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# Who is the Payer?

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**A variety of different factors are typically considered by a party in deciding whether to attend a voluntary mediation in an effort to resolve a dispute. One factor that arises only in some cases and therefore may be overlooked in the decision-making process and preparation for the mediation itself is which party will be the payer at the mediation. If there is uncertainty on this point at the start of the mediation, the outlook for a successful mediation is diminished. The issue instead needs to be considered at an earlier stage.**

In considering whether to attend a mediation a party will evaluate a myriad of factors, many of general application to the concept of mediation itself, and some more case, subject matter, or industry specific. Some of the general factors include the cost of litigation and amounts at issue, timing including the need for a quick resolution, the stage of the lawsuit, the need for confidentiality, the desire for an ongoing relationship, outcome control, and settlement options that are of a nature that they cannot be awarded by a court or an arbitrator. There are many others.

One factor that needs to be considered in some cases is who will be the payer at the mediation. While this factor does not arise in many cases, for example, a wrongful dismissal case or a rear-end motor vehicle accident claim, it does arise in a smaller number of cases, most obviously where there is a claim and a counterclaim or competing claims. It is an important issue as it is challenging enough to reach agreement on a number when the payer is known, and more so when each party expects the other will be the payer. This article will briefly explore this issue and provide an example of it arising in practice to illustrate how counsel and a party can properly prepare for this issue so as to enhance the prospects of a successful mediation.

The concept will be demonstrated based on my own practice, but readers will recognize similar considerations or situations from their own practice areas or industries. My primary practice area is construction law and as such I am frequently presented with cases involving disputes on projects. In many cases, a contractor is seeking additional compensation from an owner while in other cases an owner may be pursuing a contractor for a warranty or quality issue. In less frequent situations, the construction contract is terminated prior to completion of the work. The contractor is removed from or abandons the project and the owner retains a replacement contractor to complete the work. In this situation the contractor typically advances a claim against the owner for wrongful termination or breach of the contract, lost profits and any unpaid progress invoices and related matters. The owner as well typically advances a claim against the contractor for the increased costs of completing the work[1] and any damages arising from the delay in completing the work.

Even in the contract termination situation where the parties have competing claims and emotions are often high given the way the project ended, my experience is that parties still typically attempt to resolve the dispute through mediation in advance of trial or arbitration. Unfortunately, in some cases the parties attend the mediation and simply continue to advance their position that the termination was proper or improper (as the case may be) and expect the other party will be the payer. This is not a recipe for a successful mediation as it is a monumental task to convince a party which has an expectation that it should be paid into becoming a payer.

[1] That is, the difference between what it should have cost to complete the work (being the original contract value) and the actual cost to complete the work.

A number of years ago I represented an owner in a construction contract termination case. After several years of endless document and witness discovery, it was time to set the matter down for trial. A mediation was discussed. I spent significant time with my client explaining that I thought, given the dynamics of the situation, that it was unlikely the contractor would voluntarily pay money to the owner to settle the case and that if they wished to receive money they would most likely have to proceed to a trial. Armed with that information along with legal and expert opinions about the case, the client decided it did not want a trial. But it did wish to have a mediation, recognizing that a successful mediation would likely mean either both parties walk away from their claims or the owner paying some money to the contractor. The case was settled at a two-day mediation with the owner ultimately making a payment to the contractor. The payment was not made based on an assessment of likely trial outcomes but rather on a desire to avoid the trial itself.

Reflecting on this situation, it is apparent that the key to resolution was work done well in advance of the mediation. As a result, the client better understood its alternatives and overcome its expectation that it should be paid into becoming the payer to achieve its desired outcome of avoiding a trial. A mediation following this up front work is often more productive than the mediations we all sometimes see where a party does not really intend to change its position and appears to be attending the mediation in the hopes that the mediator will successfully persuade the other side of the merits of their position.

*Phil's practice focuses on construction projects and commercial litigation with an emphasis on the resource sector. His experience includes providing counsel to project proponents in the structuring of the project and drafting the construction contracts as well as representing parties in disputes arising from those projects.*

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