

"Why do some settle before mediation"

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Many disputes settle at mediation. Some disputes settle between the day of the mutual decision to mediate, or the mandatory referral to mediation, and the day of mediation. Why are disputes settling before mediation?

One reason may be that the skilled preliminary interventions of the mediator or the mediation service are enough to unlock the stalemate and facilitate resolution. Perhaps there are some types of disputes that are more likely than others to resolve before mediation. Or, some lawyers may be less susceptible to the psychological trap of "keeping on keeping on" and more willing to act on opportunities for settlement that arise during preparation for mediation. At this time, as there is no statistically supported research illuminating this phenomenon, we are left with educated hunches to explain early settlement. The following list will be of use when deciding how much third party intervention is required.

"At the mediation door."

Settlement at the mediation door occurs for many of the same reasons that it does on the steps of the court house. Critically assessing one's case in preparation for mediation may make resolution compelling. During preparation, lawyers and clients examine the:

- * relevant facts and documents
- * relevant decisions
- * goals of each party
- * other criteria for settlement such as industry standards
- * reasons why the matter has not settled, and
- * the risks and costs of litigation if the matter is not resolved.

As a consequence of preparing for mediation, a party or lawyer may become aware of a solution that he or she believes will be acceptable to all. A settlement proposal may be made and accepted avoiding the need to attend the mediation meeting.

Other insights gained during preparation may bring about settlement prior to the mediation meeting. To illustrate, the facts or judicial decisions in support of a client's position may be weaker than initially believed. The other party's evidence or witnesses may be stronger than anticipated. The client may prefer to resolve the matter without spending time at mediation or undergoing the emotional investment of meeting with the other party. Perhaps the passage of time and the receipt of objective legal advice have changed the client's perception of the dispute. One or more of the foregoing insights may result in the client being willing to settle upon previously proposed terms or to propose a new settlement which is accepted prior to mediation.

The willingness to mediate builds trust.

The willingness to mediate communicates a readiness to resolve the dispute and it may be received as an indication that a disputant is prepared to consider the other disputant's interests, to hear "the other side of the story". This perception encourages trust.

Thus, the act of agreeing to mediate, which is reinforced when there is active participation in preliminary conferences and other preparatory activities, may engender sufficient trust to settle the dispute before mediation.

Opportunities to negotiate.

Communications during pre-mediation activities or at preliminary conferences between the parties or their lawyers may include exchanging tentative settlement proposals. Mediators and mediation services also serve as communication links between parties. The mediator's pre-mediation contacts may precipitate the disputants' problem solving activities so effectively that resolution is reached prior to the joint meeting.

The conflict may be illusory.

Once information is exchanged during preparation, the matter may resolve. This can occur when there has been a misunderstanding about the circumstances of the dispute or when the motivation for behaviour has been misconstrued as between the disputants. For example, one party may be missing a critical document.

That the document exists and has yet to be exchanged is uncovered during preparation. The provision of this document then renders the mediation meeting unnecessary. To give another example, one party may believe inaccurately that the other party acted with maliciousness. Again, preliminary mediation activities can and do resolve misunderstandings thereby obviating the need for mediation.

Momentum.

Momentum, or each disputant's belief that their problem can be resolved, builds with the number of agreements that are reached during preparation for mediation. It may be that the agreements over process, such as deciding to mediate, agreeing on when and where and choosing the mediator, create the necessary momentum to resolve the substantive dispute prior to the mediation meeting. Clients, or their lawyers, may develop the confidence that they can resolve their own dispute and approach each other directly rather than waiting for mediation.

The foregoing explanations for dispute resolution before the mediation meeting are educated guesses. It may be that a combination of two or more of these is necessary before a dispute will settle during preparation. Being alert to the possibility of early resolution has the potential of reducing the costs of dispute resolution and facilitating faster settlements.