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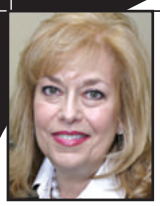

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PRE-LITIGATION MEDIATION

A SIGNAL OF WEAKNESS OR A SIGN OF STRENGTH?

A look at the reasons to mediate earlier in the civil dispute process

Recently, I have been asked to mediate various cases before lawsuits are filed. In order for a mediation of any type to be successful, both sides must want to mediate the issues between the parties. Why and when might counsel encourage this process? Is it a sign of weakness or is it really a sign of strength? Who might benefit from such a process? When might such a process be valuable? Is it a creative strategy? This article explores these issues and concludes that early mediation may be the creative strategy.

Why do pre-litigation mediation?

There are various reasons to do a mediation before suit is filed. First, some contracts require mediation before arbitration or before filing a lawsuit to collect prevailing party attorney fees. For instance, the California Association of Realtors (CAR) for California Residential Purchase Agreements require mediation before filing an arbitration in order, in most cases, to collect prevailing party fees in an arbitration or court action. There are other similar provisions in other industry agreements such as some stock agreements.

There are other reasons to conduct pre-litigation mediations other than to collect fees. One is that arbitration tribunals and judges and juries are uncertain at best. Many times it is like Las Vegas going to arbitration or to trial. There are no certainties.

Also, litigation can be very emotionally draining on plaintiffs, especially in

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very emotional cases. Additionally, as litigation goes on, the relationship between the parties may deteriorate even further. Further, the dispute may become more complex as litigation goes on and the disputes escalate. Of course, one of the most compelling reasons for early mediation is the expense in hotly litigated matters.

Time away from jobs and family may be yet another justification and motivation for pre-litigation mediation. Many times in a mediation I will encourage settlement if the deal works when I see the emotional and sometimes physical toll that prolonged litigation has on family relationships and its impact on the litigant's life in general.

While many of the pro bono or party pay state-court panels have fallen by the way of budget cuts, the U.S. District Court in the Central District of California still provides a three-hour free panel to hold court-ordered mediations. This is after the case is already filed but many times mediation is ordered early in a case by the district judge. Of course, counsel may always request an early mediation and may take the initiative to have all sides stipulate to a panel mediator in Central District.

All in all, there is a move to mediate early in the process. Even the American Bar Association Section of Dispute Resolution has gotten involved with the Planned Early Dispute Resolution (PEDR) Task Force to do early mediations. This program is to help promote the idea of PEDR to lawyers and clients and to help utilize neutrals at the earliest possible time. (See www.americanbar.org/groups/dispute_resolution/resources/planned_early_dispute_resolution_pedr.html).

Another area where early mediation is helpful is in the Family Law arena. In dissolution actions or even before the action is filed, mediation may be helpful in deescalating the conflict, keeping costs down, preventing even more emotions to heat up and to speeding the process along.

Similarly, many times business disputes are like a divorce, but in a business context. In partnership disputes or shareholder disputes, an early mediation and especially a pre-litigation neutral intervention may actually save a business relationship.

How to prepare for pre-litigation or early mediation

The first step in pre-ligation mediation is to verify that both or all parties and counsel are willing to pursue an early resolution to the dispute. Rather than being a sign of weakness, a well drafted demand from Plaintiff/Claimant may be a strong creative strategy. Showing defendant a real downside risk may encourage early neutral involvement. Likewise, a defendant who receives a demand letter may show good business judgment by having counsel request an early mediation to save costs and stress of lengthy litigation.

A detailed demand letter may be a key to an early resolution. This demand concept is particularly valuable in the employment-law area. In cases where the alleged wrongdoing may involve individuals who are high up in an organization and claimant's counsel has done the research, a pre-litigation demand may yield a good client result. This is, of course, if there are no statute-of-limitation issues requiring administrative proceedings and/or litigation or arbitration action immediately.

However, if time is on claimant's side, a well thought out, well crafted demand with factual statements and even detailed legal analysis may help the client avoid the prolonged stress of litigation dispute escalation and yield an early influx of settlement funds.

Benefits to plaintiff in doing a pre-litigation mediation

- Avoids prolonged, potentially emotionally draining depositions and delays
- Shortens the time to recovery of settlement funds
- Allows plaintiff to move forward with their lives sooner
- Gives certainty of result
- Maintains confidentiality

Benefits to defense in doing a pre-litigation mediation

- Avoids disruption to the company
- Helps keep the dispute confidential in what could be an embarrassing situation (especially in employment)
- Reduces large litigation costs
- Keeps insurance rates from escalating from litigation exposure
- Gives certainty and finality

When is the best time to commence a pre-litigation mediation?

Usually, if informal discovery is possible, then mediation might be timely before costly discovery and depositions take place. In other cases, there are key depositions that must take place first for a resolution to be possible from a mediation. In some cases, it is not until the eve of a summary judgment motion when mediation is timely. In high profile employment and entertainment cases, earlier the better may be the strategy.

Conclusion

Sometimes, pre-litigation mediation or early mediation just are not an option. The other side will not agree, the risks to either side are not clear yet, discovery needs to be taken. But, where the time is right, the benefits to all may make pre-litigation mediation the creative strategy.

Joan Kessler, a full-time mediator and arbitrator, received her Ph.D. in Communication before she attended law school. She was a jury consultant, Communications Professor and has practiced law for over 25 years. She specializes in employment, real estate, trust/estate, business, commercial, entertainment, and insurance cases. Ms. Kessler may be reached at: jkessler@kesslerandkessler.com. Ms. Kessler is on the American Arbitration Association panel of arbitrators and mediators, the United States District Court panel of mediators and she mediates and arbitrates matters independently. She recently partnered with DecisionQuest and American Arbitration Association on developing CaseXplorer Arbitration as an online assessment mechanism in arbitrations. Her Website is www.joanbkessler.com.