mediation sooner rather than later. Just commit to a more aggressive fact-finding timetable than the rules of civil procedure countenance. Plus there is no harm in a second mediation months later, after some war wounds have been inflicted.

Timing is a funny issue. In rare cases, if you mediate too soon, the parties may harbor resentments or hostility that are impediments to settlement. If you mediate too late, the parties can become polarized and bruised by the ugliness of the litigation process such that compromise seems like defeat. Sometimes the case spirals into a mind-numbing morass as it ages, which can create problems that might have been avoided by early resolution.

Most insurers have some form of early resolution guidelines or mandates, so the trend is definitely toward earlier mediations. In jurisdictions outside Florida, you more commonly find mediation set on the eve of trial simply to clear the docket, which is problematic for a number of reasons. Late mediations can lead to malpractice if you realize only at mediation that a joinder is necessary and the statute of limitations has run. Yikes!

The other problem we see is scheduling mediation before all parties are joined. It is really hard to mediate a case when it becomes clear that someone is missing from the party. Candidly, this is usually a lawyer-induced problem. Someone has not done the work to evaluate the claims, the parties and the causes of action that exist. Scheduling a mediation a week or two after a new party has joined the case may lead to headaches and sometimes an adjournment if you are seeking a significant contribution from a party and attorney who have not digested the case. Trying to force a mediation on a new party is like trying to cook a pot roast in two hours. Some things just have to stew for a bit or they are really tough. With most things, the better practice is to schedule a short mediation planning conference so the attorneys can map out a thoughtful timetable for any needed information exchange and ensure joinder of all parties. Time does cost money. Be more proactive in posturing the case for an early mediation. Regardless of what side you are on, your clients will thank you.

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