The (Overlooked) Advantages of Pre-Suit Mediation

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Most attorneys know about, and use, some form of alternative dispute resolution (ADR) as part of their litigation practice, as do many sophisticated business men and women. Most ADR is brought into disputes, or lawsuits, after thousands of hours and dollars have been spent "fighting the fight." How many of us ever consider the idea of mediating a contested matter BEFORE it matures into litigation?

After more than 36 years of law and mediation practice, my answer is, sadly, very few. All too often personal, financial or business concerns overshadow the simple truth that early evaluation of an issue and the involvement of a skilled neutral third-party mediator, may set the course for an expeditious settlement. At minimum, pre-suit mediation can build a bridge over the risks, known and unknown, which can consume resources and have a destructive force that prudence would tell all parties to avoid. The following illustrates why pre-suit mediation is a grossly underutilized vehicle for litigation avoidance.

Why Is Pre-Suit Mediation the Answer?

Many parties argue that until you have all the facts, smoke out the secrets and find all of the Achilles heels involved, it is premature to consider mediation or any other form of ADR. As any litigator knows, you need as much ammunition as you can gather on behalf of your client before commencing the settlement battle, or at least that is the conventional wisdom of the trial lawyer. "Don't ask a question unless you know the answer" has been the mantra of cross examination for centuries. I pose the question, "why not?" If you are committed to a confidential mediation process, what is the harm in asking that question? Sure, the answer may hurt your case or weaken your position, at least temporarily, but it may also lead to knowledge that could aid in early resolution, as the expectations of a party or parties may be changed. By asking a simple question during pre-litigation, you can avoid arsenals amassing, troops assembling, and pre-emptive strikes in the form of pleadings, requests for injunctive relief and monstrousamounts of paper cascading across both sides of the "border" of litigation.

The Benefits

In today's business climate, every lawyer should be willing and able to counsel his or her client as to the potential benefits of pre-suit mediation. The following compilation is not intended to be all-inclusive, but lends to the efficacy and benefits of the ADR process.

Total Confidentiality

This fact has been set in stone by the California legislature in the form of Evidence Code sections 1115 through 1129. Most recently the California Supreme Court upheld the principals of confidentiality in Cassel v. Superior Court, (2011DJDAR 658 (S178914, filed January 13, 2011). In a unanimous opinion, with only a mildly worded concurring opinion by Justice Chin suggesting that the legislature should take another look at the issue, the court engaged in a very thorough history of mediation confidentiality in California and came to the unequivocal conclusion that the principal is inviolate—that mediation confidentiality should be broadly and liberally construed so as to foster the public policy that underlies the concept: settlement.

Time and Cost Savings

These two benefits need no explanation. Costs in terms of dollars and time, and not only attorney time, but the time of executives, employees, experts and witnesses are very substantial in most litigation and pre-suit settlements. The use of early mediation can save millions of dollars and thousands of hours, not to mention the savings in terms of emotional energy, down time and loss of productivity that always accompanies litigated matters. Most companies are in business to produce a product or service, not to

litigate. Find me a room full of CEOs and I will bet none are fans of the practical toll litigation takes on day-to-day business. The savings to be realized by pre-suit mediation and settlement are immeasurable both to the entrepreneur and to the over-taxed court system.

Total Risk Avoidance

There is little to no risk to pre-suit mediation. It does not "show weakness" as some have professed; to the contrary, it can be argued as showing strength and confidence in one's position to seek a solution early on, in a private, confidential manner. There need not be press releases, media coverage, or "ripple effects" from filing of a high profile lawsuit, and no sudden drop in stock prices. In other words, the parties are in total control of the result; not the media, stock holders, judge or jury, arbitrator, counsel or public opinion. The decision makers, with the sound guidance of a skilled mediator and their able counsel, are in total control of the outcome.

Binding Result-Predictability

Because the parties control the outcome, a binding written settlement contract, signed by all parties to the dispute, is created, which by its own terms is enforceable in any court of competent jurisdiction. The settlement contract guarantees the parties a certain outcome, a known future and a sound basis for the ongoing conduct of their business. Contingent liabilities, the bane of auditors, can be much more readily identified, controlled, and even eliminated, by pre-suit mediation and settlement. There is no more efficient and controllable business model for early dispute resolution.

Conclusion

As both an attorney representing parties in litigation and a mediator guiding adversaries to resolution in thousands of cases, I have personally observed that mediation is a far superior method of resolving disputes at any stage. For many years the Federal Courts have had an Early Neutral Evaluation program that encourages the practice of engaging in early settlement discussions. An increasing number of State Courts have adopted similar methodologies that invite such a process, and now, more than ever before, there is a pool of well-qualified mediators available to provide the guidance necessary to bring an issue to resolution at an early stage.

There is of course a need to select the proper dispute for pre-suit mediation, as all disputes may not fit the early resolution mold. Sometimes further investigation, expert analysis, or parameter clarification is needed before early attempts at resolution are feasible. A personal injury matter may need medical expert analysis; a trademark, copyright or patent matter may need a market study to determine the extent of infringement or other damages; a hostile work environment claim may need further investigation by an employer.

There are many other examples of everyday disputes that may not be ripe for early pre-suit mediation and settlement. However, the common thread of all disputed issues heading for litigation is time—time before suit is filed and the first shot is fired, when a good faith effort to mediate and settle the matter is in order. Like a good general who never puts his troops unnecessarily in harm's way, the wise business person, and his or her counsel, should always consider pre-suit mediation as a viable alternative to the filing of litigation, after the initial analysis of the issues.

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