MEDIATION DECISION-MAKERS NEED "DECISION-QUALITY INFORMATION"

By Hon. Carol Park-Conroy (Ret.)

The decision on when to mediate is an important one. Indeed, one of the most common reasons why cases do not settle is because the parties tried to mediate too early in the dispute process. When is the right time to mediate? In my mind, it is when the individuals with settlement authority have "decision-quality information."

The federal government began to actively embrace the notion of alternative dispute resolution in agency administrative processes after passage of the Administrative Dispute Resolution Act of 1996 (ADRA) (5 U.S.C. 571 – 581). At that time, one of the agency leaders responsible for implementation of the ADRA began to talk about the need to have "decision-quality information" before engaging in mediation. As I found myself mediating more and more contract disputes, I began to appreciate that those three words—"decision quality information"—were much more than a catchy little phrase. To the contrary, in my experience, cases settle in mediation when the people with settlement authority are able to attend the mediation and are armed with "decision-quality information."

So what is "decision quality information"? Briefly defined, it is the factual and legal information needed to permit the person with settlement authority to make an educated and rational decision to settle a dispute. There are, of course, many variables associated with how much information that might be. At a minimum, it is the core information that is central to the dispute.

Why is "decision-quality information" necessary? Because, without it, the dispute probably will not be settled. If one or both parties do not have the information necessary to make an informed decision, it is too early in the dispute process for them to engage in mediation. If they do proceed anyway, perhaps due a mandatory mediation requirement, the likely outcome will not be a settlement. Instead, the parties will have to decide whether they want to recess until they have gathered the necessary information before they continue trying to resolve their dispute. Alternatively, they might decide they want to move on, either to arbitration or trial. The better option usually is to recess and resume talks so that the parties can settle the dispute on terms they have negotiated. But such a recess also results in a loss of momentum and prolongs the process, making it more costly than it would have been had the timing been right.

When do you know you have "decision-quality information"? The nature of the necessary information depends entirely upon the complexity of the factual and legal issues presented by the dispute. Obviously, a complicated matter typically requires a great deal of information before the parameters of the dispute can be sufficiently ascertained and evaluated. The amount of money involved is usually another factor to be considered, even if the issues are not otherwise particularly complicated. Similarly, some decision-makers need more information than others before they think they have the information they need to settle a dispute. While this is in part a function of the complexity of the issues and the amount of money involved, it is also a reflection of the personality and experience of the person with settlement authority. The more cautious and less experienced he/she is, the more information will be needed before he/she has the right amount of "decision-quality information."

The right time to mediate is that point in the dispute at which "decision-quality information" has been obtained by both parties. While this may be early in the dispute, it more often occurs after the exchange of information, either informally or as part of the litigation process. When the parties have "decision-quality information," they are ready to resolve their dispute. ■

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