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# Mediation: The Parties Have To Be "Ready" to Settle

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I have written previously that the best time for mediation is probably when both sides have enough information to make a thorough and well-reasoned evaluation of their case and their opponent's case.

Although this is still a good rule of thumb, a few recent experiences have reminded me of an important corollary: The parties have to be *ready*. What does that mean? Quite simply, it means that the parties have to be prepared at least to contemplate the possibility of settlement on a meaningful and realistic basis.

What "ready" means certainly varies among litigants. However, in almost all cases, even business cases, being "ready" includes an emotional or psychological component along with the informational component. The two often go hand in hand: Getting the necessary information may change the attitude.

Parties need to understand that almost all settlements involve an element of compromise on both sides. If a party assumes that the mediator will see things only as the party sees them, and will somehow convince the other party to admit it was wrong, a successful conclusion is not likely. Very few cases settle with one party going away entirely empty-handed. It is true that it may not take much to convince a party with a weak case to settle. But it usually takes something.

Despite the obvious benefits of an early settlement, some parties just take more time to get "ready." That may mean another round of discovery and another round of motions. Although this may seem wasteful, ultimately, if a settlement is to be reached, human beings with authority are going to have to agree for both sides. The human mind can be a delicate thing, particularly regarding disputes. Elements of hubris, self-delusion, and self-denial sometimes have to be confronted before the parties' representatives are both ready to agree.

What does this mean for a mediator? Certainly, it is part of the mediator's job to help get the parties "ready." It is a good idea to talk candidly to counsel for both sides

(probably privately) about whether their clients are really prepared to consider settlement. If one side is clearly not ready, it may be wise to suggest that the mediation be postponed until some definitive milestone is reached (perhaps the taking of another deposition or the court's ruling on an outstanding motion).

If it appears that a good part of the mediation will need to be spent getting one party "ready," it is a good idea to anticipate multiple sessions, and to make sure the parties are prepared for multiple sessions. If the parties are not told of this possibility, they may conclude that no progress is being made, and positions may harden.

What does this mean for counsel for the parties? Make sure, first, that your client understands the process. Try to make sure that the client is ready to explore settlement in a meaningful manner. This can sometimes be difficult because some clients do not want to hear their advocate discuss anything less than total victory. Other clients understand that the goal is the best possible resolution.

If you, as counsel, need help with a client, *tell* the mediator privately. One of the best things a mediator can do is to provide feedback to clients that is sometimes difficult for lawyers to give.

If the mediator and counsel work together, both parties are likely to be "ready" when it is time to mediate, or to get "ready" quickly during the mediation process. Once that happens, mediation is usually successful.