

## Mediation: When's the best time?

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I used to be a mediation sceptic. I really didn't understand how a settlement could be achieved by bringing in someone from outside who knew virtually nothing about the case. If both sides were reasonable commercial people with more or less competent solicitors they should always be able to sort out a compromise long before trial. Trials would only happen when one party was badly advised or just plain bonkers.

It is quite a few years since I was converted. A client told me that he wanted to mediate and as he was paying my bill I could not really object. It worked. So did the next one. Then two solicitors asked me to be the mediator in their case. That worked too.

Times have moved on. Scepticism used to be very common, but few lawyers or clients with much experience of construction disputes admit to it these days. Mediation is now conventional and whilst the courts will not go so far as to insist on mediation before trial they will expect the parties to give it serious consideration.

The difficult question now is not whether or not to mediate, but when to mediate. There are good reasons for and against mediating at just about every stage of the dispute process. The earlier the mediation takes place, the more there is to save in legal and administrative costs. But the later the mediation takes place, the more the parties understand the issues and so the greater the chance of settlement..

Here are some possibilities:

*Before lawyers are instructed.* Nobody has spent anything in legal costs and so there is a huge potential saving. But neither side has a clear view of the sums in issue or the arguments that are going to be used. You are very sure about your claim for £1million, but the other side seems to think it has a defence and they don't want to pay. You might be better off making the Defendant set out its case in formal pleadings and then demonstrate why its rubbish. Better to hang on.

*After you have started legal action.* That shows you are serious. Your Statement of Claim reads well and will have them worried. The legal costs so far are relatively modest and so there is a real incentive to settle. Unfortunately the other side is not keen just yet because they want to explain what their case is in order to reduce your expectations. Mediation is not likely to happen for a while,

*After pleadings are closed.* A fair chunk of money has been spent but there is a lot more to go yet. Both parties have set out positions fully in the court submissions, but the next stage will be disclosure when they will have to reveal their embarrassing file notes and emails. It would be nice to know that they don't have a leg to stand on. Perhaps it would be better to deal with disclosure first.

*After disclosure but before witness statements are exchanged.* Now we are beginning to spend some real money but disclosure didn't reveal any smoking guns. Your witnesses are really pretty good. If the other side sees the how strong they are they should settle. Lets get those done before mediation.

*After witness statements but before trial.* This must be best possible time to mediate. Everyone knows everything about the case. There are roomfuls of papers and the experts have produced analysis of every possible aspect. But unfortunately the other side's witness statements were a little better than expected and the expert programmer produced a report that wasn't quite as good as you hoped. Huge amounts of money have been spent in legal costs. Should we just go on to trial and hope our brilliant QC can impress the judge?

The fact is that there is no perfect time for a mediation, and you can always find a reason for not mediating just yet. The best time for you may well be the worst time for the other side and insisting on your preferred timing may make mediation impossible. Clearly it helps if both sides know what the arguments are, so it's a mistake to be too early, but delay will be expensive and may make settlement more difficult. It is better to mediate at an imperfect time than not to mediate at all.