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Important Considerations Regarding the Timing of the Mediation of Business Cases

By

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One of the great things about mediation is that a case can be mediated at any time, from before a matter is in litigation to any time during the litigation process. The United States Court of Appeals for the Eleventh Circuit even has a program for mediation of cases that are on appeal. Although an appeal in the federal court system would not seem to be the optimal time for mediation, the administrator of that program has told me that it has a surprising amount of success.

In many instances, the timing of mediation reflects a tension between limiting litigation costs (best served by an early mediation) and having all the information on the table necessary to evaluate the case (often best served by mediating after the completion of discovery). However, this is not always the case. If the parties are in an on-going business relationship, for example, they may already have equal access to all of the relevant information, and that would favor an early mediation.

In theory, the optimal time for mediation will be as soon as both parties have enough information to make a thorough and reasoned evaluation of their case and the likely outcome. This time will vary from case to case, but it does not always require that discovery be completed and every last bit of information gathered. If an informed mediation can take place sooner, the parties may be more flexible because there are fewer "sunk costs" and a settlement will allow additional expense to be avoided.

In some instances, such as where confidentiality and speed are desired, the parties may consider exchanging information outside of the court-supervised discovery process. In such circumstances, mediation can be used to establish a process for information exchange and then for the resolution of the case.

The parties may also agree to mediate over a number of sessions. The first session can be devoted to defining the information that each side needs to assess the merits and to establish a timetable for exchanging information. During interim sessions, the mediator can assist the process in making sure that the exchange is moving forward, and that any disputes about the information exchange are resolved. Once the information has been exchanged, the final session or sessions are devoted to a traditional mediation focused on settlement.

Although the foregoing counsels in favor of mediation relatively early in the process, I have recently modified this view to include the following caveat: *The parties have to be ready to settle*. For some reason, it seems that some parties need to go through at least several rounds of discovery and “head butting” before they get serious. This is unfortunate, but, in some instances, it seems to hold true.

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