



When Is the Right Time to Go to Mediation?

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(Part 1 of a 4-part series on gearing up for a mediation.)

When is the right time to go to mediation? Like most lawyers say, “it depends.” One option is to do it pre-litigation, before any lawsuit has been filed. Another option is to do it relatively early in the litigation, before the parties have invested significant time and money litigating and preparing for trial. Yet another option is to do it well into the litigation, perhaps even on the eve of trial.

The right timing for mediation often depends on the motives of the parties in the underlying dispute. For instance, a defendant that wants to avoid the negative publicity that may come with a lawsuit may be motivated to mediate early on in the case, sometimes even before a lawsuit is filed. At the same time, a plaintiff who is having financial issues may have an incentive to mediate sooner rather than later in anticipation of receiving the settlement proceeds.

Ideally, if the goal is to maximize the odds of settlement, the parties should wait until they have enough information to evaluate the case. Going into mediation without sufficient information can result in surprises, and surprise is usually not a good thing for settlement negotiations. On the other hand, taking the time to gather information does not necessarily mean waiting until the eve of trial. Instead, the parties can mediate shortly after they exchange the key documents and depose a few important witnesses.

to mediation. Ultimately, because surprise information, like a declaration or e-mail that was not produced, is more likely to derail settlement discussions, it pays for both sides to cooperate and produce it ahead of time.

Lastly, there may be a key legal issue that is dispositive of the case, like a preemption argument or jurisdictional issue. The settlement value of the case can turn drastically based on the court's ruling on such issues. Therefore, it may make sense for the parties to have the appropriate motions on file prior to the mediation, with a hearing scheduled to follow shortly thereafter. This will allow each side to more fully assess its chances of winning and the time and resources required to make or oppose the motion at the time of the mediation, which will maximize the odds of reaching a settlement.

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