TIMING AND ITS IMPACT ON MEDIATION

by Jerome F. Weiss

THE ELUSIVE SEARCH FOR THE PERFECT TIME

One of my favorite jokes deals with the stand up comic who leaves the stage and starts schmoozing with the people in the audience. You've seen it. He teases, embarrasses and does all kinds of things to get a laugh - mostly at the audience's expense. He often uses these innocent victims as his "straight men" for various jokes. For one of these jokes he tells his prey, "Why don't you ask me why I'm such a great teller of jokes?". Not knowing what to do - after all the poor man or woman is just there for a night out - the audience member takes the bait and asks: "Why are you such a great teller of...". Without allowing the poor slob to finish the question, the comedian quickly steps on the last word of the question and blurts out "TIMING". What's supposed to be funny about this "joke" is the irony that this comedian has none - TIMING, that is, and that neither he nor his joke are all that funny. They are, however, successful because they do evoke humor at a certain level.

Those who are old hands at dispute resolution, whether through litigation or its alternatives, have their volumes of war stories which tell about the importance of timing. Some will tell you that timing is everything, but few will opine that there is anything such as a perfect time to resolve a case, either through trial or some other form of resolution. That's mainly because in real life there is none. Just as no case comes to the trial hand perfectly in terms of client quality, liability, collectabilty, damages - no matter which side of the case you are on - and just as that case will probably never line up "perfectly" throughout its life, there is no place in the life cycle of a case that is perfect for mediated resolution either. Certainly, some points in the case's tenure may be better than others. However, there is never a "magic moment" when the matter is perfect for mediated resolution. In the worst timed cases, when we are just about ready to hang it up, we often find resolution practically falling like manna from heaven without any apparent reason or much effort from the parties or neutral. Conversely, in what some might consider the best timed cases, where we think that resolution is imminent, impasse is all too common.

UNDERSTANDING YOUR CASE

The lesson here for mediators and mediation counsel is the importance of developing a comprehensive understanding of where they are in the life of the case and what the exact permutation of the multitude of variables is at any moment. We mediators do this so that we can develop an understandable model and so that the model fits the reality of the case as closely as possible. More importantly, we need to constantly tweak that model, since the dynamics of most complicated cases are constantly in flux. Simply stated, the question in mediation becomes "What needs to be done *at this moment and beyond* to get this resolved?", since the mediation's purpose (and presumably the purpose of the parties) is to "get this resolved". Just as with the

uncertainties and exigencies that arise and need to be dealt with in litigation, experienced mediators and mediation counsel are constantly monitoring the status of the case in order to optimize the chances of mediation success, which in the mediation context is a mutually determined and accepted resolution, without the need for continued courtroom battle.

ARE THERE INSTANCES WHERE TIMING ISSUES PRECLUDE MEDIATION?

A mediator colleague and I recently had lunch and compared a few general, non-confidential notes. She used to be a judge and criticized one of her fellow judges who had just referred a case to mediation, where it was apparent that the parties and/or their counsel were less than enthusiastic about the mediation. She complained further that no discovery had yet been conducted in the case and the parties felt short-changed about being thrown into a process against their will and before they were prepared to engage in meaningful dialogue. My friend and I went down the list of whether and why the case was conducive to mediation. We agreed it was not, but perhaps not for the reasons you might suspect. One of the most widely recognized cornerstones of effective mediation is self-determination. If the various disputants and their representatives decide that they don't want to be in mediation, for whatever reason, the greatest powers on earth, including the power of the judicial gavel, will probably not get it done - at least not through a mediated process in which self-determination is an essential ingredient.

My colleague and I also agreed that although it might have been nice to have had formal discovery in the case, the lack of it, while a challenge to the mediation, would not necessarily be fatal to the process. In fact, my experience indicates that the parties might be able to accomplish more in terms of finding out about a case and obtaining discovery through mediation than by more traditional litigation discovery means. Ask any litigating attorney and chances are he or she will tell you that discovery is their least favorite portion of the litigation repertoire.

Examples of how discovery might be better served by mediation than traditional litigation are contained in two recent cases in which I was the mediator. In both cases, mediation allowed the parties to develop their discovery cases in a substantial way, while also allowing them to mediate resolution. In one, a fairly complex employment and discrimination matter involving a large corporation and one of its key employees, the disputants and their representatives agreed that mediation ought to be given a try and would be preferable to litigation (the case had already been filed). While considerable discovery had been propounded by both sides, there had been no substantive responses at the time the parties came to mediation. The result was having disputants who wanted to be there for all the right reasons, but who weren't necessarily in a good position to know all the relevant facts and in turn, to bring about final resolution. Initial sessions of mediation were aimed at discussion and informal exchange of information. As a trusted mediator, I facilitated this exchange without the need for one motion or one request from the judge on whose docket this case appeared. At times our discussions were intense and by the end of multiple sessions spanning several months, it was clear that the parties got to know more about the cases than they would have through a litigation process that would have lasted much longer than the several months we spent in mediation.

The other case was a medical malpractice matter. Considerable discovery had been conducted but there was strong debate about the extent of the resulting physical impairment and prior inconsistent statements made under oath by various experts on both sides. The mediation context allowed reality testing of the contrasting positions that resulted from the contradictory discovery materials, in a manner that would not have been possible in the litigation context, with the mediator sitting as a sort of referee. Remarkably, the cases were resolved. Importantly, they were resolved in a more efficient and much faster manner than they would have been in court and they resolved in a mutually acceptable way without the need for eight strangers - *i.e.*, a jury - to be involved.

Even If the Timing Isn't Good, Frameworks Can Be a Good Result

In another case involving a class action against a governmental agency, the parties came to me without knowing much about mediation, which unfortunately is still often the case. Their reluctance and lack of sophistication in the process was evident and we spent a lot of time probing whether they really wanted to be in a mediation setting and how to best utilize that setting. Once again, there had been no formal discovery and the parties were not close to defining what were the operative facts and issues of the case. This state of affairs regrettably reflects the state of so many filed cases today. Over the course of multiple mediation sessions lasting only a few months, the disputants were able, with the help of the mediator, to construct the framework and attendant devices necessary for settlement. Mediation allowed the parties to define what the case was about and where it should be headed.

The process helped the parties leap frog what is too often a useless process of discovery speculation, that contains no useful or constructive resolution consideration. Especially in this last example, while timing was less than ideal, mediation enhanced a better understanding of the law and facts and structure/framework of how the case might be settled. It got people thinking earlier than they would have about an end game and how to get there, without the unnecessary process and related pain that comes with what is being increasingly viewed as useless litigation.

Is There Such a Thing as Too Much Time in Mediation?

The general rule is that mediation is best conducted against some backdrop of a deadline. The reasons for this are obvious, including the fact that like litigation, the mediation process and its participants will take as long as you give them. There obviously needs to be some sense of imminence or urgency. Moving on is important, if for no other reason than it heads in the direction of closure. The parties and mediator know genuine impasse when they see it and the professional mediator is usually well armed with devices to break such impasse. But absent some lively discussion of new issues or new approach to old issues, mediating too long can actually cause backward movement. That having been said, there is no one time span that is perfect for a given mediation process. One of the constant considerations and goals of the mediator is to keep the dialogue alive and to keep the disputants focused on the prize - just resolution.

As shown above, time is necessary to educate parties, to obtain facts, to establish frameworks, to answer all those questions that arise, to get the proper people with the proper authority to the table; to let things "cook" in the minds and souls of the disputants and their representatives. Oftentimes, the passage of time brings about great positive change in attitudes, both intellectually and emotionally. Sometimes, the passage of time in mediation has an attrition effect whereby, for example, the reality and seriousness of the process may sink into a mind that might have otherwise taken a more frivolous view, and in turn may convince that person that perhaps the lawsuit is not the "sport" they once thought it was.

What we do know is that notwithstanding the amount of time taken in mediation, the vast majority of cases are resolved without the courtroom and usually despite the negatives of the litigation process - not because of that process. It is the job of the mediator to enhance the chances of that resolution and to use the timing, no matter how long or short, for that purpose.

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