Stoel Rives LLP

Why Early Mediations Often Fail, and Possible Remedies

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Mediation is commonly used in the construction claims process to resolve disputes. Twenty years ago, the typical mediation was conducted close to the trial date. The stakes were high. Tensions were higher. And the parties stayed well into the evening or early morning hours attempting to settle.

Things are different today. The allure of a mediated settlement often leads to multiple mediation sessions during the life of a dispute. In fact, most construction and design contracts now call for an early mediation session before a lawsuit or arbitration demand can be filed. Despite good intentions and great mediators, early mediations often fail. Why do they fail, and can anything be done to increase the odds of success?

One major obstacle is that the parties usually lack key information in the early stages of a dispute. Each side is entrenched in its own version of events and rejects any contradictory version. Formal discovery has not begun, and most parties will not (voluntarily) search for information that challenges their views. The parties head into mediation confident in their moral high ground. They are dismissive of their opponents' situation, financial or otherwise. They sometimes assume the worst about their opponents: they are hiding the truth; they know their claim lacks merit; they are trying to line their own pockets. It is not until time-consuming, expensive, and involuntary document exchange and depositions occur that they are forced to face what they were happy to never learn.

But they will learn it. The question is when. To remedy this problem without the expense of full discovery, parties preparing for an early mediation should exchange targeted documents. These usually include email from key witnesses, accounting documentation to support claimed damages, and preliminary expert reports when subject matter expertise is needed. An honest, open-minded review of this information is critical to forming a balanced perspective of the risks you face as you head down the litigation path.

Another reason early mediations often fail is that legal costs are still relatively low. Few people compromise without something pressuring them to do so. Mounting legal costs add significant pressure, especially when you know that the heaviest costs — the costs of trial — are yet to come. But those costs seem far away to many early mediation participants.

For reality to set in sooner, lawyers should provide candid fee estimates before mediation. They should be broken out monthly or at least by quarter to avoid the appearance of a distant threat only. The individuals attending the mediation should present the fee estimates to those above them in the chain of command. Doing so can lead to a larger grant of settlement authority prior to mediation.

Some cases involve a key legal issue that is pivotal to the outcome. It might be the interpretation of a contract clause. It could be the manner in which case law or a statute will be applied to the facts of the dispute. If not dependent on the resolution of disputed facts, the parties should consider getting resolution of the key legal issue prior to the early mediation. Arbitration can be tailored for this purpose. For example, the parties could appoint a single arbitrator whose only role will be the resolution of that issue. The parties can brief and argue the issue within a few weeks and obtain resolution soon thereafter. Achieving a settlement at an early mediation is more likely when the outcome of the key legal issue is known.

Finally, early mediations often do not involve the right decision-makers. The dispute may have a low profile within the company. It may not have the attention of upper level management. This changes as lawyer fees grow, trial approaches, and company representatives spend increasing amounts of time in support of the litigation. Upper level management has at least two things that mid or lower tier managers do not: (1) higher settlement authority; and (2) a less-biased view of the case merits, untainted by emotion and deep involvement in the project details. The sooner upper management is involved, the better.

Early mediations may fail even when the challenges above are considered and mitigated. Not every case settles, and few settle early. But there is a bright side. If the steps above are taken by all parties, the ensuing discovery process will be more efficient and the next mediation will have a far greater chance of success.

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