

A Call To Pre-Suit Mediation In These “Worst of Times”

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What can only be called a “plunge” in this nation’s economy has sent many corporations and local governments scrambling to make significant budget cuts. Production levels are being decreased, staffing levels are being lowered and even routine purchases are being scrutinized just to name a few of the impacts. As businesses governments are required to turn the magnifying glass on themselves to make the numbers work, how litigation is handled should not be overlooked as a potentially significant cost-saving measure. Litigation is costly and unpredictable, two factors that are simply unacceptable.

One way to most effectively avoid the costs and unpredictability of litigation is to engage in pre-suit mediation. Often-times, pre-suit mediation is not considered because no party feels the pressure or anxiety which comes with a pending Motion for Summary Judgment, and no party feels threatened by a looming and ominous trial date. Although these external motivators for settling cases may not exist pre-suit there are an equal number of internal motivators which are often overlooked and warrant consideration when contemplating pre-suit mediation.

Cut Costs

Money is the ultimate motivator, and pre-suit mediation simply makes good economic sense. “The earlier a case can be resolved, the greater the cost/benefit ratio for both sides.”¹ Parties that have not engaged in the lengthy discovery process can consider using those unexpended funds toward resolving the case rather than engaging in discovery - perhaps allowing a pre-suit offer to be greater than what could be considered once litigation is commenced or a party to accept a lower offer because out-of-pocket expenditures are limited. Resources that would otherwise be used to conduct discovery, prepare for trial and try the case can be used instead to resolve the dispute. ²

Reduce Emotional Baggage

Emotions are probably the second most important motivator. Emotions often run high in litigation. This emotional factor can be significantly reduced, although not eliminated entirely, when parties agree to engage in pre-suit mediations. We have all participated in depositions with our client wincing beside us at every word the deponent is uttering. Those emotional flare-ups are certainly a natural result of hearing something which is unpleasant or distasteful. The sting of hearing the other party’s position does not usually fade with time and often leads a party to be less inclined to deal reasonably and rationally with the other party.

Pre-suit mediation can allow parties to negotiate without the posturing and resistance the discovery process can create.

Save Time

Time is another factor. Litigation is a long, arduous process. Once parties have invested substantial amounts of time sitting through multiple attorney conferences and depositions and crafting responses to lengthy interrogatories and repeated requests to produce, their positions harden and their perceptions regarding the strength of their case becomes engrained and hardened. This is when expectations can soar and become unreasonable. And, it is why we occasionally encounter the attorney at mediation who needs the mediator to focus the clients on realistic resolution of the matter. At pre-suit mediation negotiations are initiated early enough

that the parties' resolve is often not solidified and openness to cooperation and compromise still exists.

Time is also a consideration because of the delay which comes with litigation. As court budgets are tightening, hearing times and trial dates are harder and harder to come by. Many clients are confused by the time it takes to resolve a case from the date of filing to Final Judgment. Pre-suit mediation allows parties to retain or regain control of their calendars.

Public Records Law Affords Early Discovery

Finally, some shy away from pre-suit mediation because of the perceived inability to prepare a case prior to initiating a lawsuit. However, in some instances the discovery process need not await the filing of a lawsuit. For example, if one of the litigants is a governmental entity, Florida's Public Records Law can play a significant cost and time-saving role. The material which would be obtained through the discovery process can often be obtained pre-suit with well-phrased and specific public records requests.

The Bottom Line

The time is right to give pre-suit mediation a chance. With a little education and persuasion businesses and local governments will learn to appreciate the opportunity to resolve the matter early on and less expensively. Pre-suit mediation gives all litigants a much-needed measure of control in this regard. In this economy pre-suit mediation is a winning bet because even if unsuccessful, it is a useful pre-suit strategy to narrow issues and get a first glimpse of the other party's case. ³

1. Clelland, Ted, "Pre-suit Mediation; Good Economics?," May 13, 2008, adrted.com, accessed September 12, 2008, <http://adrted.com/articles.htm>.

2. Florida Mediation and Arbitration LLC, "Pre Suit Mediation," floridamediator-arbitrator-umpire.com, accessed September 12, 2008, <http://floridamediator-arbitrator-umpire.com/PreSuitMediation.html>.

3. Id.