



Is Timing Everything in Mediation?

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Time and timing permeate all aspects of the mediation process, including:

- When is a dispute ripe for mediation?
- When are parties receptive to evaluative feedback?
- When should a mediator's settlement proposal be made?
- When should an apology be offered?

They can impact countless other facets of the process, too. Mediators can use the above to help guide the parties toward resolution.

“Better three hours too soon than a minute too late.”
— William Shakespeare

Pre-dispute and early dispute resolution can be very effective in the right circumstances. They are often most effective when (1) the parties have an ongoing business relationship with a vested interest in solving the underlying problem, (2) the facts are substantially known to both sides (*e.g.*, in many preference actions), and/or (3) the amount in dispute exceeds the cost of discovery.

There are three primary advantages to mediating early in a dispute:

- *Minimal Advocacy Bias*: While each side enters the dispute with their preconceived views, as a dispute matures parties can become so enmeshed in

their trial strategy that they lose the ability to objectively consider unfavorable information.

- *Relationship Preservation*: If the parties have an ongoing relationship, early resolution mitigates the risk of harming their relationship through discovery or trial and may allow them to implement a confidential settlement.
- *Cost Savings*: Discovery is expensive. Pre-discovery mediation is an opportunity to find a cost-effective resolution.

Often when mediation is held prior to or early in discovery, a critical element is the confidential and informal exchange of information. For example, in a bankruptcy or out-of-court restructuring mediation, the mediation may need to begin with establishing a basic set of shared facts. This can be accomplished in a variety of ways, including exchanging documents confidentially and informally through the mediator and/or conducting a nonadversarial information session, facilitated by the mediator, to review and understand the debtor's financial information.

"We must use time as a tool, not as a crutch."
— John F. Kennedy

Time is a tool that a mediator may use to structure the mediation. For example, often mediation is a forum to allow one or more parties to safely express their frustration, anger, fear, confusion or hurt. This requires empathetic listening from the mediator, but it also requires time. The need to vent is particularly critical in mediations involving personal injury, fraud, deception or bad faith, but can be applicable to all disputes.

Once a party has been heard and validated, they are often more open to evaluative feedback, but then may need time to move past their emotions, digest what they've heard, reevaluate their position and formulate a response. Depending on the circumstances, this time could be minutes, hours or days. It is incumbent on the mediator to balance allowing time to process and evaluate with the need to move toward resolution.

"Observe due measure, for right timing is in all things the most important factor."
— Hesiod

Time and timing are equally critical factors when considering if, when and how to offer a mediator's settlement proposal to bridge a gap in the parties' offers. As mediators listen and learn, mediators try to distinguish between wants versus

needs, and between what is said versus what is meant. Mediators may also explore nonmonetary or creative solutions. Mediators use the process to probe for unspoken motivations, receptivity to new information and evolving offers, and openness to compromise.

If a mediator's settlement proposal is offered too soon, then the mediator may lack sufficient information to formulate an offer acceptable to both parties and/or the parties may not yet be in a frame of mind open to receiving the mediator's settlement proposal. If a mediator's settlement proposal is offered too late, then the mediator risks one or more parties having hardened their position and, at least mentally, left the negotiating table. While rejection of a mediator's settlement proposal does not automatically foreclose the opportunity to settle, it can make it harder to reach a compromise. As a result, before making a proposal, mediators need to take the time to understand the case dynamics.

“The two most powerful warriors are patience and time.”
— Leo Tolstoy

Patience, time and timing are particularly critical factors in disputes where an apology is needed to facilitate resolution. Parties may need feedback from the mediator to gauge the right time for an apology in any given dispute. An apology offered at the outset of a mediation is often ill-received. The recipient may perceive the apology as fake or performative. Plus, they may not be receptive until they've shared their story, processed their emotions, and been heard and validated.

Similarly, an apology offered in conjunction with an explanation is often perceived as a nonapology. To the extent that any explanation may be offered, timing of the explanation and apology can be pivotal. In some instances, it may be most effective for any explanations to be offered early in the process, followed by a heartfelt apology later in the process. The opposite timing may be more effective in other situations.

“I'm late, I'm late. For a very important date....”
— White Rabbit

When parties seek mediation on the eve of a pivotal ruling in a case, such as a motion for summary judgment, the effectiveness of the mediation may be dependent upon the mindset of the parties. If one party is laser-focused on the upcoming ruling, convinced they have no risk of loss, and remains entrenched in this view throughout the mediation, then settlement is unlikely. It is a rare

mediation where the other party admits complete defeat and agrees to whatever the opposing party wants.

However, with a pivotal ruling pending, timing may be perfect for mediation if all parties recognize they have some risk in the outcome (regardless of how they weigh those risks). Risk-mitigation, cost-reduction and closure can be important considerations to motivate the parties toward resolution.

“Time is the wisest counselor of all.”

— Pericles

In some disputes, there are too many moving parts and shifting alliances at the outset to permit early resolution. In chapter 11 cases, this often arises in plan-related negotiations. The parties may need court intervention and/or a multi-step mediation in order to narrow issues before the remainder of the dispute can be settled. Time is needed to develop a framework for resolution and build consensus among disputing parties. Similarly, in some disputes, there may be too many gaps in information to reach a resolution. The parties may need additional time to informally exchange information or continue discovery before the dispute is ripe for resolution. While many mediations can be completed in a single day or even a few hours, others require multiple mediation sessions.

“Timing is everything.”

— Unknown

There simply is no magic moment in time to conduct a mediation or make an offer or give an apology, but there are certainly moments that are better timed than others. So, is timing everything in mediation? No. While timing is an important factor, it is not necessarily outcome-determinative. Instead, time and timing can be valuable tools in a mediator’s toolbox.