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Alternative Dispute Resolution

Peter Benner: Early Mediation Works for Lawyers as Well as Clients

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I have written and spoken regularly on the benefits of early mediation in a litigated dispute. The reasons for early assistance from a neutral third party are compelling: More than 95 percent of civil cases settle. Unnecessary delay and expense before reaching the point of addressing settlement is commonplace. Resources are often wasted by engaging in surplus motions and discovery, which can be largely driven by posturing and "showing strength." Early work with a capable, impartial third party can, at a minimum, focus the dispute on what really matters and what is actually needed by way of information exchange and narrowing the issues. An "early mediator" can assist in finding a resolution based on mutual interests much sooner and more favorably than would otherwise occur. Unnecessary rancor and costly escalation of the conflict, which soon takes on a life of its own, can be curtailed or avoided altogether.

So why has early mediation not caught on? I will address that question, and then suggest one additional benefit to consider that might help tip the balance in favor of more frequent use.

When I speak to attorneys and clients about this question, one factor we often agree on (even the lawyers) is that it is not in an attorney's financial interest to take active steps toward early resolution, since thousands, or tens of thousands, of dollars that could accrue in a case may go unspent. That is a sensitive subject and each case is different, such that generalizations can be perilous. I do believe it is safe to say that erring on the side of "over-lawyering" can be motivated, at least in part, by financial considerations.

That may seem obvious, but possibly only in retrospect with each case. In the heat of a dispute, prospectively, complexities and unknowns can cause the reflexive casting of a wide net. And, of course, there is the perception of the importance of coming on strong. More on that later.

Putting the issue of self-interest aside, in my experience the obstacles to early neutral involvement relate more to custom, risk avoidance and litigator training. These factors combine to impede change, by inhibiting taking a perceived risk of trying something out of the ordinary. It's safer to begin—and prolong—a case with a fusillade of discovery and motions because: (1) that's the way it's done, and deviation from the norm can put counsel in the position of being second-guessed; (2) a litigator wants to show toughness to both the client and the other side, even to the point of intimidation; (3) the client is convinced she or he is in the right

("confirmation bias" runs rampant), so anything that might be seen as a conciliatory sign is avoided; (4) counsel really does need information to assess the case before approaching the possibilities for resolution; (5) there are legal issues that need to be clarified, and motions are the only way to do that; and (6) a case has to "mature" through a life cycle—it's human nature—before it's ripe and counsel and the parties are ready to talk seriously about settlement.

I have seen each of these in action repeatedly in my 30 years as a litigator and now during five years as an independent mediator and arbitrator.

The basic overarching point is that there are entrenched forces weighing on litigators that cause them to take a hard, broad early line—not in all cases, but in many in which a more focused and constructive interest-based approach could more effectively advance their client's objectives.

Does the idea of early third-party neutral assistance so disregard the realities of litigation, particularly in complex cases with high stakes, that encouraging it seem naïve? Or overtly self-interested on my part as a mediator?

I will admit to the latter, since early mediation becoming the norm rather than the exception is good for the expansion of the process. Although, just as a litigator prolonging a case is not to be faulted purely for reasons of self-interest, so is it for the notion, advanced by a mediator, of early neutral assistance, as long as that tactic yields well-defined value.

What about the question of whether early mediation is just not suited to complex cases where the facts and law must be sorted out and exposed? In a well-designed process with an experienced, savvy mediator, there is so much to be gained and almost nothing to lose, or nothing that cannot be fully protected against. That means there is virtually no risk, substantial potential benefit, and de minimis cost in the overall scheme of things, particularly in relation to what can be saved.

The clear benefits are that (a) issues can be narrowed and developed around those that matter most; (b) clients' respective, and ideally mutual, interests can move front and center, which almost always leads to a more value-oriented outcome than when entrenched positions are the basis for bargaining; (c) counsel can agree to a stepped, less costly means of exchanging information and addressing legal issues necessary to fully assess the case; and (d) if not resolved immediately, the case is much better positioned to be favorably settled at an earlier point than it would have been, before the parties become dug in and spend tremendous amounts that make a positive outcome so difficult, if not impossible, the longer a case drags on.

These reasons are client-focused and based on the presumption that a client is better served by an attorney who works (even in the face of early client skepticism or resistance) to find the most direct, least expensive route to a resolution that most fully accomplishes the client's interests.

There is another reason that I have not seen raised to any degree in other writing or discussion. And that is that early mediation can be a case and practice management tool for the lawyer, particularly in this era of increasing pressure on attorney time and resources. Client interests remain in the forefront, while attorneys also benefit from the fact that they can much more effectively, and predictably, manage their own time and investment in a case by engaging in a process that is intentionally designed to eliminate unnecessary work.

Is this reason for early mediation itself naïve and unrealistic, particularly if the critique that lawyers prolong cases for financial gain has merit, or that an early conciliation process ignores the necessity to show strength? After all, capable lawyers will do what they think is best with all considerations in mind, meaning that lawyers would pursue early mediation if it actually had the benefit described here.

Yes, but the fact is that early neutral assistance is not used because it is not how most cases are litigated in the "real world" of the norms and practices by which litigators are trained and find themselves working, even as overburdened as they may be.

So, consider giving early mediation a try—for your client's sake as well as your own. Working with a third-party neutral early in the case can produce a result that will change clients' minds about what dispute resolution can mean, leading to better, less costly, interest-oriented outcomes, and thus client satisfaction and loyalty, as well as a more "in control" and successful practice.•
