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Too Early to Mediate? Think Again.

BY STEVEN S. GUY

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When I first started practicing law nearly 30 years ago, hiring a neutral third party to facilitate settlement agreements was almost unheard of in the world of civil litigation. Through the late 1980s and early 1990s, as the use of mediators in Arizona came into vogue, the industry met the practice with some resistance. But today, mediation is commonplace, and the value of using a neutral third party to facilitate settlement and reduce costs associated with trial is widely recognized.

Prevailing Wisdom May Mislead

Despite the current prevalence of mediation in civil litigation, there seems to be a conventional wisdom that mediation is only appropriate after the parties have completed or nearly completed discovery, identified experts and/or filed dis-



positive motions. In other words, mediations often are held in the later stages of litigation as the parties are gearing up for or are on the verge of trial.

This phenomenon is likely borne from the maxim most trial lawyers learn early in their careers that “Every case must be prepared as if the case were going to be tried.” From that principle, many lawyers have come to believe that only once you have reached the maximum state of preparation can you achieve the most favorable settlement for your client.

Although there is no substitute for preparation when it comes to litigation and trial, the reality is that the vast majority of litigated disputes end up being settled. Moreover, it can hardly be disputed that full-throttle litigation and discovery have the potential to be fraught with waste. So, while there are undoubtedly many cases where early mediation is not appropriate, in my experience, that is not the case when the parties and their lawyers have conducted an early case evaluation by investing sufficient time and energy in efficiently preparing and evaluating their claims and defenses at the very outset of the litigation (or even prior to the commencement of litigation). When

they have done all that, then more often than not early mediations can and do result in favorable settlements, vastly reduced litigation costs and potentially more satisfied clients.

Evaluating Early

What is “early case evaluation”?

This is a process in which the lawyers and parties attempt to evaluate their dispute within the first 90 days of the lawsuit. It involves examination of the facts, applicable law, venue and opposing counsel at the outset of the lawsuit and prior to completion of a great deal of discovery. Counsel and parties should attempt to assess objectively the strengths, weaknesses and risks of litigation for both sides. This requires estimating the likelihood of prevailing, the amount of damages, and the cost of prosecuting and/or defending the case through its conclusion.

Even where an early case evaluation is rigorously performed, it is a given that one will not know at this early stage all the facts necessary to predict the outcome of the dispute. This requires counsel to ascertain and identify quickly the facts that are known and those that can credi-

bly be established and to develop reasonable assumptions regarding yet unknown facts. In addition, counsel must identify the legal issues and principles presented in the lawsuit.

Armed with these facts, assumptions and legal issues, counsel should be able to come up with a reasonable assessment of the settlement value of the case. Thus, even where the evaluation is dependent on a number of qualifications and assumptions, counsel and the parties should have a reasonably good picture of the exposures and merits of the litigation.

Benefits to Early Assessment

Early mediations can and often do result in favorable settlements even where the parties have not undertaken any kind of rigorous or formal early case evaluation or are otherwise not fully prepared. This is because the range of mutually acceptable settlements is often fairly narrow and can be identified by experienced counsel. Moreover, one of the benefits of early mediation is that the mediator can provide an early neutral case evaluation that will help identify the settlement range as well as the strengths and weaknesses of each party’s case. This opportunity to obtain a “reality check” delivered by a neutral and knowledgeable third party to educate clients early in the case can be very valuable, especially where the parties’ lawyers may be reluctant to bluntly discuss case weaknesses with their clients.

Many other significant benefits can be reaped through early mediation. The most obvious benefit that is likely achieved is the avoidance of significant litigation expense, including lawyers’ fees, investigative expenses, deposition expenses, and expert witness fees and costs.

Such savings are especially critical in today’s world, where increased costs of discovery—especially electronic discovery—have the risk of turning litigation into the proverbial “sport of kings.”

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These increased costs, coupled with the current economic environment, have resulted in most companies mandating that their in-house legal, claims and risk-management departments manage litigation more effectively in terms of ultimate results and costs.

These companies have passed those mandates down to their outside lawyers. Gone are the “winning is everything” days in which the cost of winning was of secondary or minor importance. Today’s litigants understand that which 18th-century French philosopher and essayist Voltaire observed: “I was never ruined but twice—once when I lost a lawsuit, once when I won one.”

Litigation Costs Are Numerous

Besides cost savings, another important benefit of an early mediation is to put an end to the familiar anxiety surrounding litigation. Not all litigators fully understand the physical and emotional toll that being a party to a lawsuit can take on the litigants. Some litigators may actually embrace the fight, but to the litigants themselves, the experience is often a difficult and stressful one. In fact, 19th-century American author and satirist Ambrose Bierce referred to litigation as “a machine which you go into as a pig and come out as a sausage.” If Bierce’s sausage grinder analogy is even remotely accurate, then shouldn’t the parties’ lawyers consider ways to mitigate the potential unpleasant-

ness—perhaps through an early mediation?

Litigation also may be a time-consuming distraction from more constructive ventures in which clients might otherwise be engaged. Although the distractive costs of litigation may be hard to measure, few would argue that they do not exist and are not significant. Again, early mediation should be considered for this reason alone.

Another benefit to early mediation is that the chance of success in settling the lawsuit may be higher where the parties and their lawyers have less time and money invested in the litigation. It is a well-known fact that litigants may become more intractable, the more angst, money and time they have invested in a lawsuit.

Does it not make more sense to invest the relatively small expense of mediation before the parties and their lawyers have become so entrenched and inflexible that settlement becomes nearly impossible?

Mediation Benefits the Entire Case

Even if an early mediation fails to result in settlement, it is likely to more precisely define the parameters of a future settlement, and it will likely provide valuable information to the parties regarding their respective positions. This information may be used to formulate earlier offers of judgment that will ultimately be more beneficial when later seeking Rule 68 sanctions and/or attorneys’ fees under

applicable fee-shifting statutes.

In addition, lawyers can learn a lot about the case during mediation. Most veteran practitioners have experienced mediations in which they learned new and surprising information from the other side or even from their clients during joint sessions or private caucuses. These revelations may be far more useful during the early stages of the lawsuit. Lawyers are also apt to learn more about their client’s concerns and sensitivities during the mediation process. This is because the mediation process is more likely to elicit the client’s true feelings about the dispute than would the typical merit- and advocacy-based discussions that occur between lawyer and client outside the context of mediation.

Obviously, not every case is suitable for an early mediation. There are cases where even after performing an early case evaluation the parties simply do not have sufficient factual information to adequately assess their claims and defenses. There also may be significant undecided legal issues that need to be resolved by the court before mediation can be truly effective. Nevertheless, the benefits of early mediation are huge, and they typically far outweigh the cost of the mediation, even if the case does not settle in the first round. Moreover, though early mediations might result in lower billings in the short term, client satisfaction is likely to go through the roof, ultimately resulting in more cases and increased revenue in the long term. ☐



Community Mediation Resources

More information on community mediation organizations, as well as a variety of mediation and arbitration tools and tips, is available online: <http://azatty.wordpress.com/2011/09/15/focus-on-adr/>